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Which the Deader Hand? A Counter to the American Law Institute's Proposed Revival of Dying Perpetuities Rules

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Which the Deader Hand?
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Scott Andrew Shepard*

Encouraged primarily by a fluke in federal estate and gift tax law, more than half of the states have either effectively or entirely abolished their rules against perpetuities in the past two decades. The American Law Institute, deeply troubled by this development, has adopted for its Third Restatement a proposed rule against perpetuities that would essentially prohibit conditional gifts to continue for the benefit of parties born more than two generations after the transfer.

The ALI’s efforts are misguided. The rule against perpetuities was the product of a legal, political, and social age very different than our own. It was designed in large part to address concerns, such as inalienability conditions, that do not effectively exist in modern law, either because the evolution of property structures has dealt with these problems by other means, or because changes in political and social structure have lessened the concerns. While some of the old concerns do remain, in modified form, the Rule Against Perpetuities provides a poor response to them. It offers a medieval barber’s amputation saw where the job demands a modern surgeon’s scalpel. Though both may save the patient from the illness, the scalpel will do a more exact and reliable job, with far less collateral damage.

This Article demonstrates where the ALI went wrong and fashions the scalpel required to deal with modern iterations of dead-hand control issues and related problems.

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I. INTRODUCTION

The Rule Against Perpetuities (RAP or Rule) has had a long run. Its first forebear articulated in the Duke of Norfolk’s Case in 1682, the Rule has been reduced to classic formula, has tormented generations

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of law students and practitioners, and has evoked storms of scholarly debate when torment led to rebellion against and eventual alteration of that classic formula. No alteration, however, can save this ancient cudgel of a Rule, nor render it fit for present purposes. Designed for an era when most property was held in land, when landed property carried with it profound political and social power, and when the trust had not yet become a meaningful vehicle of conditional transfer, it has outlived its usefulness. It is time for the Rule to go.

As it happens, the Rule has gone—entirely or effectively—in more than half of the states in the country. These states have either wholly abolished it, or have effectively abolished it by a variety of means: by extending the perpetuities period to extraordinary lengths, by rendering the RAP a default rule out of which transferors can opt, or by excluding long-term or perpetual trusts from the application of the Rule.

These developments have evoked consternation and response from the American Law Institute (ALI). The ALI has rightly noted that the states that have made these reforms have done so not on the basis of principled, doctrinal objections to the RAP and its efficacy in the modern world, but instead have acted in order to gain for their citizens (either as settlors or as providers of trust services) the benefits of a quirk in federal tax law. In the throes of preparing the Restatement of the Law Third, Property: Wills and Other Donative Transfers (Third Restatement), the ALI and the Restatement authors registered their objection to the movement toward RAP abolition and minted (in Division VIII (the Rule Against Perpetuities) of the Third Restatement) a new RAP, one that they hope will stem the tide toward abolition. Their new iteration of the Rule (proposed Rule or Third Restatement RAP) would substitute for previous formulations a Rule requiring, in brief, that conditional gifts end (generally, by the dissolution of trusts) upon the deaths of the transferees who are two generations younger than the transferor.

In this Article, I suggest that the ALI authors are misguided. While the states may not have moved decisively toward RAP abolition on principled grounds, there are in fact principled grounds upon which to argue for RAP abolition. These grounds include the fact that the RAP makes a poor vehicle for controlling dynastic wealth generation and transmission; that the RAP cannot distinguish between good and bad long-term conditional gifts; that many of the historical justifications for the RAP no longer apply; and that the RAP inflicts needless costs on society without any particular countervailing
benefits. These grounds also include the fact that the legitimate dead-hand concerns that do remain, given modern property structures, can be addressed far more subtly, and at a far lower aggregate cost, by a few relatively minor adjustments to existing property law—especially to presumptions that apply to conditional gifts, whether legal (namely, conditional estates) or equitable (namely, trusts). Further, I argue that the specific RAP formulation proposed in the Third Restatement will be no better on these grounds than some more recent RAP iterations, and for that reason and others stands very little hope of adoption by the states. Finally, I propose a concrete package of reforms to do the useful work at which the RAP is aimed without also incurring the unnecessary ancillary costs occasioned by the Third Restatement RAP, or any other version.

