The New Direction of American Trust Law

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Shirley A. Webster, a 1932 graduate of the University of Iowa College of Law, was a distinguished lawyer and law reformer. His colleagues affectionately called him "Mr. Iowa Probate Law" in recognition of his long-time leadership in the effort to reform the probate law of Iowa. That effort came to fruition in 1963 when the *Iowa Probate Code* was enacted. The *Iowa Probate Code* contained many of the reforms later reflected in the *Uniform Probate Code*, promulgated nationally in 1969. I serve on the board that monitors and updates the *Uniform Probate Code*, and we are still benefiting from ideas and provisions originating in Iowa and advocated by Shirley Webster. It was an honor to deliver a lecture bearing his name.

I serve as the assistant executive director of the Joint Editorial Board for Uniform Trust and Estate Acts within the Uniform Law Commission and as an associate reporter of the *Restatement (Third) of Trusts*. I also participate in the Members Consultative Group for the *Restatement (Third) of Property: Wills and Other Donative Transfers*. The views expressed in this Article are personal and are not offered on behalf of the Uniform Law Commission or the American Law Institute.

I. INTRODUCTION

There is a central tension in the law of trusts between the rights of the donor and the rights of the beneficiaries. On the one hand, the position of the donor seems paramount. The donor—known in trust law as the "settlor"[1]—establishes the terms of the trust[2] and, therefore, has the power to determine the extent of the beneficiaries' equitable interests and the power to control the actions of the trustee in the trust's administration. Indeed, the organizing principle of the law of donative transfers, as stated in the *Restatement (Third) of Property: Wills and Other Donative Transfers*, is that the "donor's intention is given effect to the maximum extent allowed by law."[3] On the other hand, the position of the beneficiaries also has a claim to supremacy. Only the beneficiaries hold the ownership interests in the trust, not the settlor.[4] Of course, it sometimes happens that the settlor is also a beneficiary,[5] but here we are speaking of the settlor *as such*. The beneficiaries, not the settlor, have the equitable ownership of the trust assets, and this would seem to limit the power of the settlor to control the trust. And indeed the *Restatement (Third) of Trusts* emphasizes that "a private trust, its terms, and its administration must be for the benefit of its beneficiaries."[6]

In navigating between the extremes of settlor control and beneficiary control, the law of trusts has at times taken a position more favorable to the settlor, and at other times a position more favorable to the beneficiaries.

In this Article, I shall offer both a descriptive and a normative analysis of where we currently stand and where we are going. I shall argue that American trust law, after decades of favoring the settlor, is moving in a new direction, with a reassertion of the interests and rights of the beneficiaries. I shall also argue that this new direction is appropriate and welcome.

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1. *See* UNIF. TRUST CODE § 103(15) (amended 2004), 7C U.L.A. 414 (2006) ("'Settlor' means a person, including a testator, who creates, or contributes property to, a trust."); RESTATEMENT (THIRD) OF TRUSTS § 3(1) (2003) ("The person who creates a trust is the settlor.").

2. *See* RESTATEMENT (THIRD) OF TRUSTS § 4 (2003) (defining the phrase "terms of the trust").

3. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 (2003).

4. *See* RESTATEMENT (THIRD) OF TRUSTS § 3(4) (2003) ("A person for whose benefit property is held in trust is a beneficiary.").

5. *See id.* § 3 cmt. d ("The settlor or the trustee, or both, may be beneficiaries; but a sole trustee may not be the sole beneficiary . . . .").

6. *Id.* § 27(2); *see also* UNIF. TRUST CODE § 404, 7C U.L.A. 484 (2006) ("A trust and its terms must be for the benefit of its beneficiaries.").

II. BACKGROUND

A word of background is in order, as some readers may be unfamiliar with the fundamental structure of a trust. The most vivid definition of a trust is the one advanced by Oxford University professor Bernard Rudden, who explained that a trust is "essentially a gift, projected on the plane of time and so subjected to a management regime."[7] Legal title to the trust assets is transferred from the settlor to the trustee; equitable title is transferred from the settlor to the trust's beneficiaries.[8] The distinction between legal and equitable title derives from England, where for many centuries the courts of common law recognized the ownership of the trustee while the Court of Chancery, administering equity, enforced the rights of the beneficiaries.[9] The fusion of common law and equity occurred in England in the nineteenth century,[10] but it is still conceptually accurate and helpful to think of a fragmentation of title at the core of the trust's conceptual structure.

There is a second preliminary point to be made. The trusts that I discuss in this Article are created by donative transfers. This is what Professor Rudden meant by referring to the trust as "essentially a gift." The garden-variety trust arises from the noncommercial transfer of property, typically within a family. As explained by one of the leading scholars of American trust law, Professor John Langbein: "The trust originated at the end of the Middle Ages as a means of transferring wealth within the family, and the trust remains our characteristic device for organizing intergenerational wealth transmission when the transferor has substantial assets or complex family affairs."[11] There are, to be sure, plenty of commercial trusts—pension trusts, mutual funds, real estate investment trusts, law-office trust accounts, et cetera[12]—but the focus of American trust law has been on the trust arising from a gratuitous transfer. By way of example, the American Law Institute, in the *Restatement (Third) of Trusts*, has excluded business trusts from the coverage of the project,[13] focusing instead on the trust "as a device for flexible, long-term settlement of family property."[14] In the same vein, the

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7. Bernard Rudden, *Gifts and Promises. By John P. Dawson*, 44 MOD. L. REV. 610, 610 (1981) (book review).

8. 1 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 1.1, at 5 (5th ed. 2008) ("The trustee holds legal title, but the beneficiary has equitable ownership.").

9. For an overview, see J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 290–93 (4th ed. 2002).

10. *See* T.P. Gallanis, *Victorian Reform of Civil Litigation in the Superior Courts of Common Law*, *in* WITHIN A REASONABLE TIME: THE HISTORY OF DUE AND UNDUE DELAY IN CIVIL LITIGATION 233, 243–44 (C.H. van Rhee ed., 2010).

11. John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165, 165 (1997).

12. *See id.* at 167–78.

13. RESTATEMENT (THIRD) OF TRUSTS ch. 1, intro. note (2003).

14. *Id.*

trust about which I am speaking here is the trust as a donative transfer to the beneficiaries, structured to permit the management of wealth, typically across generations within a family.

In the context of the donative family trust, one can readily envisage the potential for conflict between the desires of the settlor and the desires of the beneficiaries. When this conflict arises, the law must answer the fundamental question: "Whose trust is it?" Over the course of our nation's history, American law has given different answers to this central question.

Tensions between the rights of the settlor and the rights of the beneficiaries arise in two contexts: during the trust's existence (the period of trust administration) and when the trust ends (the point of trust termination). In this Article, I shall examine both contexts—administration and termination—and shall illustrate my main theme with two examples from each context, for a total of four examples.

