Washington Law Review

Volume 75 | Number 4

10-1-2000

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LONG LIVE THE DEAD HAND: A CASE FOR REPEAL OF THE RULE AGAINST PERPETUITIES IN WASHINGTON

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Abstract: The common law rule against perpetuities has had a storied career spanning several centuries and two legal systems. The rule developed to curb the concentration of wealth in the hands of a few, and to limit the control of property by those no longer alive to use it. Legendary for its complexity, the rule has undergone statutory reform in many states; some states have gone so far as to repeal the rule outright. Washington has embraced two of the major reforms of the rule and is considering repeal. This Comment argues that the rule, even with reform, no longer serves the policies for which it was designed. The threats posed by "dead hand control" are no longer pressing, and extant legal mechanisms are adequate to deal with the threats that remain. Reform is too mild a response to the rule's shortcomings. Washington, therefore, should repeal the rule.

> If there should be among our rules one which is so abstruse that it is misunderstood by a substantial percentage of those who advise the public, so unrealistic that its "conclusive presumptions" are laughable nonsense to any sane [person], so capricious that it strikes down in the name of public order gifts which offer no offense except that they are couched in the wrong words, so misapplied that it sometimes directly defeats the end it was designed to further—then . . . we should take corrective action.[1]

Barton Leach offered this criticism of the rule against perpetuities while discussing the case of *Ward v. Van der Loeff*,[2] in which the British House of Lords invalidated the codicil[3] to an uncle's will revoking a gift to his nephews and nieces because the codicil violated the rule.[4] The rule addresses contingent property interests and limits the amount of time such interests may remain contingent.[5] The point of this limitation is to prevent the concentration of wealth in the hands of a powerful few and

1. W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 Harv. L. Rev. 721, 722 (1952).

2. 1924 App. Cas. 653 (appeal taken from C.A.).

3. A codicil is "[a] supplement of addition to a will, not necessarily disposing of the entire estate but modifying, explaining of otherwise qualifying the will in some way." Black's Law Dictionary 251 (7th ed. 1999).

4. *See Ward*, 1924 App. Cas. at 653.

5. *See* Jesse Dukeminier & Stanley M. Johanson, *Wills, Trusts, and Estates* 834 (5th ed. 1995). See *infra* notes 47–54 and accompanying text for a discussion of how long is too long according to the rule.

mitigate the extent to which those no longer alive can restrict the use of property and thereby limit its productive use.[6] In *Ward*, the validity of the codicil was contingent upon the total number of the uncle's parents' children.[7] Although the uncle's parents were both sixty-seven years old when the uncle died, Lord Dunedin held that it was at least possible that the parents, in spite of their age, would have further children.[8] As a result, the property interests described in the codicil might have remained contingent for a longer period than the rule allowed. This violation of the rule meant that the codicil was void at its inception.[9] Those who expected to receive substantial property interests from the codicil instead received nothing.[10]

Because of cases like *Ward*, the rule has been described as "a technicality-ridden legal nightmare"[11] that conceals numerous traps for estate planners.[12] For that reason, the rule has become the target of the "corrective actions" that Leach called for almost fifty years ago.[13] While many states have taken Leach's suggestion that the rule be reformed,[14] some states have seriously curtailed or repealed the rule outright.[15] Washington has embraced two of the major reforms of the common law rule[16] and is considering repeal.[17]

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6. *See infra* Part I.C.2.

7. *See Ward*, 1924 App. Cas. at 653.

8. *See id.* at 654, 667.

9. *See id.* at 670.

10. *See id.* at 680.

11. W. Barton Leach, *Perpetuities Legislation Massachusetts Style*, 67 Harv. L. Rev. 1349, 1349 (1954).

12. For a summary of the hidden difficulties in complying with the rule, see Dukeminier & Johanson, *supra* note 5, at 837–46.

13. *See* Leach, *supra* note 1 at 745–49.

14. *See generally* Dukeminier & Johanson, *supra* note 5, at 876–97.

15. There are nine jurisdictions that have either seriously curtailed or repealed the rule. *See* Alaska Stat. § 34.27.050(a)(3) (Michie 2000); Ariz. Rev. Stat. § 14-2901(a) (2000); Del. Code Ann. tit. 25, § 503(a) (1998); Idaho Code § 55-111 (1999); 765 Ill. Comp. Stat. 305/1-5 (West 2000); Md. Code Ann., Est. & Trusts § 11-102(2) (1999); Ohio Rev. Code Ann. § 2131.09(B)(1) (West 1999); S.D. Codified Laws §§ 43-5-1, -8 (Michie 2000); Wis. Stat. § 700.16 (1999).

16. *See infra* at Part II.D (discussing cy pres approach and wait-and-see approach); *see also* Wash. Rev. Code §§ 11.98.130, .150 (2000).

17. *See* Memorandum from Michael D. Carrico, Chair, Washington State Rule Against Perpetuities Reform Task Force (Jun. 4, 1999) (on file with author). There is a distinction between repeal of Washington's statutory version of the rule, and the statutory declaration that the common law rule is inoperable. Repeal of the statutory version of the rule would leave the common law rule intact. Thus, to rid the State of the rule altogether it is necessary to couple repeal of the statute with

This Comment argues that Washington should repeal the statutory rule and declare the common law rule inoperable for two reasons. First, the rule, even with reform, does not effectively prevent wealth concentration or limit restrictions that impair the productive use of property. Second, like other states, Washington has developed other legal mechanisms that respond to these threats more directly and efficiently. Part I of this Comment explicates the common law rule, traces its development from seventeenth-century England, articulates its principal justifications, and presents the major approaches to statutory reform, including the approaches adopted in Washington. Part II examines extant legal mechanisms aimed at achieving the same results as the rule. Part III advances three related arguments favoring repeal of the rule: First, extant legal mechanisms adequately serve the policies the rule was designed to address; second, the rule does not adequately serve those policies; third, the policies driving reform of the rule are ill-conceived in ways that highlight the benefits of repeal of the rule. This Comment concludes that reform is too mild a response to the troubles plaguing the common law rule. The creation of contingent interests in property should not be constrained by a bright-line rule. Rather, the law should invoke more reactive mechanisms to invalidate such interests only when necessary to avoid adverse social and economic consequences.

I. THE RULE AGAINST PERPETUITIES

Because the rule serves as an indirect limit on the duration of trusts,[18] it is helpful to begin with an examination of trusts and their relation to the rule. This understanding will permit a detailed explication of the rule, as well as an examination of the history of the rule and the motivations driving its development. This section concludes with a discussion of prominent statutory reforms of the common law rule.

A. Trusts and the Rule Against Perpetuities

A trust is a property interest held by one person, the trustee, at the request of another, the settlor, for the benefit of yet another, the

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enactment of a substitute that does not simply return Washington to the pre-statutory common law rule. *See id.*

18. *See* Dukeminier & Johanson, *supra* note 5, at 662.

beneficiary.[19] Although settlors can create trusts for many reasons,[20] they are often created gratuitously for the benefit of private parties.[21] Such trusts may be testamentary (created by will) or inter vivos (created during the lifetime of the settlor).[22] Parents who wish to provide for their children and grandchildren, for example, may choose to place property in a trust for the benefit of their offspring and subsequent descendants. By placing the property in trust, rather than giving it to the children and grandchildren outright, parents may provide for their children while at the same time minimizing certain risks to the family fortune.[23] One such risk involves the future management and disposition of family property; by placing their property in trust, parents may protect the property from mismanagement in the hands of children who are either not yet capable of sound fiscal judgment or who for other reasons lack sufficient business acumen.[24]

Although trusts are often benign and beneficial, the law has long recognized that they present potential problems to society. Ambitious settlors may wish to use trusts to maintain ownership of property and other forms of wealth within a single family for long periods of time.[25] This use may give rise to consequences detrimental to society, such as the concentration of wealth in the hands of a few[26] and the unproductive use of property[27]; it also takes control of property and other assets out of the hands of those who will subsequently use them.[28]

The law's initial response to these risks was the rule against perpetuities. According to the classic statement of the common law rule, no future interest in real or personal property is permitted unless it must vest, if at all, within twenty-one years after the end of some life in being at the creation of the interest.[29] A future interest in property is one where

19. *See id.* at 565.