This Article takes the following course. In Part II, I provide a brief history of the development of the RAP, considering the evolution of the “classic formulation” of life-in-being-plus-twenty-one-years and the more recent wait-and-see versions of the Rule. In Part III, I review the ALI authors’ reasons for supporting a revival of the RAP generally and their specific defenses of their particular Third Restatement RAP. Part IV reviews other scholars’ evaluations of the states’ movement to abolish the RAP and their proposed responses.

I critique the arguments of the ALI and of these other scholars in Part V. In Part VA, I consider whether any RAP is either necessary or appropriate to the modern realities of society and of property law, and conclude that it is not. First, the RAP, and state property law generally, is the wrong place to address the question of whether to take state action to diminish or destroy large family fortunes; that step should be taken, or not, as a matter of federal tax law. Second, while one of the central justifications of the RAP has long been its role in limiting alienability restraints on property, that justification has largely vanished. Third, dead-hand concerns have also been radically diminished by modern property law developments. Those concerns that remain are best addressed by changes to the rules under which conditional-transfer documents are interpreted, and by legislative or judicial action that bans and revises conditional gifts that contravene some specific, clearly articulated, and generally agreed upon public policy concern—not by a blanket ban on all conditional gifts that continue beyond a specific, limited period. Finally, I demonstrate that the ALI authors’ narrow focus on so-called family-dynasty trusts, and their specific concerns about such trusts, either undermine their
position entirely or are easily dealt with by the expansion of rules permitting trustees to avoid capricious trust management.

In Part V.B, I consider particular drawbacks that append to the Third Restatement RAP. These include the fact that, despite the ALI authors’ claims to the contrary, their proposed Rule would usually result in a far shorter perpetuities period than applies under the most common still-extant state RAPs, a problem that will likely get worse as human longevity increases. As a result, the Third Restatement RAP is not alive to changing social, legal, and technological conditions in the ways claimed. These practical failings will provide additional reinforcement to the structural factors that will discourage state legislatures from following the ALI’s recommendations.

I draw together in Part VI the concrete solutions I derive in Part V to the dead-hand problems that still genuinely obtain. I initially propose, of course, abolition of the RAP in the states that yet retain it, while cautioning that for conditional gifts that carry inalienability provisions, the alienability limitations should either be prohibited ab initio or should be expressly limited to some fixed period. Next, I propose a “rule of administrative efficiency” that would allow trustees to effect revision of trust conditions, in accord with settlor intent and with an eye toward long-term efficient management, when trust-administration expenditures exceed some fixed total of trust assets or income. Additionally, in response to concerns that distribution conditions will fail to anticipate unforeseeable changes in social attitudes, family structures, or technological development, I propose two possible changes to the presumptions applied when interpreting conditional gifts, and consider the relative merits of each option. Finally, I propose a “noxious-conditions” rule under which conditional gifts that are legal when made but that become noxious to changing public sentiment and public policy over time are—at the time that the conditions and the behaviors for which they create incentives become noxious—explicitly struck on the grounds of noxiousness. This rule will permit conditional grants to remain in force if they do not, over long periods, manifestly offend overwhelming contemporary sensibilities. These carefully crafted reforms should do all of the necessary work that the Third Restatement RAP—or any RAP—would do, without the unnecessary bluntness, and unnecessary costs, that must arise from a RAP.
II. A BRIEF HISTORY OF THE RULE AGAINST PERPETUITIES

Various scholars, including perhaps most famously Professor John Chipman Gray, have charted the history and development of the RAP in fascinating detail. This Part includes only a brief sketch of that history and development, the necessary background for the discussion that follows.