III. TRUST ADMINISTRATION

Let us begin with trust administration. While the management of a trust is ongoing, whose wishes about the administration of the trust are paramount: the settlor, who established the trust and specified the terms of its governance in the trust instrument, or the beneficiaries, who are the equitable owners of the trust assets?[15]

I examine this question within the context of two specific doctrines: first, the doctrine concerning the validity and reach of the so-called "spendthrift clause," which restricts the power of the beneficiaries to alienate

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15. In standard trust law, the three relevant parties are the settlor, the trustee, and the beneficiary. *See id.* § 3 (defining these terms). Recently, however, an additional player has appeared on the stage of American trust law: the "trust protector." Estate planners Alexander A. Bove, Jr. and Melissa Langa have provided a good definition of a trust protector: "[A] trust protector is an individual (or committee or entity) who is not a trustee but who is nevertheless granted powers under the trust that supersede the corresponding powers of the trustee." Philip J. Ruce, *The Trustee and the Trust Protector: A Question of Fiduciary Power. Should a Trust Protector Be Held to a Fiduciary Standard?*, 59 DRAKE L. REV. 67, 68 n.1 (2010) (quoting Alexander A. Bove & Melissa Langa, *The Real Story of the Trust Protetor*, MASS. LAW. WKLY., Mar. 10, 2003, at 11, 11). The trust protector "established itself as a useful tool in international asset-protection trusts" and then migrated into the domestic trust. *Id.* at 78. For scholarly analyses of the trust protector, see *id.*; Gregory S. Alexander, *Trust Protectors: Who Will Watch the Watchmen?*, 27 CARDOZO L. REV. 2807 (2006); Jeffrey Evans Stake, *A Brief Comment on Trust Protectors*, 27 CARDOZO L. REV. 2813 (2006); Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761 (2006). How the trust protector fits into the theme of this Article—as a further illustration of the central thesis or, alternatively, as a counter trend—varies depending on the terms of the trust and on the identity of the protector. As Professor Stake rightly observed, "A trust protector can be employed for the benefit of beneficiaries or solely for the purpose of protecting the wishes and designs of the settlor." Stake, *supra*, at 2813. A protector who is a beneficiary or a representative of a beneficiary is likely to favor the beneficiary's interests over the settlor's. In contrast, a protector who is a representative of the settlor is likely to favor the settlor's intention, or presumed intention, over the interests and wishes of the beneficiaries.

their interests in the trust; and second, the doctrine of administrative deviation, which comes into play when the management terms of the trust instrument conflict with the best interests of the beneficiaries.

A. *THE SPENDTHRIFT CLAUSE*

We begin with the validity and reach of the so-called "spendthrift clause." The spendthrift clause is a provision, inserted into the trust instrument by the settlor (or the settlor's lawyer), that attempts to disable the beneficiary's ability to transfer to a third party the beneficiary's equitable interest, and hence also to disable the power of the beneficiary's creditors to reach the interest.[16] A standard spendthrift clause reads as follows: "No interest of any beneficiary in the income or principal of this trust shall be assignable in anticipation of payment or be liable in any way for the beneficiary's debts or obligations, and shall not be subject to attachment."[17]

Is such a clause valid? The answer to this question tells us a great deal about the larger question at the heart of this Article: "Whose trust is it?" If the beneficiaries truly own the trust assets, then it must be remembered that an important component of ownership is the power to alienate,[18] and with the power to alienate comes the responsibility to pay debts. Property that we own can be reached by our creditors.[19] On the other hand, if the trust is fundamentally the settlor's, then the settlor's wishes, expressed in the spendthrift clause, should be paramount. The powers of the beneficiary—and, by extension, the creditors of the beneficiary—take second place.

Under the common law of England, and the early common law of the United States, the modern spendthrift clause was invalid.[20] This rule was

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16. *See* RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. a (2003) ("The term 'spendthrift trust' refers to a trust that restrains voluntary and involuntary alienation of all or any of the beneficiaries' interests."); 3 SCOTT ET AL., *supra* note 8, § 15.2, at 898–900 (discussing spendthrift trusts).

17. THOMAS P. GALLANIS, FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 398 (5th ed. 2011).

18. *See, e.g.*, Maxwell v. Moore, 63 U.S. (22 How.) 185, 190 (1859) ("It is inconsistent with the nature of property, if the individual owning property, or a right to property, has not the power to alienate it."); Dodge v. Woolsey, 59 U.S. (18 How.) 331, 376 (1855) (referring to alienability as "the essential attribute of property").

19. *See, e.g.*, Broadway Nat'l Bank v. Adams, 133 Mass. 170, 174 (1882) ("Under our system, creditors may reach all the property of the debtor not exempted by law . . . ."). Owning property that can be reached by creditors is not necessarily a burden rather than a benefit. With respect to past creditors, it is a burden. But with respect to future creditors, it is a benefit because it enables the owner to borrow using the property as collateral. This point is emphasized in THOMAS P. GALLANIS, FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS (TEACHER'S MANUAL) 219–20 (5th ed. 2011).

20. *See* RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. a (2003) ("Spendthrift restraints are not permitted under English law . . . ."); 3 SCOTT ET AL., *supra* note 8, § 15.2.1, at 900 ("The English courts have consistently invalidated provisions restricting the alienation of beneficial interests in trust."). For a superb treatment of the American history, see Gregory S. Alexander,

established by the English Chancellor, Lord Eldon, in the 1811 case of *Brandon v. Robinson*.[21] The case concerned a trust established by the will of Stephen Goom for the benefit of his children. One of his children, Thomas Goom, became bankrupt. A provision in the will stated that the interests in trust "should not be grantable, transferable, or otherwise assignable."[22] The plaintiff Brandon was the surviving creditor; the defendant Robinson was one of the trustees. Lord Eldon held the anti-alienation provision ineffective. Thomas Goom had received an interest in trust, and that interest continued to exist after his bankruptcy.[23] Therefore, the interest was not immune from assignment to the creditor, Brandon.

The rule of *Brandon v. Robinson* was the prevailing rule in the United States until the late nineteenth century.[24] The judicial opinion credited with having changed the direction of American law is the Massachusetts Supreme Court's decision in 1882, in the case of *Broadway National Bank v. Adams*.[25] The case concerned a will, establishing a trust in favor of the testator's brother, Charles Adams. The will provided as follows:

> I give the sum of seventy-five thousand dollars to my . . . executors . . . in trust to invest the same . . . and to pay the net income thereof, semiannually, to my . . . brother Charles W. Adams, during his natural life, such payments to be made to him personally when convenient, otherwise, upon his order or receipt in writing; in either case free from the interference or control of his creditors, my intention being that the use of said income shall not be anticipated by assignment.[26]

The Massachusetts Supreme Court recognized that, under well-settled law, this clause would be invalid if applied to a direct grant of the property from the testator to Charles: "[T]he rule of the common law is, that a man cannot attach to a grant or transfer of property, otherwise absolute, the condition that it shall not be alienated; such condition being repugnant to the nature

The Dead Hand and the Law of Trusts in the Nineteenth Century, 37 STAN. L. REV. 1189, 1198–1200 (1985).

21. Brandon v. Robinson, (1811) 34 Eng. Rep. 379 (Ch.).

22. *Id.* at 379.

23. Lord Eldon observed that the testator could have, but did not, impose a limitation on the interest: for example, to *A* for life or until he becomes bankrupt. In Eldon's words, "There is an obvious distinction between a disposition to a man, until he becomes bankrupt, and then over, and an attempt to give him property, and to prevent his creditors from obtaining any interest in it, though it is his." *Id.* at 380.

24. Alexander, *supra* note 20, at 1199 ("The rule of *Brandon v. Robinson* was followed by a number of American courts during the first part of the nineteenth century."); *id.* at 1202 ("The move by American courts away from the rule of *Brandon v. Robinson* . . . began late in the nineteenth century and continued through the first two decades of the twentieth century.").