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.* at 834 (citing Arthur Hobhouse, *The Dead Hand* 188 (1880)).

25. *See, e.g.*, Joseph Singer, *Property Law: Rules, Policies, and Practices* 590 (2d ed. 1997).

26. *See infra* notes 55–60 and accompanying text.

27. *See infra* notes 64–71 and accompanying text.

28. *See infra* notes 72–76 and accompanying text.

29. *See* Dukeminier & Johanson, *supra* note 5, at 827 (citing John Chipman Gray, *The Rule Against Perpetuities* § 201, at 191 (4th ed. 1942)). Although the use of the term "life in being" in this expression of the rule does not itself so indicate, the perpetuities period is determined by reference to

possession or enjoyment of the property must wait until some future time.[30] Such an interest vests when one has a fixed or absolute right in the property (even if possession and enjoyment of the property must wait until some future time).[31] Under the rule, a trust creating a future interest in property must be such that future interests in the property become fixed rights within a finite amount of time, called the perpetuities period;[32] that period is specified by reference to the lifespan of someone alive when the trust was created, plus twenty-one years.[33] It is possible for a trust to endure beyond the perpetuities period, so long as a fixed right in the trust property is created within the perpetuities period.[34] Because the rule has the effect of terminating trusts within a finite amount of time, it mitigates social costs associated with long-term trusts, such as the accumulation of wealth and the unproductive use of property.[35] The rule also balances the rights of present generations to control their assets against the rights of subsequent generations to control the assets they use.[36]

B. *Explication of the Rule Against Perpetuities*

According to the common law rule, if an interest must vest or unequivocally fail to vest within the perpetuities period, then the interest does not violate the rule.[37] Suppose, for example, that in her will S leaves in trust $50,000 to her childless son B, to be distributed upon S's death if B is alive at that time, and $100,000 to each of B's children, if he should have any, to be distributed on their twentieth birthdays. These interests must each vest or fail to vest during B's lifetime, plus twenty-one years. B's $50,000 interest will plainly vest within B's lifetime, or if he dies, it

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the lifespan of *someone who can affect vesting* of the interest (as opposed to someone irrelevant to the interest), and who was alive when the interest was created. *See id.* This is a validating or measuring life, that is, someone alive at the creation of the interest within whose lifespan the contingent interest becomes a fixed interest. *See, e.g.*, Dukeminier & Johanson, *supra* note 5, at 836.

30. *See Black's Law Dictionary* 685 (7th ed. 1999).

31. *See id.* at 1557.

32. *Cf.* Dukeminier & Johanson, *supra* note 4, at 835.

33. *See id.* at 590.

34. *See id.* at 835.

35. *See id.* at 833.

36. *See* George Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. Pa. L. Rev. 19, 46 (1977).

37. *See* John Chipman Gray, *The Rule Against Perpetuities* § 201, at 191 (4th ed. 1942).

will fail to vest immediately upon his death. If B dies never having had any children, then the $100,000 interest B's children would have had will have failed to vest during his lifetime and therefore lapse. If B does have children, then the $100,000 interest will have vested within B's lifetime plus twenty-one years. Because there is no possibility of the interest vesting later than twenty-one years after B's life, the interest is valid under the common law rule.

By contrast, if there is even a remote possibility that an interest will vest after the perpetuities period has run, then the interest is void from the start.[38] Suppose, for instance, that S also included provisions for B's grandchildren. Because there is a distinct possibility that a child of B's might be born after the trust is created, it is possible that the grandchildren's interests would vest later than twenty-one years after all persons living at the creation of the trust have died. Under the common law rule, the grandchildren's interest would be void at its creation.

C. *Development of the Rule Against Perpetuities*

The rule is a product of British common law. Scholars have extracted from myriad cases three related policies the rule was initially intended to serve.[39] The first policy appeals to principles of social justice, the second is based on economic analyses, and the third is grounded in individual rights.

1. *How the Rule Developed*

Although the rule received its classical expression by John Chipman Gray in 1942,[40] its common law roots extend at least back to seventeenth-century England,[41] and possibly earlier.[42] Land was once the principal

38. *See id.*

39. Among those contributing to discussions about the policies behind the rule are Dukeminier & Johanson, *supra* note 5, at 833; Everett Fraser, *The Rationale of the Rule Against Perpetuities*, 6 Minn. L. Rev. 560 (1922); Donna P. Grill, *Perpetuities Reform: A Signal From West Virginia*, 11 Real Est. L.J. 116 (1982); W. Barton Leach, *Perpetuities Legislation: Hail, Pennsylvania!*, 108 U. Pa. L. Rev. 1124 (1960); Philip Mechem, *Further Thoughts on the Pennsylvania Perpetuities Legislation*, 107 U. Pa. L. Rev. 965 (1959); and Lewis Simes, *The Policy Against Perpetuities*, 103 U. Pa. L. Rev. 707 (1955).

40. *See supra* note 36, § 201, at 91.

41. *See* Duke of Norfolk's Case, 22 Eng. Rep. 931, 931 (Ch. 1682).

42. *See* Dukeminier & Johanson, *supra* note 5, at 827–32.

form of wealth,[43] and the landed gentry of England often sought to convey land to heirs with restrictions on alienability to prevent the land from being sold outside the family.[44] Almost from the outset, however, judges were reluctant to allow testators to tie up land forever with restrictions that might allow it to deteriorate and become unproductive (for example, unusable for farming).[45] After struggling for centuries to define a period during which it was acceptable for the dead hand to control, English courts finally settled in 1833 on a life in being plus twenty-one years.[46]

The rule developed in an era when wealth, power, and social status were bound up intimately with land ownership.[47] Governments quickly recognized that it was against the interests of society to allow unrestrained "dead hand control" of property[48] to tie up land and promote accumulation in the hands of a wealthy few.[49] At the same time, however, courts recognized some right of testators to influence inheritance; under the English system of primogeniture, the first-born son had a right to the family estate upon the father's death.[50] The eldest son, however, was not necessarily gifted with the real-estate acumen needed to maintain the property, so the need arose to protect the family estate from incompetent sons who could squander it.[51] Courts granted England's landowning elite the legal authority to withhold inheritance in order to give fathers the opportunity to determine whether their sons could competently maintain the family estate; if the father believed that the eldest son was incapable of maintaining the estate, he could bequeath the estate to another child or relative.[52] The authority to withhold inheritance, however, did not extend to the assessment of unborn

43. *See id.*

44. *See* Singer, *supra* note 25, at 533.

45. *See* Dukeminier & Johanson, *supra* note 5, at 828.

46. *See* Cadell v. Palmer, 6 Eng. Rep. 956, 974 (1832, 1833).

47. *See* Singer, *supra* note 25, at 527.

48. "Dead hand control" is a term used to describe the control of property by a settlor; the settlor's "dead hand" places restrictions on property through the terms of the trust. *Cf.* Haskins, *supra* note 36, at 46.

49. *See* Leonard Levin & Michael Mulroney, *The Rule Against Perpetuities and the Generation-Skipping Tax: Do We Need Both?*, 35 Vill. L. Rev. 333, 333 (1990).

50. *See* James S. Chase, *Perpetuity Reform: How Much Do We Need?*, 11 Prob. L.J. 1, 2–3 (1992).