The RAP arose as an intervention in favor of alienability of property interests in a long war between testators and devisees over the question of whose plans for a given res of property should trump. In the initial position—in England before and during the thirteenth century—neither testators nor devisees enjoyed free alienability or plenary control of their lands. Instead, ultimate control of land transfers lay in the hands of feudal lords and ultimately the king. This feudal control was lifted in 1290 with the Statute Quia Emptores, but a nearly contemporary act of Parliament, the Statute de Donis Conditionalibus of 1285, substituted for the lord’s veto an estate known as the “fee tail.” The fee tail estate allowed freeholders to “entail” their land, so that each succeeding generation would hold the land and enjoy its use, but would lack the power to alienate the land from the original entailer’s line of lineal descendants. (In effect, entailment of property created “a perpetual series of life estates.”)

One primary effect of entailing land was that no present possessors of the land could alienate the property in fee simple; at most, they could grant an interest in the land for the period of their lives. Had the courts strictly honored the entail and had the general run of landowners taken up the opportunity of entailing their estates, the result would have been the practical inalienability of most of

5. See id.
6. Statute Quia Emptores, 1290, 18 Edw. 1, cc. 1-3 (Eng.).
7. Statute de Donis Conditionalibus, 1285, 13 Edw. 1, cc. 1-50 (Eng.).
8. Dukeminier & Krier, supra note 4, at 1320.
England’s wealth. Given that the stock of land is essentially fixed and that the fixed stock of land is particularly limited in a country that shared a small island with at least one other country, the result would have severely curtailed both English liberty and opportunities for English economic development.

To avoid these increasingly problematic ends, the courts stepped in near the end of the fifteenth century to curtail the fee tail by a process called “barring the entail.” This process allowed present possessors of the fee tail to convert it into a fee simple absolute (and thus to alienate the interest) simply by bringing suit for a “common recovery.” This effective gutting of the fee tail gave present possessors of property a relatively direct route to alienability.

Posterity- and patrimony-minded devisors, however, fought back. Employing life estates and contingent remainders, and, later (following their creation in the Statute of Uses, which took effect in 1536), executory interests, testators managed effectively to revive the opportunity for perpetual devises and for permanently rendering land inalienable. The judicial response this time was the—or at least a—rule against perpetuities. Announced in the Duke of Norfolk’s Case, the Rule did not originally take the strict and convoluted life-in-being-
plus-twenty-one-years form that has haunted more recent generations of law students.\textsuperscript{16} Rather, under the Rule announced in the \textit{Duke of Norfolk's Case}, the courts first "permitted transferors to control inheritance of the family estate for a period equal to the lives of persons they knew and whose competence they could judge, plus any actual minorities thereafter,"\textsuperscript{17} though by the end of the eighteenth century, courts had begun to cite the case as the font of the Rule as we know it today.\textsuperscript{18} Professor Gray crystallized the Rule for American audiences in the second edition of his classic treatise on the RAP: "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."\textsuperscript{19}

So matters rested with a compromise between grantors' and takers' interests until the middle of the twentieth century when—echoing and responding to the agony of confusion that the RAP of Gray's definition created for practitioners and grantors—reform began in the states and defenders of reform stepped forward in the academy.\textsuperscript{20} First, the Commonwealth of Pennsylvania revised its RAP in 1947 to require courts to allow conditional grants to unwind, and to wait and see whether they actually violated the RAP, rather than determining at the outset whether they conceivably could violate the Rule.\textsuperscript{21} Within a few years, Professor Barton Leach advocated reform of the Rule along the wait-and-see lines that Pennsylvania had embraced.\textsuperscript{22} Leach's advocacy inaugurated a series of "Perpetuities Wars,"\textsuperscript{23} as eminent scholars in the field debated various subtleties of the proposed