25. Broadway Nat'l Bank v. Adams, 133 Mass. 170 (1882).

26. *Id.* at 170 (internal quotation mark omitted).

of the estate granted."[27] The court also recognized that, under the English and majority American rules, the same invalidity would apply to a restriction on an interest in trust. In the words of the court's opinion:

> [W]hen the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to the debts of, the [beneficiary], . . . [and] this quality is so inseparable from the estate that no provision, however express, . . . can protect it from his debts.[28]

Why, then, did the court depart from the majority American view and uphold the validity of the settlor's spendthrift clause? The court's answer points to the interests and powers of the settlor:

> The founder of this trust was the absolute owner of his property. He had the entire right to dispose of it, either by an absolute gift to his brother, or by a gift with such restrictions or limitations, not repugnant to law, as he saw fit to impose. . . . His intentions ought to be carried out, unless they are against public policy. . . .
>
> We are not able to see that it would violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary.[29]

The decision by the Massachusetts Supreme Court to accept the validity of spendthrift clauses proved heavily influential,[30] and today all American jurisdictions recognize the spendthrift trust.[31]

But that is not the end of the story. Spendthrift clauses are valid, but they are not always completely effective. By legislation, a number of states have imposed limitations on the effectiveness of spendthrift clauses, thereby providing some ability for the beneficiary to alienate,[32] and creditors to

27. *Id.* at 171.

28. *Id.* at 172.

29. *Id.* at 173.

30. *See* RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. a (2003) ("A case could also be made that the most influential case in establishing the spendthrift trust as a part of American common law was *Broadway National Bank.*"); 3 SCOTT ET AL., *supra* note 8, § 15.2.1, at 902 ("The leading case that actually upheld a restraint on the alienation of a beneficial interest in trust is *Broadway National Bank v. Adams.*").

31. N. Camille Varner, Note, *Is the Dead Hand Losing Its Grip in Texas?: Spendthrift Trusts and* In re Townley Bypass Unified Credit Trust, 62 BAYLOR L. REV. 598, 609 n.89 (2010) (citing statutory or judicial authority for each state's recognition of the validity of spendthrift trusts).

32. Recall the point made in note 19.

reach, the beneficiary's interest in the trust.[33] New York, for example, provides by statute that creditors can reach income "in excess of the sum necessary for the [beneficiary's] support and education."[34] California has enacted a variation on the New York scheme, similarly allowing creditors to reach amounts in excess of what is needed for "support" and "education"—but limited to twenty-five percent of the amounts otherwise payable.[35] A different approach, taken by many states, is to identify certain creditors who are permitted to reach the beneficiary's interest, despite the presence of a spendthrift clause.[36] Thus, according to the majority view, a spendthrift clause will not shield a beneficiary's interest against claims for alimony and child support.[37] And in 1997, the Mississippi Supreme Court issued a decision, described by the Reporter of the *Restatement (Third) of Trusts* as "widely acclaimed,"[38] in the case of *Sligh v. First National Bank*.[39] The *Sligh* decision held that a spendthrift clause will not insulate a trust beneficiary against claims arising from the law of tort.[40]

The direction of American law points toward a better balancing of the wishes and motives of the settlor with the ownership rights and responsibilities of the beneficiaries. The rule of *Broadway National Bank* permitted settlors to use spendthrift clauses to strip beneficiaries of the power of voluntary and involuntary alienation of their interests in trust. The current position on spendthrift clauses is increasingly nuanced, recognizing

33. *See* RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. a (2003) ("A number of states have enacted legislation codifying the law of spendthrift trusts. A few statutes contain significant departures from the rules stated here . . . limiting the extent of the protection allowed . . . .").

34. N.Y. EST. POWERS & TRUSTS LAW § 7-3.4 (McKinney 2002).

35. CAL. PROB. CODE §§ 15306.5(b), 15307 (West 2002).

36. The *Restatement (Second) of Trusts* included a subsection describing "Particular Classes of Claimants" who could reach the interests of beneficiaries of a spendthrift trust. RESTATEMENT (SECOND) OF TRUSTS § 157 (1959). The *Restatement (Third) of Trusts* contains a similar—though not identical—provision. RESTATEMENT (THIRD) OF TRUSTS § 59 (2003).

37. Hurley v. Hurley, 309 N.W.2d 225, 227 (Mich. Ct. App. 1981) ("The majority rule is that, in the absence of a specific state statute, the income of a spendthrift trust of which a former husband is the current income beneficiary may be reached to satisfy his former wife's claim for alimony . . . or child support."); *see also* UNIF. TRUST CODE § 503(b)(1) (amended 2005), 7C U.L.A. 525 (2006) ("A spendthrift provision is unenforceable against . . . a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance . . . ."); RESTATEMENT (SECOND) OF TRUSTS § 157(a) (1959) (allowing "the interest of the beneficiary" to "be reached in satisfaction of an enforceable claim" against him or her "by the wife or child of the beneficiary for support, or by the wife for alimony").

38. Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Other Trends in American Trust Law at Century's End*, 25 ACTEC NOTES 101, 108 (1999).

39. Sligh v. First Nat'l Bank, 704 So.2d 1020 (Miss. 1997).

40. *Id.* at 1029.

more circumstances in which the beneficiaries must have the obligations of ownership.[41]

B. ADMINISTRATIVE DEVIATION

A second context in which there is a tension between the settlor and the beneficiaries during the trust's existence occurs when an administrative provision of the trust instrument requires the trustee to act in a manner at odds with the interests of the beneficiaries. In such an event, there is a doctrine—known as the doctrine of administrative deviation[42]—that permits the trustee to deviate from the problematic provision. But what are the preconditions for administrative deviation? The position of American law through much of the twentieth century was stated by the *Restatement (Second) of Trusts*: "The court will direct or permit the trustee to deviate from a term of the trust if owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust . . . ."[43] In this formulation, note the significant role given to the settlor's knowledge and intention.

Consistent with the *Restatement (Second)*, the role of the settlor figures prominently in a leading case on administrative deviation: *In re Pulitzer's Estate*, decided by the Surrogate's Court of New York County, New York, in

41. A word is appropriate here about the domestic asset protection trust. Under longstanding American common law, a spendthrift clause is ineffective with respect to the interest of a beneficiary who is also the trust's settlor. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 58(2), 60 cmt. f (2003). However, twelve states now authorize, by statute, the self-settled asset protection trust. The statutes vary in their details. *See generally* David G. Shaftel, *Comparison of the Twelve Domestic Asset Protection Statutes*, 34 ACTEC J. 293 (2009). The self-settled asset protection trust is simultaneously pro-settlor and pro-beneficiary, for the same person occupies both roles. The third-party creditor is the one whose intentions and wishes are frustrated. The statutes raise significant concerns and have motivated thoughtful critiques. *See generally* RESTATEMENT (THIRD) OF TRUSTS § 60 cmt. f reporter's notes (2003).