51. *See id.*

52. *See* Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. Rev. 1023, 1055–56 (1987).

children.[53] Thus, there was a limit on the father's ability to control inheritance. This limit was eventually extended to twenty-one years beyond those living at the time of the bequest.[54]

2. *Why the Rule Developed*

The first type of rationale for the rule appeals to notions of social justice. One problem that the rule addresses is the "threat to the public welfare from family dynasties built either on great landed estates or on great capital wealth."[55] The accumulation of wealth by family dynasties deprives those outside the settlors' circle of beneficiaries from gaining access to the property controlled by the families, which limits outsiders' opportunities for economic prosperity.[56] The rule helps to prevent such dynasties from enduring in perpetuity by limiting the extent to which a greedy settlor may require land and wealth to remain within a single family.[57] Although this argument favoring the rule also has economic elements,[58] it is mainly an argument from basic principles of fairness: If vast amounts of property and wealth are in the hands of the few, and it can be made to remain there simply by the greed of a few dead hands, then the rest of society is forever disadvantaged.[59] While everyone may enjoy equality under the law, not everyone would enjoy economic equality.[60]

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53. *See id.* at 1056.

54. *See id.*

55. Leach, *supra* note 1, at 727.

56. *Cf.* Singer, *supra* note 25, at 590.

57. *See* Leach, *supra* note 1, at 727. Suppose S accumulates vast amounts of real property that she leaves in trust to B for life on the condition that B not sell the property outside the family, with a remainder to B's children for life on the same condition, and so on. If S's trust could endure in perpetuity, no one else would ever have the opportunity to acquire this land. If B's heirs add to such an estate with the same restrictions, S's family could conceivably come to own everything. Or, similarly, suppose S leaves a fund in trust for the benefit of B without giving B access to the principal, then to B's children with the same restriction, and so on. As this principal is invested and grows, more and more wealth accumulates in the trust. If S's heirs add to the principal in a similar manner, S's family may come to control all wealth.

58. It would be bad for economic development to have so much property in the hands of so few. *See, e.g.*, Simes, *supra* note 39, at 709.

59. *See id.*

60. *See* Leach, *supra* note 1, at 727.

The problem of private wealth accumulation is analogous to the problem of monopolies addressed by antitrust laws.[61] When one company captures vast amounts of market share, the lack of serious competition allows the monopolizing company to control prices.[62] The disadvantage to the public is not unlike that arising when a single wealthy individual controls vast amounts of land and other wealth. Those who want or need access to that property must capitulate to the desires of the owner just as customers must pay the price charged by the monopolizing company.[63] The rule exists to prevent this noncommercial wealth accumulation from wreaking havoc analogous to that wrought by corporate monopolies.

A second type of rationale for the rule is essentially economic. Through the use of trusts, the dead hand can impinge on current and future generations' ability to control property,[64] which in turn can impair the alienability[65] and productivity of property.[66] Apart from using explicit trust terms to prohibit sale, the dead hand may make trust property inalienable indirectly by placing restrictions on the use of the property, or by creating uncertainty about when and in whom future property interests will vest.[67] Dead hand restrictions discourage potential buyers by preventing them from developing the property as they see fit; uncertainties discourage potential buyers because they do not know who will have claims on the property, how sizable their claims are, whether it is possible to buy out these interests, nor how much a buyout would cost.[68] If, for these reasons, trust property cannot be sold, other terms of the trust, or the lack of trust resources, may prevent the property from being developed to economic advantage.[69] The result may be that the property can neither be sold nor put to productive use.[70] The rule blocks

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61. See generally Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* 12–36 (1994), for a discussion of the problems posed by market monopolies.

62. *See id.* at 12.

63. *See id.*

64. *See* Haskins, *supra* note 36, at 46.

65. The alienation of property is its transfer from one to another, often by sale. *See Black's Law Dictionary* 73 (7th ed. 1999).

66. *See, e.g.*, Brian Layman, *Perpetual Dynasty Trusts: One of the Most Powerful Tools in the Estate Planner's Arsenal*, 32 Akron L. Rev. 747, 749 (1992).

67. *See* Simes, *supra* note 39, at 710.

68. *See* Singer, *supra* note 25, at 590.

69. *See id.*

70. *See* Dukeminier & Johanson, *supra* note 5, at 833.

these undesirable economic consequences by invalidating the interests that could vest after the perpetuities period has run.[71]

A third type of argument is rooted in basic principles of individual rights. According to one source, the rule aims to strike "a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy."[72] Thus, on the one hand is the maxim that the current generation has the right to control the property they enjoy,[73] and on the other hand is the right of testators to do with their property what they wish.[74] The rule exists to balance these competing rights.[75] The testator's hand gets to control the distribution of wealth for some time after death, but at some point the rights of the living pry trust assets and property from the dead hand's grip. The claim made by the rule's proponents, usually without argument, is that the perpetuities period is the right compromise between the competing rights of the dead and the living.[76]

D. *Reform of the Rule Against Perpetuities*

The common law rule is often difficult to apply because it requires the estate planner to rule out exceedingly remote possibilities. The fertile octogenarian,[77] the precocious toddler,[78] the unborn widow,[79] the slothful

71. *See* Singer, *supra* note 25, at 590.

72. Simes, *supra* note 39, at 723.

73. *See* David M. Becker, *If You Think You No Longer Need to Know Anything About the Rule Against Perpetuities, Then Read This!*, 74 Wash. U. L.Q. 713, 714 (1996).

74. *See* Singer, *supra* note 25, at 525.

75. *See* Simes, *supra* note 39, at 723.

76. *See* Ira Mark Bloom, *Perpetuities Refinement: There is an Alternative*, 62 Wash. L. Rev. 23, 26 (1987).

77. Under the rule, courts must presume that any living person is capable of having or fathering children, no matter how old they are. *See* Jee v. Audley, 29 Eng. Rep. 1186, 1187 (1787). Thus, the rule strikes down any interest whose vesting depends on the assertion that, for example, octogenarians will not have children. *See id.*

78. Under the rule, courts must presume that living persons are capable of having or fathering children, no matter how young they are. *See In re* Graite's Will Trusts, [1949] 1 All E.R. 459, 460 (Ch.). Thus, the rule strikes down any interest whose vesting depends on the assertion that, for example, a toddler will not have children. *See id.*

79. Under the rule, courts must presume that one could be succeeded by a widow who is not yet born. *See, e.g.*, Dickerson v. Union Nat'l Bank, 595 S.W.2d 677, 680 (Ark. 1980). Thus, the rule strikes down any interest whose vesting depends upon one's widow being alive at the creation of the interest. *See id.*

executor,[80] the magic gravel pit,[81] the war that never ends,[82] and the exploding birthday present,[83] all may pose problems for an estate planner. Each reflects a remote possibility that could delay the vesting of a contingent interest beyond the perpetuities period.

The difficulties in applying the rule have motivated reform movements.[84] Because of the myriad possibilities that can invalidate a will or trust under the rule, it is not uncommon to find out many years after an instrument has been created that it contains a perpetuities violation.[85] As a consequence, many intended beneficiaries have been shocked to find out only upon their benefactor's death that the interests they were promised are void under the rule.[86] Such consequences led to malpractice suits filed against drafters who failed to negotiate adequately the rule's subtle terrain.[87] Some courts, however, found that a perpetuities violation is a mistake too understandable and easy to make to qualify as professional malpractice.[88] This concession that the rule is too opaque set the stage for statutory reforms that aim to preserve the rule's ability to reach its goals while avoiding the labyrinth of possibilities that befuddled estate planners.