\begin{itemize}
  \item \textsuperscript{16} Duke of Norfolk's Case, (1682) 22 Eng. Rep. 931; see also Ives, supra note 1, at 674.
  \item \textsuperscript{17} Dukeminier & Krier, supra note 4, at 1320; see also W. Barton Leach & Owen Tudor, \textit{The Common Law Rule Against Perpetuities}, in \textit{6 AMERICAN LAW PROPERTY} § 24.16, at 51 (1952) ("In a will a man of property could provide for all of those in his family whom he personally knew and the first generation after them upon attaining majority.").
  \item \textsuperscript{18} See, \textit{e.g.}, Long v. Blackall, 101 Eng. Rep. 875, 876-77 (1797) ("The usual period allowed by law after which an executory devise may take effect, is a life or lives in being and twenty-one years afterwards, as settled in the case of \textit{The Duke of Norfolk} . . . .'').
  \item \textsuperscript{19} Gray, supra note 2, § 201, at 191; \textit{RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS} 115 n.13 (Tentative Draft No. 6, 2010) [hereinafter Tentative Draft].
  \item \textsuperscript{20} See, \textit{e.g.}, Leach, supra note 3, at 722 (noting that the Rule "has been made badly, or so intricately that it is a dangerous instrumentality in the hands of most members of our profession," so that "our corporate responsibility to the public is not being met"); Tentative Draft, supra note 19, at 115 ("[T]he mechanism embodied in the common-law Rule was ill-chosen[,] difficult to master[, and] mysterious and confusing.").
  \item \textsuperscript{21} See \textit{20 PA. CONS. STAT. ANN.} § 6104(b) (West 2011).
  \item \textsuperscript{22} See Leach, supra note 3.
  \item \textsuperscript{23} Susan F. French, Perpetuities: Three Essays in Honor of My Father, 65 \textit{WASH. L. REV.} 323, 332-33 & n.24 (1990).
\end{itemize}

Even as the USRAP swept the traditional Rule before it, however, a new wave of reform began to crash onto shore. Tax law changes in 1986 both tightened the generation-skipping transfer tax (GST tax) and included an exemption in that tax that allowed at least $1 million per grantor to pass unburdened by the GST tax directly to...
grandchildren, or via trust that resulted in one or more generation-skipping transfers. The duration of such trusts—and the attendant tax benefits—were limited only by state RAPs. In response to this incentive, an increasing flood of states has either extended the wait-and-see period of their modified RAPs to extraordinary lengths, allowed grantors to opt out of the state’s Rule, or effectively eliminated the RAP altogether, at least with regard to trusts.

At present, then, more than half of the states have effectively eliminated the application of the RAP (at least as to trusts) as a mandatory rule.

III. THE AMERICAN LAW INSTITUTE’S PROPOSAL FOR REVIVING AND REVISING THE RULE

The ALI began the process of drafting and approving the Third Restatement in 1991. Volume three of that Restatement includes Division VIII, which focuses specifically on the RAP. This newly revised Division VIII is the ALI’s first promulgation of a revised RAP since 1979, when it proposed the wait-and-see revisions to the Rule. It thus represents the ALI’s first Restatement response to the post-1986 trend toward practically or completely eliminating the RAP.

The ALI, in short, wholly disapproves of “the recent trend to abolish limits on perpetual trusts.” Rather, per its Director, it considers the Rule to be a “need[ed] time limit[] on these trusts to ease commerce and to permit the living to govern assets.” As a result, it
has approved a proposal that the RAP “be simplified by replacing ‘lives in being’ with ‘generations’: thus trust limitations established by a settlor would only be enforceable for the next two generations.”

Subpart A below explains the Rule that the ALI has proposed, and reviews the ALI’s defenses of this proposed Rule, as opposed to the traditional Rule or the wait-and-see Rule (still based on the traditional Rule) that it endorsed in the Second Restatement. Subpart B reviews what the Director of the ALI considers “convincing” arguments against the movement to eliminate the RAP altogether. Critique of the proposed Rule and the ALI’s arguments in its favor of reinstituting a RAP awaits in Part IV.

A. The Proposed Rule and the ALI’s Assertions of Its Superiority over Previous Rules

The ALI has approved the following Rule:

(a) A trust or other donative disposition of property is subject to judicial modification . . . to the extent that the trust or other disposition does not terminate on or before the expiration of the perpetuity period, except that if, upon the expiration of the perpetuity period, the share of a beneficiary is distributable upon reaching a specified age and the beneficiary is then younger than the earlier of the specified age or the age of 30, the beneficiary’s share may, without judicial modification, be retained in trust until the beneficiary reaches or dies before reaching the earlier of the specified age or the age of 30.