42. *See, e.g.*, GALLANIS, *supra* note 17, at 536–39 (discussing administrative deviation). This doctrine is not to be confused with the closely related doctrine of equitable deviation, which allows the modification of trust provisions in light of unanticipated circumstances and where doing so would accord with the settlor's probable intention. *See* T.P. Gallanis, *The Trustee's Duty To Inform*, 85 N.C. L. REV. 1595, 1621 n.137 (2007). The *Uniform Trust Code* allows both equitable and administrative deviation. Section 412(a), the equitable deviation provision, allows for modification of trust terms under certain circumstances, but requires that "[t]o the extent practicable, the modification must be made in accordance with the settlor's probable intention." UNIF. TRUST CODE § 412(a) (2000). Section 412(b), however, goes on to allow modification "if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration," with no mention of settlor intention. *Id.* § 412(b). The *Restatement (Third) of Trusts* has no direct counterpart to *Uniform Trust Code* section 412(b) but instead, in the reporter's notes, embraces administrative deviation within the contours of the *Restatement*'s equitable deviation provision. *See generally* RESTATEMENT (THIRD) OF TRUSTS § 66 cmt. a reporter's notes (2003).

43. RESTATEMENT (SECOND) OF TRUSTS § 167(1) (1959).

1931.[44] The case concerned the will of Joseph Pulitzer, an immigrant who became one of the country's most influential journalists.[45] He published two newspapers, the *New York World* (and its associated papers, the *Sunday World* and the *Evening World*) and the *St. Louis Post-Dispatch*. The *New York World* was clearly his favorite. He worked to build the *New York World* into the most widely read daily newspaper on Earth.[46] When he died, his will established a trust holding shares of the Pulitzer Publishing Company, which published the *St. Louis Post-Dispatch*, and the Press Publishing Company, which published the *New York World* and its associated Sunday and evening papers. The trustees of the trust were permitted to sell shares in the former company but not shares in the latter. Here is the relevant provision:

> I further authorize and empower my Executors and Trustees to whom I have hereinbefore bequeathed my stock in the Pulitzer Publishing Company of St. Louis, at any time, and from time to time, to sell and dispose of said stock, or any part thereof, at public or private sale, at such prices and on such terms as they may think best, and to hold the proceeds of any stock sold in trust for the beneficiaries for whom such shares were held in lieu thereof, and upon the same trusts. This power of sale is not to be construed as in any respect mandatory, but purely discretionary. This power of sale, however, is limited to the said stock of the Pulitzer Publishing Company of St. Louis, and shall not be taken to authorize or empower the sale or disposition under any circumstances whatever, by the Trustees of any stock of the Press Publishing Company, publisher of "The World" newspaper. I particularly enjoin upon my sons and my descendants the duty of preserving, perfecting and perpetuating "The World" newspaper (to the maintenance and upbuilding of which I have sacrificed my health and strength) in the same spirit in which I have striven to create and conduct it as a public institution, from motives higher than mere gain, it having been my desire that it should be at all times conducted in a spirit of independence and with a view to inculcating high standards and public spirit among the people and their official representatives, and it is my earnest wish that said newspaper shall hereafter be conducted upon the same principles.[47]

44. *In re* Pulitzer's Estate, 249 N.Y.S. 87 (Sur. Ct. 1931), *aff'd mem.*, 260 N.Y.S. 975 (App. Div. 1932).

45. For a recent biography, see JAMES MCGRATH MORRIS, PULITZER: A LIFE IN POLITICS, PRINT, AND POWER (2010).

46. For a biography focusing on Pulitzer as a newspaper publisher, see GEORGE JUERGENS, JOSEPH PULITZER AND THE *NEW YORK WORLD* (1966).

47. *In re Pulitzer's Estate*, 249 N.Y.S. at 92.

Unfortunately, the *New York World* was becoming unprofitable, and the trust was in danger of losing too much of its value. So the trustees went to court, seeking approval to deviate from the terms of the trust and sell the stock. The court agreed and permitted the sale.[48] What is noteworthy is how it reached that conclusion. Central to the court's reasoning was the imputed intention of the settlor: What would Pulitzer have intended if he had known that the stock's value would decline so dangerously? A fair reading of the trust suggests that Pulitzer was sufficiently vain that he would never have contemplated such a scenario.[49] But to reach the right outcome, the court engaged in some slippery reasoning combined with excessively lavish praise for the settlor's business judgment. Here is what the court said:

> The dominant purpose of Mr. Pulitzer must have been the maintenance of a fair income for his children and the ultimate reception of the unimpaired corpus by the remaindermen. Permanence of the trust and ultimate enjoyment by his grandchildren were intended. A man of his sagacity and business ability could not have intended that from mere vanity, the publication of the newspapers, with which his name and efforts had been associated, should be persisted in until the entire trust asset was destroyed or wrecked by bankruptcy or dissolution.[50]

Having determined that the settlor's imputed intention was to save the trust, the court held that the trustees had the power to sell the assets.[51]

Under modern trust law, the same result could be reached without resort to the settlor's imputed intention. As stated in section 412 of the *Uniform Trust Code*: "The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration."[52] Why is there no reference to the settlor's intent? The answer is found in the comment to the *Uniform Trust Code* section:

> Although the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose which is for the benefit of its beneficiaries precludes unreasonable restrictions on the use of trust property. An owner's freedom to be

48. *Id.* at 98 ("I accordingly hold . . . that the terms of the will and codicils do not prohibit the trustees from disposing of *any* assets of the Press Publishing Company . . . ." (emphasis added)).

49. *See id.* at 92 (quoting the trust itself, which claimed that Pulitzer had published the *World* "from motives higher than mere gain"; that it was, during his life, "at all times conducted in a spirit of independence"; and that he wished it to "hereafter be conducted upon the same principles").

50. *Id.* at 94–95.

51. *Id.* at 98.

52. UNIF. TRUST CODE § 412(b), 7C U.L.A. 507 (2006).

> capricious about the use of the owner's own property ends when the property is impressed with a trust for the benefit of others.[53]

As with the validity and reach of the spendthrift clause, the doctrine of administrative deviation shows how the new direction of American trust law is to rebalance the wishes of the settlor with the ownership rights of the beneficiaries. The administration of the trust must, in the end, be for the benefit of the beneficiaries, and their equitable ownership over the trust assets must be respected.

IV. TRUST TERMINATION

I now turn from trust administration to trust termination. All well-drafted trusts have provisions providing for the natural termination of the trust. For instance, if the trust provides for income to *A* for life, remainder in corpus to *B*, the trust will terminate at the end of *A*'s life estate. The subject here, however, is *early* termination, either by voluntary action of the beneficiaries or by operation of the Rule Against Perpetuities.

A. VOLUNTARY ACTION OF THE BENEFICIARIES

Let us first consider the early termination of a trust by the voluntary action of the beneficiaries. By creating the trust, the settlor has chosen to give the beneficiaries a limited equitable interest, rather than outright ownership of the trust assets. To what extent can the beneficiaries decide that they would rather have the assets outright?

The Court of Chancery in England faced this question in 1841 when it decided the case of *Saunders v. Vautier*.[54] The testator, Richard Wright, devised all of his stock in the East India Company, in trust, for the benefit of his great-nephew, Daniel. Under the terms of the trust, the interest and dividends were to be accumulated until Daniel reached age twenty-five, at which point the stock (plus the interest and dividends) were to be transferred to him outright.[55] At age twenty-one, Daniel petitioned the court for the immediate possession of the funds. The court agreed. Daniel's interest was indefeasibly vested,[56] and he was entitled to demand the funds as soon as he reached the age of legal competence. *Saunders v. Vautier* was understood to hold that a trust could be terminated early "when all parties

53. *Id.* § 412 cmt.