Three non-exclusive approaches to reform have developed. The cy pres approach borrows from the legal doctrine applying to charitable

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80. Under the rule, courts must presume that one's executor could fail to probate one's will within 21 years after one's death. *See, e.g.*, Estate of Garrett, 94 A.2d 357, 359 (Pa. 1953). Thus, the rule strikes down any interest whose vesting depends on probating the will within the perpetuities period. *See id.*

81. Under the rule, courts must presume that any gravel pit (or analogous commodity-producing asset) could remain productive well beyond the perpetuities period. *See, e.g.*, *In re* Wood, [1894] 3 Ch. 381, 381. Thus, the rule will strike down any interest whose vesting depends on the exhaustion of the commodity-producing asset. *See id.*

82. Under the rule, courts must presume that a war could last well beyond the perpetuities period. *See, e.g.*, Brownell v. Edmunds, 209 F.2d 349, 350 (4th Cir. 1953). Thus, the rule will strike down any interest whose vesting depends on the completion of the war. *See id.*

83. Under the rule, courts must presume that one reaches 21 at the first moment of the day before one's birthday (this is because one is in existence on the day of one's birth, and that on the day before one's first birthday one has completed one year). *See* Dukeminier & Johanson, *supra* note 5, at 846. Thus, any interest that vests when one reaches one's twenty-first birthday could violate the rule by one day. *See id.*

84. *See* Olin Browder, Jr., *Construction, Reformation, and the Rule Against Perpetuities*, 62 Mich. L. Rev. 1, 1 (1963); Leach, *supra* note 1, at 721.

85. *See* Dickerson v. Union Nat'l Bank, 595 S.W.2d 677, 681 (Ark. 1980).

86. *See* Ward v. Van der Loeff, 1924 App. Cas. 653, 680 (appeal taken from C.A.).

87. *See* Lucas v. Hamm, 364 P.2d 685, 690 (Cal. 1961).

88. *See id.*

trusts.[89] A charitable trust is one set up for the benefit of a charitable organization.[90] When a charitable trust contains unenforceable restrictions, such as racially discriminatory restrictions, courts have recast the trust's terms to conform to the law, but in a way that is as close as possible to the settlor's general charitable intent.[91] For private trusts in violation of the rule, courts using the cy pres approach to perpetuities reform have recast trusts containing violations of the rule to conform to the rule in a way that most closely approximates the settlor's intent.[92] Many trusts now contain savings clauses, which explicitly require cy pres modification of trust terms if the trust (as written) violates the rule.[93]

The wait-and-see approach to reform eliminates the rule's focus on *possible* ways that contingent interests might remain unvested beyond the perpetuities period by invalidating interests only if they *actually* remain unvested beyond the perpetuities period.[94] Much of the trouble with the common law rule involves the innumerable and hopelessly abstract possibilities that might cause a future interest to vest after the close of the perpetuities period.[95] Under the wait-and-see approach, rule-violating possibilities that do not come about do not affect the validity of the instrument.[96] Only those possibilities that actually cause an interest to vest after the perpetuities period has run affect the validity of the instrument.[97] If an unvested interest remains after the perpetuities period has run, then the relevant portion of the trust can either be invalidated or brought into conformity with the rule and distributed under the cy pres approach.[98]

The Uniform Statutory Rule Against Perpetuities (USRAP) adopts the wait-and-see approach, but stipulates a wait-and-see period of ninety years; if an interest actually vests within ninety years of the effective date of the instrument, that portion of the instrument that created it is valid.[99]

89. *Cf.* Dukeminier & Johanson, *supra* note 5, at 876.

90. *See Black's Law Dictionary* 1514 (7th ed. 1999).

91. *See* Singer, *supra* note 25, at 558–59.

92. This approach was first taken up in *Edgerly v. Barker*, 31 A. 900, 915 (N.H. 1891), and more recently in cases such as *Berry v. Union National Bank*, 262 S.E.2d 766, 770–71 (W. Va. 1980).

93. *Cf.* Wright v. Williams, 47 Cal. App. 3d 802, 809 n.2 (1975).

94. Support for the wait-and-see approach is found in Leach, *supra* note 1, at 728–30.

95. *See supra* notes 77–83 and accompanying text.

96. *See* Singer, *supra* note 25, at 595.

97. *See id.*

98. *See id.* at 595.

99. *See* Unif. Probate Code § 2-901(a)(2) (1999)

It is sometimes difficult to determine all the relevant lives-in-being and hence difficult to determine the precise extent of the common law perpetuities period.[100] The ninety-year period obviates the need to wrestle with this problem. The perpetuities period is not calculated by an obscure formula; it is simply stipulated to be ninety years.[101]

Washington embraces elements of both the wait-and-see and cy pres reforms.[102] Washington's waiting period is set at beneficiaries' lives-in-being plus twenty-one years.[103] Trust interests that vest before the end of this perpetuities period are distributed to the beneficiaries, even if there had been some remote possibility that the interests could have vested later.[104] If there are unvested interests at the end of the perpetuities period, courts will use the cy pres doctrine to distribute the assets with due attention paid to the intent of the settlor.[105]

The various perpetuities reform movements have not been without controversy. Each new proposal or defense of a proposal has been greeted with one or more heated retorts.[106] No real consensus has emerged regarding the direction and emphasis that perpetuities reform should take.[107]

100. *See supra* note 29 and accompanying text.

101. *See* Dukeminier & Johanson, *supra* note 5, at 887.

102. *See* Wash. Rev. Code §§ 11.98.130–.150 (2000).

103. *See* Wash. Rev. Code § 11.98.130.

104. *See* Wash. Rev. Code § 11.98.140.

105. *See* Wash. Rev. Code § 11.98.150.

106. The following sequence of exchanges between Jesse Dukeminier and Lawrence Waggoner is illustrative: Lawrence F. Waggoner, *Perpetuity Reform*, 81 Mich. L. Rev. 1718 (1983); Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 Colum. L. Rev. 1648 (1985); Lawrence F. Waggoner, *Perpetuities: A Perspective on Wait-and-See*, 85 Colum. L. Rev. 1714 (1985); Jesse Dukeminier, *A Response by Professor Dukeminier*, 85 Colum. L. Rev. 1730 (1985); Lawrence F. Waggoner, *A Rejoinder by Professor Waggoner*, 85 Colum. L. Rev. 1739 (1985); Jesse Dukeminier, *A Final Comment by Professor Dukeminier*, 85 Colum. L. Rev. 1742 (1985); Dukeminier, *supra* note 52, at 1023; and Lawrence F. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 Cornell L. Rev. 157 (1988). Commentators in Washington have also joined the fray. *See* Bloom, *supra* note 76; Susan F. French, *Perpetuities: Three Essays in Honor of My Father*, 65 Wash. L. Rev. 323 (1990); Robert L. Fletcher, *Perpetuities: A Father's Reply*, 65 Wash. L. Rev. 357 (1990).

107. *See supra* note 106.

II. EXTANT MECHANISMS LIMITING DEAD HAND CONTROL AND WEALTH ACCUMULATION

The rule is not the only legal mechanism designed to curb dead hand control and wealth concentration. Other legal mechanisms aimed at achieving the same results include federal taxes, the powers and duties of trustees, and marketable-title acts.

A. Federal Taxes Limit Wealth Concentration

Three chapters in the Internal Revenue Code tax the various ways an individual might distribute his or her assets. The federal estate tax generally targets transfers of interest in property occasioned by the death of the property's owner;[108] if one transfers wealth in a will effective upon one's death, the estate tax may claim a substantial portion of the assets.[109] The federal gift tax targets inter vivos gifts;[110] if one attempts to avoid the estate tax by transferring one's assets well before one approaches death, the gift tax may claim a substantial portion of the assets.[111] The generation-skipping transfer (GST) tax targets generation-skipping transfers,[112] whether or not such transfers are subject to the estate or gift

108. *See* I.R.C. § 2001(a) (1999). One's taxable estate is determined by subtracting certain deductions from one's gross estate. *See* Richard Stephens et al., *Federal Estate & Gift Taxation* ¶ 1.02, at 1-2 (1991). The gross estate consists of property owned at death, together with other property more or less artificially included in one's gross estate. *See id.* This other property includes property transferred near death, property transferred where the transferor retains enjoyment of the property, property transferred where the transfer is conditioned upon survival of the transferor, property transferred revocably, joint-and-survivor annuities, jointly held property, property where one has a general power of appointment that includes the power to appoint property to oneself, life insurance, and qualifying terminable-interest property. *See id.* There are various credits used in computing the estate tax, the most important of which is the unified credit, which exempts from taxation the first $675,000 of the estate, provided the credit was not used in offsetting one's gift tax. *See id.* ¶ 3.02, at 3-3.