(b) The perpetuity period expires at the death of the last living measuring life. The measuring lives are as follows:

(1) Except as otherwise provided in paragraph (2), the measuring lives constitute a group composed of the following individuals: the transferor, the beneficiaries of the disposition who are related to the transferor and no more than two generations younger than the transferor, and the beneficiaries


45. Liebman, supra note 41, at xi.
of the disposition who are unrelated to the transferor and no more than the equivalent of two generations younger than the transferor.

(2) In the case of a trust or other property arrangement for the sole current benefit of a named individual who is more than two generations younger than the transferor or more than the equivalent of two generations younger than the transferor, the measuring life is the named individual.46

In essence, the Rule retains the wait-and-see innovations of the Second Restatement, but abandons the traditional life-in-being-plus-twenty-one-years formulation of the Rule.47 Instead, it substitutes a two-generations Rule.48 Under this Rule, transferors may make conditional gifts (including by establishment of trusts) that remain conditional until the death of transferees (whether or not born at the time the grant is made) who are up to two generations younger than the transferors.49 If the transferees are not blood relatives of the transferor, the Rule assumes that the transferor lives at the center of “his” generation and posits generation equivalents of twenty-five years.50 Thus, a transferee born ten years after the transferor is deemed to share a generation with the transferor, while one born three years later is deemed to be a member of the next generation.51

Two exceptions to this basic rule arise. The first occurs if a conditional grant is made “for the sole current benefit of a beneficiary such as a living great-grandchild” who would, by definition, fall more than two generations beyond the transferor’s generation.52 Conditional gifts made to such specific, in-being individuals remain valid until the

46. Tentative Draft, supra note 19, at 135-36 (specifying text of proposed section 27.1, Statement of the Rule Against Perpetuities, of the Proposed Third Restatement: Wills).
47. Id. § 27.1 cmts. a-b, at 136-37 (“Subsection (b) switches perpetuity law from the traditional lives-in-being-plus-21-years perpetuity period to a generations-based period.”). Of course, the USRAP had already effectively abandoned the twenty-one-years formulation in favor of a ninety-year wait-and-see rule. See supra note 26 and accompanying text.
48. Tentative Draft, supra note 19, at 137.
49. Id. (“[T]his Restatement measures the perpetuity period by generations, without regard to whether each or any member of the measuring generation was ‘in being’ when the interest was created.”).
50. Id. § 27.1 cmt. f, at 144 (“(1) [A]n individual born not more than 12 ½ years after the date of the birth of the transferor [is] assigned to the transferor’s generation, (2) an individual born more than 12 ½ years but not more than 37 ½ years after the date of the birth of the transferor [is] assigned to the first generation younger than the transferor, and (3) similar rules [apply] for a new generation every 25 years.”).
51. Id.
52. Id. § 27.1 cmt. h, at 144.
death of the individual transferee.\textsuperscript{53} Second, if, when the perpetuities period expires, a transferee who was to take a distribution from a trust is younger than the age at which that beneficiary was to receive the distribution, the distribution will be delayed until that beneficiary either reaches the specified age or turns thirty, whichever is earlier.\textsuperscript{54}

Once all of these relevant grantees have died, the perpetuities period has run. If the conditions of the grant have not naturally resolved, or the trust terminated, by this time, then the grant or trust is subject to judicial modification.\textsuperscript{55} The ALI instructs judges to modify “in a manner that most closely approximates the transferor’s manifested plan of distribution,” while conforming to the Rule’s dictate that the conditions of the gift be terminated and the res distributed.\textsuperscript{56}