54. Saunders v. Vautier, (1841) 41 Eng. Rep. 482 (Ch.).

55. *Id.* at 482.

56. An "indefeasibly vested" future interest in property is "not subject to a condition or a limitation that might prevent it from taking effect in possession or enjoyment and not subject to a limitation that would prevent it from becoming a fee simple absolute once it became possessory." RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 25.3 cmt. a (Tentative Draft No. 6 2010).

having an equitable interest in the trust and having legal capacity to consent petitioned for termination and distribution of the trust estate."[57]

The rule of *Saunders v. Vautier* was generally followed by American courts—until 1889.[58] In that year, the Massachusetts Supreme Court decided the case of *Claflin v. Claflin*.[59] Wilbur Claflin left the residue of his estate in trust, directing the trustees to sell the assets and pay one-third of the proceeds outright to his wife Mary, to pay one-third of the proceeds outright to his son Clarence, and to hold one-third of the proceeds in trust for his son Adelbert, to be paid as follows: $10,000 at age twenty-one, $10,000 at age twenty-five, and the rest at age thirty. After reaching age twenty-one, but before reaching age twenty-five, Adelbert sued, seeking the termination of the trust and immediate distribution of the trust estate. Under the rule of *Saunders v. Vautier*, his argument was solid. But the court rejected his claim. Instead, the court pointed to its own decision in *Broadway National Bank*, only seven years earlier, which emphasized that—here I quote the *Claflin* court—"a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions ought to be carried out, unless they contravene some positive rule of law, or are against public policy."[60] As the *Claflin* court concluded:

> [W]e are unable to see that the directions of the testator to the trustees to pay the money to the plaintiff when he reaches the ages of 25 and 30 years are against public policy, or so far inconsistent with the rights of property given to the plaintiff, that they should not be carried into effect.[61]

The rule of *Claflin v. Claflin* was understood to mean that a trust could be terminated early by voluntary consent only if two conditions were both satisfied: First, all beneficiaries must consent to the early termination and be competent to do so (as in *Saunders v. Vautier*); second, the early termination must not defeat a "material purpose" of the settlor in establishing the trust.[62]

In the decades after *Claflin*, many types of trusts were found to contain a "material purpose" and therefore were held to be indestructible.[63] In particular, any trust with provisions giving the trustee discretion over the payment of income or principal (hereinafter referred to as "discretionary

57. Alexander, *supra* note 20, at 1201.

58. *Id.*; *see also* 5 SCOTT ET AL., *supra* note 8, § 34.1, at 2207 ("The American view, that termination or modification should not be available even when all of the beneficiaries desire it, if doing so would defeat a material trust purpose, was not widely established until the latter part of the nineteenth century.").

59. Claflin v. Claflin, 20 N.E. 454 (Mass. 1889).

60. *Id.* at 456.

61. *Id.*

62. *See* RESTATEMENT (SECOND) OF TRUSTS § 337 (1959).

63. For a survey of cases, see *id.* § 337 reporter's notes.

provisions"),[64] or any trust with a spendthrift clause,[65] was held to contain a material purpose. Since virtually all modern trusts contain discretionary provisions, and most modern trusts contain a boilerplate spendthrift clause, the number of trusts in the modern age that can be terminated early has been very low.

But there is a new direction in American law. The *Restatement (Third) of Trusts* and the *Uniform Trust Code* have broken new ground in substantially relaxing the material purpose requirement. Here, three points should be noted.

First, the mere presence of a spendthrift clause is no longer "presumed to constitute a material purpose of the trust."[66] As the comment to section 411 of the *Uniform Trust Code* explains:

> Spendthrift terms have sometimes been construed to constitute a material purpose without inquiry into the intention of the particular settlor. . . . This result is troublesome because spendthrift provisions are often added to instruments with little thought. . . . [The Uniform Trust Code provision] does not negate the possibility that continuation of a trust to assure spendthrift protection might have been a material purpose of the particular settlor. The question of whether that was the intent of a particular settlor is instead a matter of fact to be determined on the totality of the circumstances.[67]

Second, the mere presence of discretionary provisions is no longer sufficient "to establish, or to create a presumption of, a material purpose that would prevent termination by consent of all of the beneficiaries."[68] As the comment to section 65 of the *Restatement (Third) of Trusts* explains: "[D]iscretionary provisions . . . may represent nothing more than a settlor's plan for allocating the benefits of his or her property flexibly among various beneficiaries rather than revealing some significant concerns or protective purposes that would prevent the beneficiaries from joining together to terminate a trust."[69]

Third, even if the court determines that a trust evidences a material purpose, the court is directed under the new approach to weigh the material purpose against the reason for early termination. The trust can be terminated early if the court "determines that the reason(s) for

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64. 5 SCOTT ET AL., *supra* note 8, § 34.1.4, at 2223–24 ("[W]hen a trust . . . is a discretionary trust, the beneficiary or beneficiaries cannot compel termination.").

65. *See id.* § 34.1.2, at 2213–15.

66. UNIF. TRUST CODE § 411(c), 7C U.L.A. 498 (2006) (placed in brackets by amendment in 2004); *accord* RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. e (2003).

67. UNIF. TRUST CODE § 411 cmt. (amended 2004), 7C U.L.A. 500 (2006).

68. RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. e (2003).

69. *Id.*

termination . . . outweigh the material purpose."[70] Put simply: The settlor's intentions do not automatically trump the intentions of the beneficiaries.

If we return to the fundamental question at the heart of this Article—"Whose property is it?"—the new rules on early termination by voluntary action demonstrate that the law is moving away from the dominance of the settlor toward a more balanced respect for the rights and wishes of the beneficiaries. This new balance can also be seen in the next example, concerning the termination of the trust by the operation of the Rule Against Perpetuities.

B. The Rule Against Perpetuities

The Rule Against Perpetuities is designed to limit the length of time a grantor can place restrictions on the outright ownership of property. The Rule derives from the *Duke of Norfolk's Case*, decided by the Court of Chancery in 1682.[71] But it was not until more than 150 years thereafter that the contours of the Rule were established. Indeed, the Rule as it has become known to generations of lawyers and law students was formulated by Harvard University professor John Chipman Gray. In Gray's words: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[72]

The Rule as begun in the *Duke of Norfolk's Case* and as formulated by Professor Gray applies to contingent future interests in property.[73] Originally, the Rule's effect would have been primarily on contingent future interests in land, for it must be remembered that most wealth in early modern England was in the form of real estate.[74] Over time, the dominant form of wealth changed from realty to personalty, meaning financial obligations—or as Roscoe Pound elegantly observed: "Wealth, in a commercial age, is made up largely of promises."[75] As these promises were increasingly placed into trust, the Rule applied to them as well.[76]

The Rule requires that, to be valid, a contingent future interest must be certain to vest, if at all, within some "life in being" plus twenty-one years. The effect of this requirement is that beneficial interests in trust cannot continue indefinitely. (There is an exception for interests continuously held for

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70. *Id.* § 65(2).

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

72. JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201 (2d ed. 1906). A similar formulation, but not exactly the same, was set forth in the first edition of the book, published in 1886.

73. "Contingent" future interests are "subject to a condition that was stated in precedent rather than subsequent form." RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 25.3 cmt. a (Tentative Draft No. 6 2010).

74. *See* CHANTAL STEBBINGS, THE PRIVATE TRUSTEE IN VICTORIAN ENGLAND 6 (2002).

75. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 236 (1922).

76. *See* Olin L. Browder, Jr., *Trusts and the Doctrine of Estates*, 72 MICH. L. REV. 1509, 1509 n.1 (1974).

charitable purposes,[77] but the exception is not germane to the present discussion.)

It is worth being clear about *how* the Rule places a temporal limitation on beneficial interests in trust. At some point, all of the individuals living when the trust is created will die. To the extent that there are still beneficial interests in the trust, they will be held by persons unborn or unascertained at the time of the trust's creation. The interest of an unborn or unascertained beneficiary is *contingent* on the beneficiary *being* born or ascertained. Such interests can be in favor of an individual (for example, the settlor's "eldest great-grandchild") or a class (for example, the settlor's "descendants").[78] Either way, the interest of an unborn or unascertained beneficiary is contingent, hence subject to the Rule. In order for the interest to be valid, the Rule requires that the contingency must be certain to be resolved within the lifetime of someone alive when the interest was created, plus another twenty-one years. A testamentary trust creating a remainder interest in favor of my "children" satisfies this test. We will be able to ascertain within my own lifetime plus an instant (let alone twenty-one years) if any, how many, and which children will be born to (or adopted by) me. But a testamentary trust creating a remainder interest in favor of my "great-grandchildren" fails the test as long as some of my children are alive at my death (which is likely). These children can later give birth to (or father or adopt) my grandchildren, who can later give birth to (or father or adopt) my great-grandchildren. In such a scenario, it will take longer than the death of a life-in-being plus twenty-one years to ascertain if any, how many, and which of my great-grandchildren will be born or adopted.[79] The contingency is too remote, and, thus, the interest is invalid under the Rule. The effect of the invalidity is that the invalid interest is stricken from the disposition.[80]

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77. *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES § 4(5) (1990) (creating an exception from the Uniform Statutory Rule Against Perpetuities for "nonvested property interest[s] held by a charity . . . if the nonvested property interest is preceded by an interest held by another charity"); RESTATEMENT (SECOND) OF TRUSTS § 365 (1959) ("A charitable trust is not invalid although by the terms of the trust it is to continue for an indefinite or an unlimited period."). By way of example, a trust facilitated in 1704 by a warrant from William Penn is still in existence today. *See generally* Trs. of New Castle Common v. Gordy, 93 A.2d 509, 511–13 (Del. 1952) (detailing the legal aspects of the history of the trust's creation).

78. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 13.1(a) (Tentative Draft No. 4 2004) ("A class gift is a disposition to beneficiaries who are described by a group label and are intended to take as a group. Taking as a group means that . . . the membership of the class is typically not static, but is subject to fluctuation . . . .").

79. For purposes of the Rule Against Perpetuities, class gifts are governed by the "all-or-nothing" rule of *Leake v. Robinson*, (1817) 35 Eng. Rep. 979 (Ch.).

80. W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 656 (1938) ("Where an interest is void under the Rule against Perpetuities, it is stricken out; and . . . the other interests created in the will or trust instrument take effect as if the void interest had never been written.").

Once all the interests in a trust are too remote, and stricken, the trust no longer exists.

The Rule Against Perpetuities has a salutary effect. Property that is held in trust is kept in a state of divided ownership: The trustee holds the legal title, and the beneficiaries hold the equitable title. Property owned outright, rather than in trust, is held in *un*divided ownership: fee simple absolute. The owner has much greater freedom to do with the property as he or she pleases. Put differently: The Rule limits the length of time that a settlor can require property to be held in trust. Once the trust is forced to terminate by operation of the Rule, the property moves into absolute ownership.

This beneficial effect of the Rule was emphasized by the leading twentieth-century scholar of future interests, Professor Lewis Simes, who wrote:

> [T]he Rule against Perpetuities strikes 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. . . . The difficulty here is that, if we give free rein to the desires of one generation to create future interests, the members of succeeding generations will receive the property in a restricted state. They will thus be unable to create all the future interests they wish. Perhaps, they may not even be able to devise it at all. Hence, to come most nearly to satisfying the desires of peoples of all generations, we must strike a fair balance between unrestricted testamentary disposition of property by the present generation and unrestricted disposition by future generations.[81]

In other words: The Rule offers some balance between the desires of the settlor and the desires of the beneficiaries.

This balance has been upended in more than half of the jurisdictions within the United States. Nineteen jurisdictions allow trusts to last forever, either by abrogating the Rule Against Perpetuities or by making the Rule optional.[82] In addition, several states have modified the Rule Against

81. Lewis M. Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 723 (1955). For a critique of Simes's philosophical argument, see T.P. Gallanis, *The Rule Against Perpetuities and the Law Commission's Flawed Philosophy*, 59 CAMBRIDGE L.J. 284 (2000).

82. The states that do so include the following: Alaska, *see* ALASKA STAT. §§ 34.27.051, .100 (2010); Delaware (for trusts of personal property), *see* DEL. CODE. ANN. tit. 25, §§ 501–506 (2010); the District of Columbia, *see* D.C. CODE § 19-904 (2011); Idaho, *see* IDAHO CODE ANN. § 55-111 (2011); Illinois, *see* 765 ILL. COMP. STAT. 305/3 to /4 (2009); Kentucky, *see* KY. REV. STAT. ANN. § 381.224 (West 2010); Maine, *see* ME. REV. STAT. tit. 33, § 101-A (2010); Maryland, *see* MD. CODE ANN., EST. & TRUSTS § 11-102 (LexisNexis 2011); Missouri, *see* MO. REV. STAT. § 456.025 (2010); Nebraska, *see* NEB. REV. STAT. § 76-2005 (2009); New Hampshire, *see* N.H. REV. STAT. ANN. § 564:24 (2010); New Jersey, *see* N.J. STAT. ANN. § 46:2F-9 to -11 (West 2011); North Carolina, *see* N.C. GEN. STAT. § 41-23(h) (2010); Ohio, *see* OHIO REV. CODE ANN. § 2131.09 (West 2011); Pennsylvania, *see* 20 PA. CONS. STAT. § 6107.1 (2011); Rhode Island, *see*

Perpetuities to permit trusts to last up to 1,000 years, depending on the state.[83]

What explains this disturbing development? The answer is: a loophole in federal tax law and a push at the state level for trust business. The story begins in 1986, with the reformulation of the federal generation-skipping transfer tax, or the "GST tax."[84] The GST tax imposes high taxes on trusts that last through more than one generation, but it also has a large exemption: in 2011, the GST tax exemption is $5 million per donor.[85] Trusts created with assets at or below the exemption amount remain exempt from GST tax no matter how long the trust continues, and no matter how much the value of the trust corpus increases over time from returns on investment.[86]

In crafting the GST tax exemption, Congress made a fundamental, though understandable, error: It relied on the Rule Against Perpetuities—a part of state, not federal, law—to control the length of GST tax-exempt trusts.[87] This mistake put the duration of GST tax-exempt trusts in the hands of the state legislatures. Within our system of federalism, a state legislature has little interest in protecting the national treasury, but it may have some interest in attracting, to within its own borders, trust business and revenue. The movement in favor of perpetual or near-perpetual trusts began after 1986 and gathered momentum as lawyers and banking institutions learned of the potential for attracting trust business.[88] In light of the perpetual-trust

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R.I. GEN. LAWS § 34-11-38 (2010); South Dakota, *see* S.D. CODIFIED LAWS § 43-5-8 (2011); Virginia, *see* VA. CODE ANN. § 55-13.3 (2011); and Wisconsin, *see* WIS. STAT. § 700.16(5) (2010).