109. *See* I.R.C. § 2001(a).

110. *See* I.R.C. § 2503 (1999). An inter vivos gift, made during the lifetime of the donor, should be contrasted with a testementary gift, made by will upon the death of the donor. *See Black's Law Dictionary* 697 (7th ed. 1999). Almost any gratuitous shifting of financial resources from one to another may constitute a gift for tax purposes. *See* Stephens et al., *supra* note 108, ¶ 1.03, at 1-18 (1991). The gift-tax provision includes a $10,000 per donee annual exclusion, which allows a large amount of wealth to pass to family members each year free of tax. *See* Boris Bittker & Elias Clark, *Federal Estate and Gift Taxation* 13 (1990). There are also deductions for gifts to charities and spouses. *See* Stephens et al., *supra* note 108, ¶ 1.03, at 1-24. The unified credit, exempting $675,000 from taxes, also applies to the gift tax. *See id.* at 1-26.

111. *See* I.R.C. § 2502 (1999).

112. *See generally* I.R.C. § 2611 (1999).

taxes;[113] if one attempts to avoid both the estate and gift taxes by creating a trust for the benefit of subsequent generations, the GST tax may claim a substantial portion of the assets.[114] Because most wealth today is in the form of financial assets rather than real property, these taxes are effective ways of controlling wealth accumulation.[115]

For trust wealth that is not exempted from these taxes, the graduated tax structure is particularly effective in controlling excessive wealth accumulation; the greater the amount of accumulated wealth the greater the taxes imposed on each kind of conveyance.[116] Because estate and GST taxes can climb to a rate of fifty-five percent for very large accumulations of wealth,[117] it is difficult for wealth that is passed on from generation to generation to accumulate beyond a certain level. Any wealth that does grow considerably during a given generation would be taxed at the maximum rate upon transfer.[118] This taxation reduces the amount retained significantly and therefore curbs the threat of wealth concentration.[119] Taxes, then, represent one way to curtail excessive accumulations of wealth, as well as some of the attendant effects of dead hand control, independently of the rule.

B. *Trustee Duties and Powers Limit Dead Hand Control*

Apart from the federal constraints on dead hand control through taxes, other constraints reside in the powers and duties of trustees in the management of trust assets. Trustees generally must act in the interest of beneficiaries, yet within the constraints laid down by the settlor.[120] Nonetheless, courts can give trustees the power to dispose of trust assets even if a settlor forbids it, if the disposition is in the interest of the beneficiaries.[121] Settlors' dead hand constraints act as defeasible con-

113. *See generally* I.R.C. §§ 2601–2662 (1999).

114. *See generally* I.R.C. §§ 2601–2662.

115. *See* G. Graham Waite, *The Practitioner's Corner: Let's Abolish the Rule Against Perpetuities*, 21 Real Est. L.J. 93, 96 (1992).

116. *See* Leach, *supra* note 1, at 727.

117. *See* I.R.C. § 2001(c).

118. *See* Leach, *supra* note 1, at 727.

119. *See id.*

120. *See* Dukeminier & Johanson, *supra* note 5, at 905.

121. *See generally* Simes, *supra* note 39, at 713; *see also* Wash. Rev. Code § 11.100.040 (2000) (allowing court to permit trustee to deviate from terms of trust instrument relating to "acquisition, investment, reinvestment, exchange, retention, sale, or management of fiduciary property").

ditions on trust management; they can be defeated when economic conditions clearly warrant such actions.[122] For example, if it is clear that stocks in a trust will continue to decrease in value, the trustee can request a court to allow the trustee to step in and sell the stocks to preserve the value of the beneficiaries' interests.

C. *Marketable-Title Acts Obviate Problems Associated with Enduring Trusts*

Marketable-title acts, which now exist in many states, address one type of problem that would arise in the absence of the rule. If trusts could endure in perpetuity, someone interested in purchasing property held in trust might be obligated to search far back into the past to determine precisely the restrictions placed on the use or ownership of the land.[123] Even if all information about the tract is located, there might be substantial uncertainty about just what restrictions one is buying into. This, in turn, would deter potential purchasers.[124] The rule prevents this problem from arising by preventing long-term trusts,[125] but is not the only legal mechanism capable of eliminating this sort of problem.[126] Marketable-title acts place limits on how far back one must go in a title search to determine who has an interest in the property.[127] If descendants of an original dead hand settlor do not update the settlor's intent periodically, a marketable-title act will dictate that the settlor's restrictions—including beneficiary interests in the property—have lapsed.[128] Independently of the rule, marketable-title acts remove much of the difficulty in securing clean title to real property, thereby solving the problem of uncertainty concerning legal title to real property and the resulting inalienability.[129]

122. *See* Wash. Rev. Code § 11.100.040; Simes, *supra* note 39, at 713.

123. *See id.*

124. *See id.*

125. *See* Singer, *supra* note 25, at 596.

126. *See id.*

127. *Cf. id.* Washington currently has no marketable-title act.

128. *See id.*

129. *See* Waite, *supra* note 115, at 96.

III. A CASE FOR REPEAL OF THE RULE

The case for repeal of the rule consists in three broad lines of argument. First, the rule is no longer necessary because the threats addressed by the rule are no longer pressing, and because extant legal mechanisms render the rule unnecessary to prevent the social and economic problems it was originally developed to alleviate. Second, the rule inadequately serves the policies it was developed to serve. Third, the policies undergirding reform of the rule are ill-conceived in ways that highlight the benefits of repeal. Washington, therefore, should repeal the rule.

A. Extant Legal Mechanisms that Curb Dead Hand Control and Wealth Concentration Render the Rule Unnecessary

Changes in economic conditions have mitigated the need for the rule. Extant legal mechanisms, such as federal taxes, trustee duties and powers, and marketable-title acts, respond adequately to the threats that remain.

1. The Threats to Which the Rule Responded Are Largely Absent Today

The modern United States differs in several respects from seventeenth-century England. As a result of these differences, the problems of dead hand control and wealth concentration no longer justify the rule's harsh response. The viability of the rule must be judged against the economic landscape of twenty-first-century America. The need for the rule has diminished because the threats the rule addressed are, if not eliminated, at least significantly reduced.

First, the threat to economic and social equality posed by family dynasties no longer looms large.[130] Land is more plentiful in the United States than in England and the government has set aside enormous tracts of it for public use.[131] Therefore, there is little risk that people will be

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130. *Cf. supra* notes 55–60 and accompanying text.

131. The Public Use Statistics Office of the National Park Service reports that protected national lands (for example, national parks, national monuments, national historical sites) totaled 83,641,123.86 acres in 1999; these areas were used by 286,739,115 people during 1998, the most recent year for which statistics were reported. *See* National Park Serv. (visited Feb. 9, 2000) <http://www2.nature.nps.gov/stats>.

systematically deprived of land for private development and public enjoyment. The vast expanse of this country makes it highly unlikely that a single family could come to control enough land to put the rest of the populace at a disadvantage.

Second, the economic assumptions underpinning the rule are no longer applicable.[132] Most wealth in the United States today is not in the form of land holdings.[133] Among the most affluent citizens, personal wealth is overwhelmingly in the form of corporate stocks, government bonds, and chattels, rather than real property; those who do own substantial amounts of real property often do so for investment and development, not for their own private use.[134] Thus, the threat of land monopolies is reduced simply because wealthy Americans are not aiming to acquire land monopolies. This economic reality has several implications. First, with a small amount of real estate held by the wealthiest Americans, the threat of dead hand restraints on the alienability of property is also reduced because the dead hands of tomorrow will have comparatively little real property to restrict. Second, the balancing of individual rights will also be much easier because dead hands who control only limited amounts of property can make fewer claims to restrict property used by the living. Moreover, corporations and governments in whose stock wealthy Americans have invested control significant amounts of property; if there is a burden of making this property productive, it is a burden borne by corporations and governments, not individuals.[135] Because the rule governs only individuals, it is of no help in this regard.[136]

2. *Extant Legal Mechanisms Can Protect Against Threats that Might Arise Without the Rule*

Federal taxes, fiduciary duties and powers, and marketable-title acts together address what is left of the problems that prompted the

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132. *See supra* notes 63–73 and accompanying text.

133. While the largest portion of household wealth is represented by home ownership, the remaining asset types included shares in stocks and mutual funds, IRAs, and equity in personal property such as cars. *See* T.J. Eller & Wallace Fraser, *Asset Ownership of Households: 1993 Bureau of the Census, Current Population Reports*, P70–47 (visited Feb. 9, 2000) <http://www.census.gov/hhes/www/wealth.html>.

134. *See* Grill, *supra* note 39, at 117.

135. *See id.*

136. *See id.*

development of the rule.[137] These legal mechanisms have in common the feature of addressing the potential problems of dead hand control and wealth concentration only when they become actual problems. These mechanisms could shoulder the full responsibility for curbing any threats of dead hand control and wealth concentration that remain.

a. *Repeal of the Rule Would Encourage a Uniform Federal Tax Solution to Wealth Accumulation*

Federal taxes limit wealth accumulation,[138] but taxes provide only part of the solution to the problems posed by wealth accumulation. The generation-skipping transfer (GST) tax provisions, for example, allow an exemption of up to $1 million for each individual who makes a generation-skipping transfer.[139] All interest and appreciation of those assets accruing after the exemption is taken are also exempt from the GST tax.[140] Thus, a trust consisting of $1 million in GST tax-exempt property could grow exponentially without ever being subject to any of the federal tax provisions, no matter how large it becomes.[141] Without the rule to put an end to this sort of dynasty trust, the trust could result in the kind of wealth accumulation the rule is designed to prevent. Moreover, another problem could arise: If one of these trusts persists for many generations, the number of beneficiaries could grow exponentially.[142] The administrative difficulties attendant on such a growth in beneficiaries would strangle trust management and sink the trust under

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137. *See supra* Part II.

138. *See supra* Part II.A.

139. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 1431(c), 100 Stat. 2085, 2721 (1987).

140. *See* Levin & Mulroney, *supra* note 49, at 348 (citing Staff of Joint Comm. on Tax'n, 100th Cong., 1st Sess., *General Explanation of the Tax Reform Act of 1986* 1265 (Joint Comm. Print 1987)).

141. *See id. But see* Unif. Probate Code § 2-900, at 224 (1999) (claiming, in context of 90 year wait-and-see approach, that "[n]early all trusts . . . will terminate by their own terms long before the 90 year permissible vesting period expires").

142. According to a press release from the Uniform Law Commission (ULC),

> Government statistics indicate that the average married couple has 2.1 children. Under this assumption, the average settlor will have more than 100 descendants (who are beneficiaries of the trust) 150 years after the trust is created, around 2,500 beneficiaries 250 years after the trust is created, and 45,000 beneficiaries 350 years after the trust is created. Five hundred years after the trust is created, the number of living beneficiaries could rise to an astounding 3.4 million.

Press Release, Uniform Law Commission, *Uniform Statutory Rule Against Perpetuities is Law in 26 States: Move of a Few States to Abolish the Rule in Order to Facilitate Perpetual (Dynasty) Trusts is Ill-Advised* (Oct. 21, 1999) [hereinafter ULC Press Release].

its own weight.[143] Thus, if there is a cogent argument to repeal the rule, it must address the problem of the $1 million GST exemption.

Congress will likely solve the problem created by the GST exemption. Indeed, the GST exemption runs contrary to the policy the GST tax is intended to serve.[144] Congress has a long history of favoring the use of the tax system to prevent the excessive accumulation of wealth, presumably for the same policy reasons driving the rule.[145] It is not implausible to suppose that when Congress initially enacted the GST tax in 1976, it was with the understanding that the rule, as codified in state law, would act as a safety net to catch any trusts that threaten to balloon out of control.[146] Indeed, the Senate Report on the 1976 Act stated that "[c]urrently, all States (except Wisconsin and Idaho) have a rule against perpetuities which limits the duration of a trust."[147] Therefore, it is no less plausible to suppose that if states begin to repeal the rule, Congress will eventually close the loophole created when the rule no longer blocks dynasty trusts. Congress will either remove the exemption entirely, scale it back significantly, or place some restriction on the size of trusts or the number of beneficiaries; even those opposing repeal of the rule concede that Congress will not allow any loophole created by repeal to last.[148] This way of dealing with dynasty trusts has the virtue of suggesting a response to such trusts only if, or when, they present a problem. Unlike the rule, which constitutes a cure for which there is not yet an ailment,[149] shifting the burden of responding to the threat of dynasty trusts to Congress discourages the implementation of an unnecessary solution. With Congress encouraged to address the problem through taxes, the solution to the problem of dynasty trusts will be unified at the federal level, and not composed of a patchwork of federal and state laws.

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143. See *Hodel v. Irving*, 481 U.S. 704, 707 (1987), for an example of the administrative problems created when an asset has large numbers of beneficiaries.

144. *See* Levin & Mulroney, *supra* note 49, at 335–56.

145. An earlier Congress favored the collection of revenues "'from the incomes and inheritances of those deriving the most benefit and protection from the Government.'" *See id.* at 334 n.6 (quoting H.R. Rep. No. 64-922, at 1 (1916)). A later Congress explicitly stated that the policy of taxing at uniform rates, generation by generation is "'frustrated where the imposition of such taxes is deferred for very long intervals . . . through the use of generation-skipping trusts.'" *See id.* at 354 n.106 (quoting S. Rep. No. 94-938, pt. 2, at 19 (1976)).

146. *Cf. id.*

147. S. Rep. No. 94-938, pt. 2, at 19; *see also supra* note 14 and accompanying text.

148. See ULC Press Release, *supra* note 142, where Professor Waggoner states that Congress will close any loophole created by state abolition of the rule.

149. *See supra* note 94 and accompanying text.

b. *The Policy Favoring Live Hand Control Would Be Served Better Without the Rule*

Because trustees have both the duty to manage trusts in the interest of beneficiaries, and the legal flexibility to contravene settlor restraints when necessary, the rule is not needed to curb dead hand control. Courts in Washington have the power to permit trustees to deviate from the terms of trusts.[150] Thus, dead hand control is allowed to persist only so long as it does no harm to beneficiaries or to society generally.[151] Even without the rule, trustee duties and powers ensure that there is little danger of trusts persisting to the detriment of beneficiaries and society. Moreover, this way of dealing with dead hand control has the virtue of suggesting a response to such control only if it presents a problem. Unlike the rule, reliance on court-ordered modification of trusts discourages a solution before there is a need for it.

The fact that trust property is alienable under certain circumstances addresses an argument sometimes put forth in favor of the rule.[152] Many have claimed that the rule serves the policy that it is better for the living rather than the dead to control wealth.[153] This assumes that dead hand control precludes live hand control, as if control of property were an all-or-nothing affair. In fact, however, the dead hand may control some aspects of trust property management, but the live hand of the trustee, with aid perhaps from beneficiaries and courts, controls other aspects.[154] Thus, the policy favoring live hand control could be served just as well without the rule; even trusts that endure in perpetuity would be governed to a large extent by live hands.

c. *Marketable-Title Acts Eliminate the Need for Exhaustive Title Searches After Repeal of the Rule*

Washington should enact a marketable-title statute to deal with certain problems that might arise if it repeals the rule. If trusts are allowed to persist substantially longer than the perpetuities period, there is a threat

150. *See supra* note 121.

151. *See supra* note 121 and accompanying text.

152. *See* French, *supra* note 106, at 352.

153. *See* Simes, *supra* note 39, at 708–12; *see also* Becker, *supra* note 73, at 713–14 n.4.