83. These states include the following: Alaska (for the exercise or termination of a nongeneral power of appointment), *see* ALASKA STAT. §§ 34.27.051, .100 (2010); Arizona, *see* ARIZ. REV. STAT. ANN. § 14-2901 (2010); Colorado, *see* COLO. REV. STAT. § 15-11-1102.5 (2010); Delaware (for trusts of real property), *see* DEL. CODE ANN. tit. 25, § 503 (2010); Florida, *see* FLA. STAT. § 689.225 (2010); Michigan, *see* MICH. COMP. LAWS ANN. §§ 554.71–.78 (West 2011); Nevada, *see* NEV. REV. STAT. § 111.103 (2009); Tennessee, *see* TENN. CODE ANN. § 66-1-202 (2010); Utah, *see* UTAH CODE ANN. § 75-2-1203 (LexisNexis 2011); Washington, *see* WASH. REV. CODE §§ 11.98.130–.150 (2010); and Wyoming, *see* WYO. STAT. ANN. § 34-1-139 (2011).

84. *See* 26 U.S.C. §§ 2601–2604 (2006).

85. *Id.* §§ 2631, 2010(c).

86. *See id.* §§ 2641(a), 2642(a).

87. The American Law Institute shares this view. The Introduction to Chapter 27 of the *Restatement (Third) of Property* states: "In fashioning the GST exemption, Congress relied on state perpetuity law to control the length of GST-exempt trusts, placing the duration of GST-exempt trusts in the hands of the states, some of which have exhibited greater interest in generating trust business for in-state institutional trustees than in protecting the federal fisc." RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS ch. 27, intro. note (Tentative Draft No. 6 2010) (approved in May 2010 by the ALI membership by a unanimous voice vote).

88. *See* Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2476–78 (2006); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 359–63 (2005).

movement, some observers opined about the nationwide demise of the Rule Against Perpetuities.[89]

To paraphrase Mark Twain, the reports of the death of the Rule Against Perpetuities are greatly exaggerated. Indeed, the Rule has recently been reinvigorated and reformulated. The American Law Institute has approved the final chapters of the *Restatement (Third) of Property*, which reformulate the Rule from a limit on the remote vesting of contingent future interests to a direct limit on the duration of trusts or other donative dispositions of property.[90] As reformulated, the Rule requires a trust to terminate on or before the end of the newly redesigned perpetuity period, which now expires at the death of the last living beneficiary no more than two generations below the transferor.[91] A trust that fails to terminate within this period will be subject to judicial modification so that it does terminate within the period.[92]

The purpose of the reformulated Rule is to achieve the purposes of the traditional Rule, but more directly. In the words of the *Restatement (Third) of Property*:

> An important reason for maintaining a reasonable limit on dead-hand control is that the limit forces full control of encumbered property to be shifted periodically to the living, free of restrictions imposed by the original transferor. The living can then use the property as they wish, including re-transferring it into new trusts with up-to-date provisions.[93]

The *Restatement (Third) of Property* goes further than reformulating the Rule. The *Restatement (Third)* also articulates the official position of the American Law Institute that allowing perpetual or near-perpetual trusts is ill-advised:

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89. *See* 2 SCOTT ET AL., *supra* note 8, § 9.3.9, at 503 n.16 (citing fifteen scholarly articles that draw attention to the decline of the Rule Against Perpetuities); *see also, e.g.*, *id.* § 9.3.9, at 503 ("One might even venture the observation that, for better or for worse, the rule against perpetuities is currently in free fall."); Note, *Dynasty Trusts and the Rule Against Perpetuities*, 116 HARV. L. REV. 2588, 2609 (2003) (referring to "the dynasty trusts that are today bringing about the demise of the Rule Against Perpetuities").

90. On changing the Rule to require termination on or before the expiration of a perpetuity period, see T.P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513, 559–60 (2003); Daniel M. Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?*, 56 MICH. L. REV. 683, 709 (1958).

91. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 27.1 (Tentative Draft No. 6 2010). There is a provision for retaining property in trust for a beneficiary younger than thirty or a specified age below thirty. *See id.* § 27.1(a).

92. *Id.* § 27.2.

93. *Id.* ch. 27, intro. note.

> It is the considered judgment of The American Law Institute that the recent statutory movement allowing the creation of perpetual or multiple-centuries trusts is ill advised. . . .
>
> A rule that curbs excessive dead-hand control is deeply rooted in this nation's history and tradition, and for good reason. A 360-year trust created in the year 2010 could endure until the year 2370 and have over 100,000 beneficiaries. A 1000-year trust created in 2010 could terminate in the year 3010 and have millions of beneficiaries. No transferor has enough wisdom to make sound dispositions of property across such vast intervals and for beneficiaries so remote and so numerous. A 1000-year or 360-year trust created in 2010 might incorporate what are currently considered to be flexible provisions for a trust that could last that far into the future. To put that claim into perspective, consider the devices for controlling family wealth through subsequent generations that were available 360 or more years ago, in the year 1650 or earlier. Such devices, drafted before the invention of the typewriter, first took the form of the unbarrable entail and, after the entail became barrable, the strict settlement. These devices became archaic long ago. If that which was considered sophisticated 360 or more years ago is considered primitive today, there is reason to suspect that that which is considered sophisticated today will be considered primitive 360 or more years from now.[94]

Put simply: The new direction of the law of future interests and perpetuities, as exemplified in the *Restatement (Third) of Property*, rebalances the interests and desires of the trust settlor with the interests of the trust's beneficiaries.

V. A THEORETICAL FRAMEWORK

In the preceding discussion, we have seen four examples of the new direction of American trust law. Taken together, these examples reflect some movement away from a favoritism of the settlor and toward an increased recognition of the rights, obligations, and desires of the beneficiaries.

Let me place this new direction of doctrine into a larger theoretical framework. If we were to map the different fields within the common law and equity, the law of trusts would occupy its own space but would also overlap to some extent with the law of property and the law of contract. There has been a debate in recent scholarship about whether the trust is

94. *Id.* (footnotes omitted).

closer to property or to contract.[95] Contractarian scholars view the trust as primarily a contract between the settlor and the trustee, with the trust's beneficiaries occupying a position akin to contractual third-party beneficiaries.[96] The most emphatic contractarian scholar is Professor John Langbein, who has declared that "the deal between [the] settlor and [the] trustee is functionally indistinguishable from the modern third-party-beneficiary contract. Trusts are contracts."[97] In contrast, proprietarian scholars characterize the trust and the role of the trustee as essentially "property-based"[98]: The trust is a property arrangement arising from a conveyance or devise, not a contract.[99]

I would identify myself in the proprietarian camp.[100] It is important to emphasize, however, that these positions are not all-or-nothing;[101] participants in the debate recognize that trusts combine contractual and proprietary features.[102] Still, scholars have taken positions placing more emphasis on contract or property, respectively.

The position one takes on the contractarian–proprietarian axis tends to influence one's view about the proper role of default and mandatory rules in the law of trusts. Contractarians tend to prefer default rules except in comparatively narrow circumstances, thereby giving the settlor maximum flexibility to structure the terms of the bargain with the trustee.[103]

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95. For a description of the debate, see Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 627–33 (2004).