154. *See* French, *supra* note 106, at 352; *see also supra* note 120 and accompanying text.

that clean title to real property will be difficult to secure.[155] To obviate this consequence of repealing the rule, Washington could rely on marketable-title acts, which stipulate that restrictions and property interests that are not re-recorded periodically lapse; a search that turns up no encumbrance within the most recent forty years, for example, would be sufficient to establish a clean title.[156] Washington is not currently among the states that have enacted marketable-title acts.[157] If Washington repeals the rule, it should enact a marketable-title statute to prevent problems in acquiring clean title to real property as a result of dead hand restrictions that are allowed to persist in trusts no longer terminated by the rule.

The foregoing considerations establish two points: First, the problems of wealth accumulation and dead hand control are no longer pressing; second, there are extant legal mechanisms capable of preventing such problems and dealing with them when they arise. Federal taxes limit wealth concentration, trustee duties and obligations can usurp dead hand restrictions, and marketable-title acts prevent problems in securing clean title to real property.

B. *The Rule No Longer Serves Its Policy Goals Effectively*

The rule prescribes the same type of limit on all trusts. Because this limit is arbitrary, and because it is prescribed at the creation of the trust, the rule may terminate trusts that continue to serve their intended purpose without posing threats to society. Washington should repeal the rule because it indiscriminately terminates beneficial trusts as well as harmful trusts.

1. *The Rule Prescribes an Arbitrary Limit on Trust Duration*

Some commentators defend the rule on the ground that it strikes the appropriate balance between the rights and interests of the dead and the rights and interests of the living.[158] Arthur Hobhouse claimed that lives-in-being plus twenty-one years is not simply an arbitrary limit on the

155. *See supra* Part II.C.

156. *See id.*

157. *See supra* note 127.

158. *See* Simes, *supra* note 39, at 723–25.

reach of the dead hand.[159] With this limit, settlors are able to reach judgments about the distribution of their estates that are informed by an understanding of the competence and needs of persons alive when the judgments were made.[160]

This justification of the perpetuities period, however, is specious. A judgment made while the beneficiary is quite young is about as uninformed as one made before the beneficiary is born. Competence to manage business affairs generally requires substantial training.[161] Indeed, the law tends to embrace the idea that competence can only be reasonably judged once a person reaches the age of majority.[162] Thus, the mere fact that a beneficiary is alive is not sufficient to allow the settlor an opportunity to judge the beneficiary's competence adequately. If the duration set by the rule depends on the opportunity to judge competence, it ought to be much shorter than it is: lives-in-being over the age of twenty-two plus twenty-one years, or something to that effect. In light of these considerations, the ninety-year stipulation of the USRAP fares even worse;[163] not only is its fixed period arbitrary, its duration almost certainly would prevent a testator from judging the competence of beneficiaries at the far reaches of the ninety-year period. Thus, with respect to the Hobhouse justification,[164] the duration set by the rule is entirely arbitrary.

More importantly, a judgment about competence in business affairs is almost entirely irrelevant today. Trusts are now a common mechanism for the distribution of wealth to offspring.[165] Management of these assets falls to the trustee, not the beneficiary.[166] Therefore, it does not matter whether the settlor's son or daughter can be trusted not to squander the

159. *See* Arthur Hobhouse, *The Dead Hand* 188 (1880).

160. *See id.*

161. College business degrees, for example, generally require four years of education after high school. *See, e.g.*, University of Washington Admissions Policy (visited Feb. 9, 2000) <http://www.washington.edu/students/uga/fr/admission/policy.html>. Masters of Business Administration degrees generally require two years of postgraduate study. *See, e.g.*, University of Washington Graduate Admissions (visited Feb. 9, 2000) <http://www.washington.edu/students/grad/adminfo.html#requirements>.

162. People usually become subject to the adult criminal justice system, for example, only once they have reached the age of 18. *See, e.g.*, National Crime Prevention Ass'n (visited Feb. 9, 2000) <http://www.ncpa.org/pi/crime/nov97f.html>.

163. *See supra* note 99.

164. *See supra* note 159 and accompanying text.

165. *See* Dukeminier & Johanson, *supra* note 5, at 570–71.

166. *See supra* note 19 and accompanying text.

family fortune; sons and daughters rarely have the opportunity to do so. Thus, the Hobhouse justification for the duration of dead hand control has almost no application to the trust-driven estate planning in the United States today.

The rule is arbitrary in other respects as well. First, the rule's actual effects are arbitrary. Among those wills and trusts that violate the rule, only a limited number are detected, and of those, only some are litigated.[167] It is therefore largely a matter of luck which violations actually result in an invalid instrument.[168] Second, the rule affects only contingent interests that remain unvested through the perpetuities period.[169] The historical justification for this was that contingent interests impaired alienability, while vested interests did not (at least not to the same extent).[170] Now, however, most property is held in trust, and trust property is alienable under appropriate conditions.[171] Thus, there is no reason for a rule that targets only contingent interests.

There is nothing particularly reasonable about the requirement that the dead hand's judgment be given effect only for those living at the time the dead hand creates a trust. Thus, setting the limit at lives-in-being plus twenty-one years is arbitrary.

2. *The Rule Terminates Trusts Independent of Their Actual Consequences*

Because the rule imposes its arbitrary limit on trusts in advance, even if there is no threat of wealth accumulation or excessive dead hand control,[172] it stands little chance of dealing with those threats effectively. The perpetuities period is set without regard to future economic conditions that might make it beneficial (or at least unharmful) for a trust to persist past the perpetuities period. Thus, the rule operates blindly; when the perpetuities period begins to run, no one knows what consequences a trust will have years later. Because the rule operates

167. *See* Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 Real Prop. Prob. & Tr. J. 569, 580 n.23 (1986).

168. *See id.*

169. *See supra* notes 30–34 and accompanying text.

170. *See* Simes, *supra* note 39, at 709.

171. *See supra* note 121 and accompanying text.

172. *See supra* notes 99–101 and accompanying text.

blindly, it will terminate trusts even if they continue to have the beneficial consequences the dead hands wished them to have.

The prescriptive (as opposed to reactive) nature of the rule also mitigates the extent to which the rule strikes a fair balance between past, present, and future control of property.[173] Whether or not a trust benefits beneficiaries to the full extent possible within its terms depends on the peculiarities of the trust, the changing economy, and how the two interact. The rule, however, prescribes the same result for all cases no matter how different they might be. Because fairness in a particular case depends on the details of that case, the rule is fundamentally ill-suited to the fair balancing of past, present, and future property rights.

In contrast to the rule, dead hand control will endure in a reactive regime only as long as it is beneficial or innocuous. In the case of dead hand control that restrains the alienability and hence productivity of property, the point at which dead hand control should be terminated is fairly clear. For example, suppose that a family is no longer able to manage an apartment complex effectively, but is restrained from selling it under the terms of a trust. After the family shows that it cannot manage the property, a court could break the dead hand's grip and allow the property to be sold.[174] In the case of accumulated land and capital wealth, there will be a point beyond which it is against society's interest for the estate to grow.[175] If a dead hand controls such wealth, perhaps preventing a living beneficiary from donating money or property to charity or selling land or assets, a court would terminate the dead hand's grip, at least to the extent that it is in society's interest to put the land or assets back into commercial circulation. This point might be reached within the perpetuities period, or it might be reached well after the perpetuities period has run. It is, of course, impossible to specify in the abstract when a trust has grown to the point where society's interests are adversely affected. The line will be crossed, however, when substantial numbers of

173. *See* Simes, *supra* note 39, at 723.

174. *See* Cal. Prob. Code § 15409 (West Supp. 1990). Section 15409 provides that on petition by the trustees or beneficiaries, the court may modify the administrative or dispositive provisions of trusts or terminate them if, owing to circumstances not known to, or anticipated by, the settlor, continuation of the trust under its terms would defeat or substantially impair accomplishment of the purposes of the trust. Under appropriate circumstances, the court may also order the trustee to do acts forbidden by trust instrument. *See* Cal. Prob. Code § 15409.

175. This is an assumption that proponents of the rule are in no position to dispute. The prevention-of-wealth-concentration policy the rule is intended to serve depends on the assumption that there is a point beyond which concentration of wealth affects society adversely. *See supra* notes 55–60 and accompanying text.

people experience hardship as a result of the fact that a small group of people control a large portion of the land or capital. At that point, public policy demands that others be granted economic access to the property.[176]

A comparison to antitrust law helps illuminate how a reactive regime is better able to respond to threats of wealth accumulation and dead hand control, and balance the rights of different generations.[177] To prevent the anti-competitive consequences of monopolies, antitrust law imposes a constraint on the size (measured in terms of market share) to which a company may grow; specifically, companies may not grow so large that they discourage competition.[178] Thus, the size of a company is expressly limited by reference to the adverse consequences of monopolization. In the case of private wealth accumulation of the sort targeted by the rule, the law should similarly step in to protect society from the adverse consequences that result from the lack of available land or capital.[179] It is difficult to determine when a company has enough market share to trigger the government's intervention, but that is no reason to restructure antitrust law; monopolistic threats are handled as they threaten to reduce competition.[180] Similarly, if it is difficult to determine when a family has acquired too much wealth, or when a dead hand's restrictions are too onerous, that is no reason to retain the rule; wealth monopolies should also be handled as they give rise to negative consequences.

By parity of reasoning, if one favors the rule as the proper response to the threat posed by private accumulation of wealth, then one should also favor a bright-line rule that limits how long a company may endure before being broken up as the proper response to the threat posed by monopolies. That would be absurd in the case of commercial entities because many companies never become monopolies;[181] it is only appropriate to break them up if they threaten to derail competition. The same is true in the case of private wealth accumulation. Most individuals and families never accumulate wealth to a degree that harms society;[182] it

176. *See* Dukeminier & Johanson, *supra* note 5, at 833.

177. *See supra* notes 61–63 and accompanying text.

178. *See* 15 U.S.C. §§ 1, 2 (1994) (condemning "[e]very contract, combination . . . or conspiracy in restraint of trade" and everyone who shall "monopolize").

179. *See* Leach, *supra* note 1, at 726 (describing state statutes that prohibit certain types of accumulations).

180. *See* 15 U.S.C. §§ 1, 2.

181. *Cf.* Hovenkamp, *supra* note 61, at 3.

182. *See* Leach, *supra* note 1, at 727.

is only appropriate to eliminate dead hand controls that have adverse social consequences when they actually have those consequences. In both cases, to subscribe to an arbitrary limit on duration would be to respond with unyielding finality to a hypothetical threat that may never come to pass.

C. *The Motivations for Repeal Are Superior to Those of the Major Reform Movements*

The motivations for repeal of the rule compare favorably to those of the major reform movements. Repeal of the rule is supported by the fact that extant legal mechanisms other than the rule respond directly to the problems that trusts can cause, and do not impose a single, arbitrary solution to all potential problems even before any problems have developed; it is better to respond to problems appropriately only if and when they arise. The main motivations behind two of the major reform movements, the cy pres approach and the wait-and-see approach, are similar; each reform movement also advocates dealing with trust problems when they arise rather than in advance.[183] In important respects, however, the motivations behind repeal of the rule differ from, and are superior to, those behind the major reform movements.

Consider first a comparison to cy pres. Like the cy pres approach, repeal of the rule would allow trusts to be modified to benefit beneficiaries, with due attention paid to the intent of the settlor.[184] Under the cy pres approach to reform, however, the event that triggers trust modification is a violation of the rule.[185] Trusts are modified under cy pres, then, not because they have detrimental effects, but simply because they violate the rule.[186] This has two adverse consequences. First, even a benign trust may violate the rule;[187] therefore, the cy pres doctrine will call for the modification of some trusts even when they have no detrimental consequences. Second, because trust modification requires court authority,[188] the cy pres approach imposes a needless tax on court

183. *See supra* notes 91–93 and accompanying text.

184. *See supra* note 89 and accompanying text.

185. *See* Dukeminier & Johanson, *supra* note 5, at 676–88.

186. *See id.*

187. *See* Leach, *supra* note 1, at 727 (stating that rule should not disrupt otherwise "reasonable" trusts).

188. *See* Dukeminier & Johanson, *supra* note 5, at 900.

resources through judicial termination of benign trusts. If the rule were repealed, trusts would be modified only if they have pernicious consequences for beneficiaries or society generally. In this case, however, the event that would trigger modification of the trust would be an economic development that, for example, makes sale of trust assets advisable.[189] Repeal of the rule, then, would not arbitrarily terminate benign trusts, and would call on courts to modify trusts only when economically necessary. Repeal would reduce consumption of court resources.

Consider next a comparison to the wait-and-see approach.[190] The idea of this approach is to respond to hypothetical violations of the rule only if they become actual violations.[191] But violations of the rule are not evil in and of themselves; according to the policies behind the rule,[192] violations of the rule are evil only to the extent that they contribute to problems such as excessive accumulation of private wealth or unproductive use of property.[193] If the threats that the rule addresses do not materialize during the perpetuities period, then it may not matter whether any unvested interests remain contingent. Contingent future interests are a problem only if they contribute to excessive wealth accumulation or some other adverse consequence.[194] If a contingent future interest contributes to no such consequence by the time the perpetuities period has run, then there is nothing to be gained from invalidating it at that point. For example, if the dead hand restrictions on the interest subsequently threaten to render land unproductive, then the restrictions can be lifted at that point. The wait-and-see approach correctly avoids abstract possibilities that never materialize, but its focus is too narrow.[195] The abstract possibilities to be avoided are the threats the rule is designed to prevent (that is, wealth accumulation and excessive dead hand control), not fantasies that would violate the rule without giving rise to these threats. If one should "wait and see," then

189. *See supra* note 121 and accompanying text.

190. *See supra* notes 94–98 and accompanying text.

191. *See supra* note 94 and accompanying text.

192. *See supra* Part I.C.2.

193. *See id.*

194. *See* Dukeminier & Johanson, *supra* note 5, at 833.

195. This is not the only problem with the wait-and-see approach. Because it retains the feature of the common law rule, according to which it can be determined that certain interests violate the rule only after the perpetuities period has run, all of the problems regarding uncertainty about property ownership remain. *See* Levin & Mulroney, *supra* note 49, at 348.

one should wait to see if there is any need for the rule at all. If a trust presents no threat of wealth accumulation or excessive dead hand control, then it should not be invalidated even if some interest remained unvested beyond the perpetuities period (in violation of the rule).

IV. CONCLUSION

Two of the substantive policies that the rule has traditionally served are prevention of wealth disparities and prevention of excessive dead hand control. The rule is no longer necessary to serve these policies because the threats it identified are no longer pressing in the way they once were, and because extant legal mechanisms are adequate to address the threats that remain. Federal taxes, trustee law, and marketable-title acts can curb wealth concentration, limit dead hand control, and guarantee clean title even while trusts endure for many generations.

The rule also aims to strike a fair balance between the rights and interests of past, present, and future generations. The rule's arbitrarily prescribed limit on trusts, however, is by its very nature incapable of achieving the fair balance at which it aims. Because the rule prescribes a limit, it is necessarily insensitive to economic conditions that might preserve the beneficial consequences of trusts that endure past the perpetuities period. Reactive, court-ordered variations from trust terms, however, can find context-sensitive results where the rule presumes that one size fits all.

Many states have shifted from the rule's prescription of a single solution to the problems of enduring trusts, to the reformers' reactive approaches; the reform movements, however, have misidentified the threats to which the law should be reacting. The reformers advocate reacting to violations of the rule when they should advocate reacting to the threats the rule was designed to address. Repealing the rule will focus legal resources on the threats to which the rule was addressed rather than the rule itself. Washington, therefore, should repeal the rule.