96. *See, e.g.*, John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627 (1995); *see also* Sitkoff, *supra* note 95, at 647 (describing trust beneficiaries using a term drawn from organizational law: "residuary claimants").

97. Langbein, *supra* note 96, at 627.

98. Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 768 (2000); *see also* TAMAR FRANKEL, FIDUCIARY LAW 233 (2011) (describing the trustee–beneficiary relationship as "property-based").

99. RESTATEMENT (THIRD) OF TRUSTS § 5(i) cmt. i (2003); RESTATEMENT (SECOND) OF TRUSTS § 197 cmt. b (1959).

100. *See, e.g.*, T.P. Gallanis, *The Trustee's Duty To Inform*, 85 N.C. L. REV. 1595, 1621 (2007) ("The modern law of fiduciary administration enforces a proprietarian boundary on the settlor's contractarian power. The settler of an irrevocable trust is given significant room to control the trustee's actions but cannot dispense with the core responsibility of the trustee to administer the trust in the interests of the beneficiaries.").

101. A third view, critical of contractarianism yet perhaps not fundamentally proprietarian, has been articulated by Professor Melanie Leslie, who argues that treating fiduciary duties as default rules weakens their moral force and renders their content difficult to discern. Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 89 (2005).

102. Langbein, *supra* note 96, at 669 ("Trust is a hybrid of contract and property, and acknowledging contractarian elements does not require disregarding property components whose convenience abides."); *see also* Sitkoff, *supra* note 95, at 633 ("[T]he law of trusts, like the law of other organizations, offers a careful blending of in rem and in personam features.").

103. Sitkoff, *supra* note 95, at 624 ("This Article's normative claim is that the law should minimize the agency costs inherent in locating managerial authority with the trustee (T) and the residual claim with the beneficiaries (B1 and B2), *but only to the extent that doing so is*

Proprietarians tend to be more willing to use mandatory rules that impinge upon the wishes of the settlor in order to protect the property rights held by the beneficiaries.[104] To paint with a broad brush: Contractarians emphasize the intention of the settlor; proprietarians emphasize the property interests of the beneficiaries.

English trust law has been, and continues to be, more consistently proprietarian than its American counterpart.[105] To return to our four examples: English law still follows the rule of *Saunders v. Vautier*, allowing beneficiaries to terminate a trust early by consent;[106] England has never embraced the spendthrift trust;[107] English law authorizes what we would call

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consistent with the ex ante instructions of the settlor (S)." (emphasis added)); *see also* John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1126 (2004) ("Trust law consists almost entirely of default rules. The mandatory rules barely intrude on ordinary practice.").

104. This is particularly true of English trust law, which views the trust as a "proprietary relationship." JOHN MOWBRAY ET AL., LEWIN ON TRUSTS 7 (18th ed. 2008) (observing that "the proprietary nature, in the wide sense, of a beneficiary's rights, is at the heart of the proprietary remedy which can be asserted against trustees"); *see also* DAVID HAYTON ET AL., UNDERHILL AND HAYTON: LAW OF TRUSTS AND TRUSTEES 19 (18th ed. 2010) (referring to "the traditional emphasis on the proprietary nature of the trust"); J.E. PENNER, THE LAW OF TRUSTS 39 (7th ed. 2010) ("Unfortunately the 'obligational' view of the trust still occasionally raises its bewildered head to confuse and annoy . . . ."). Note, for example, that English law imposes on trustees a mandatory duty to keep trust beneficiaries informed about the trust and its administration. *See* David Hayton, *The Irreducible Core Content of Trusteeship*, *in* TRENDS IN CONTEMPORARY TRUST LAW 47, 53 (A.J. Oakley ed., 1996) ("[A] settlor cannot . . . oust the accountability of the trustees that is fundamental to the very existence of the trust."). In the United States, the *Restatement (Third) of Trusts* and the *Uniform Trust Code* describe the trustee's duty to inform as a mandatory duty, but many states enacting the *Uniform Trust Code* declined to adopt this provision, instead framing the duty to inform as a default rule capable of override by the settlor; the Uniform Law Commission, bowing to reality, placed the relevant *Uniform Trust Code* provision in brackets. *See* UNIF. TRUST CODE § 105(b)(8), (b)(9), 7C U.L.A. 429 (2006) (describing as mandatory "the duty . . . to notify the qualified beneficiaries . . . of the existence of the trust . . . and of their right to request trustee's reports" and "the duty to respond to the request of a [qualified] beneficiary . . . for trustee's reports and other information reasonably related to the administration of the trust"); *id.* § 105 cmt. (describing the rationale for the 2004 amendment placing subsections (b)(8) and (b)(9) in brackets to indicate that "uniformity is not expected"); RESTATEMENT (THIRD) OF TRUSTS § 82 cmt. a(2) (2003) ("[T]he duty to provide information to certain beneficiaries . . . may not be dispensed with entirely or to a degree or for a time that would unduly interfere with the underlying purposes or effectiveness of the information requirements.").

105. *See supra* note 104.

106. *See* MOWBRAY ET AL., *supra* note 104, at 850–53.

107. The spendthrift trust contains a disabling restraint on alienation (the spendthrift clause). For the distinction between "disabling restraints" and "forfeiture restraints," see RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS §§ 3.1, 3.2 (1983). Disabling restraints on alienation are impermissible in England. *See* MOWBRAY ET AL., *supra* note 104, at 177–78, 1184. English law does recognize the forfeiture restraint—e.g., on alienation, insolvency, or bankruptcy—whereby the beneficiary's interest is divested or transferred upon the happening of the stated event. *See id.* at 181–86. An example is the so-called "protective trust," now on a statutory footing in England. *Id.* at 186–90.

administrative deviation without tying it to the settlor's imputed intention;[108] and England retains the Rule Against Perpetuities (now in a statutory form),[109] thereby preventing perpetual or near-perpetual trusts.

On the contractarian–proprietarian axis, where has American law been and where is it going?

VI. CONCLUSION

In the late nineteenth century and for much of the twentieth century, American trust law moved in a contractarian, pro-settlor direction. Yet the examples I have given in this Article suggest that the pendulum is moving back toward the middle, as American trust law balances the desires of the settlor with the property rights of the trust's beneficiaries. The pendulum's movement can be seen in the modern approach to spendthrift clauses, administrative deviation, the *Claflin* rule, and the Rule Against Perpetuities. Note, however, that the pendulum is moving toward the middle, rather than beyond it. The wishes of the settlor as articulated in the trust instrument still have great resonance, and rightly so. "The organizing principle of the American law of donative transfers is" that the "donor's intention is given effect to the maximum extent allowed by law."[110] American trust law will not become as proprietarian as the English trust law from which it descends. But the rebalancing of the desires of the settlor with the interests and rights of the trust's beneficiaries is both appropriate and welcome.

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108. *See* Variation of Trusts Act, 1958, 6 & 7 Eliz. 2, c. 53, § 1(1) (U.K.); Trustee Act, 1925, 15 & 16 Geo. 5, c. 19, § 57(1) (U.K.). For discussion, see MOWBRAY ET AL., *supra* note 104, at 1858–61, 1867–68, 1878–79, 1892.

109. *See* Perpetuities and Accumulations Act, 2009, c. 18 (U.K.).

110. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 (2003).