The ALI had a relatively easy case to make in advocating its Third Restatement Rule over its Second Restatement version, because the earlier Restatement proposal, unlike the USRAP, still relied exclusively on the traditional RAP mechanism for setting the perpetuity period.\textsuperscript{57} As noted above, the ALI recognized that the traditional Rule wrapped generations of students and practitioners in a fog of confusion and frustration.\textsuperscript{58} It further asserted that the common law version of the traditional Rule (that is, before the wait-and-see revolution) performed poorly the task of limiting dead-hand control because of its overinclusiveness.\textsuperscript{59} Because of fictions such as the “fertile octogenarian”\textsuperscript{60} and the “unborn widow,”\textsuperscript{61} which presume that

\begin{itemize}
\item \textsuperscript{53} Id. (“Requiring the beneficiary to be a named individual is intended to assure that the beneficiary is in being when the trust or other property arrangement is established. . . . If, during the beneficiary's life, the beneficiary ceases being the sole current beneficiary, the beneficiary can no longer be a measuring life and, unless there are subsection (b)(1) measuring lives who are still living, the perpetuity period then expires.”).
\item \textsuperscript{54} Id. § 27.1 cmt. a, at 136-37.
\item \textsuperscript{55} Id. § 27.1 cmt. a, at 135.
\item \textsuperscript{56} Id. § 27.2, at 153.
\item \textsuperscript{57} See supra notes 25-26 and accompanying text (comparing the details of the Second Restatement rule and the USRAP).
\item \textsuperscript{58} See supra note 20 and accompanying text (discussing complexities of traditional RAP); see also Tentative Draft, supra note 19, at 115.
\item \textsuperscript{59} See Tentative Draft, supra note 19, at 116 (“[T]he common-law Rule serves the limited-dead-hand-control policy poorly, because it defeats dispositions that do not violate that policy.”).
\item \textsuperscript{60} See id. at 115. The authors presume “that every individual, man or woman, is irrebuttably presumed to be physically capable of having a child until death,” even women who have passed through menopause. Id. Curiously, with the advent of regularized adoption procedures and modern, technology-assisted reproductive procedures, such a presumption is nothing like as far-fetched as it used to be, whatever the (dubious) underlying merits of the “must-vest” nature of the common law rule.
\item \textsuperscript{61} See id. at 116 (presuming that a living grantee, regardless of age, could marry a widow not yet born at the time of the grant).
\end{itemize}
technically conceivable but highly implausible events might transpire, and because the common law Rule was a vesting rule, it often struck down conditional gifts that stood no real, plausible chance of allowing for dead-hand control beyond the perpetuities period.\footnote{62}

The ALI also specifically promoted the Third Restatement Rule over the wait-and-see Rule of the Second Restatement.\footnote{63} It suggested that the two-generations Rule proves superior to the previous Rule, based in the original perpetuity calculation, because the new formulation is “more consistent with the know-and-see theory,”\footnote{64} the theory that “donors should be allowed to exert control through the youngest generation of descendants they knew and saw, or at least one or more but not necessarily all of whom they knew and saw.”\footnote{65} Similarly, “[r]equiring the lives to be in being at the creation of the interest prevents the perpetuity period from adjusting to [individualized] trust and family circumstances, because that requirement often divides members of the same generation into measuring and non-measuring lives.”\footnote{66}

The ALI also asserted that its two-generations Rule proves superior to the traditional Rule because the traditional focus on contingencies and vesting, while having “some merit,” was “not well aligned” with what the authors asserted (thereby setting themselves in contrast both to previous iterations of the Restatement and to most scholarly considerations of the subject\footnote{67}) to be the sole “purpose of the [RAP], which is to limit dead-hand control.”\footnote{68} This change also permitted the authors to dispense with the distinction between contingent and vested interests, by applying the new Rule to both kinds.\footnote{69} In other words, the new Rule actually expands the reach of perpetuities limitations to a category heretofore untouched by the RAP.\footnote{70}

\footnote{62.}{The common law rule only allowed an interest to stand if it was clear at the time of the grant that it would vest or fail within the perpetuities period.}
\footnote{63.}{See Tentative Draft, supra note 19, at 130-32.}
\footnote{64.}{Id. at 130.}
\footnote{65.}{Id. at 114-15 (quoting Lawrence W. Waggoner, The Uniform Statutory Rule Against Perpetuities, 21 REAL. PROP. PROB. & TR. J. 569, 587 (1987)). For a critique of this assertion, see infra Part VA.3.}
\footnote{66.}{Tentative Draft, supra note 19, at 130.}
\footnote{67.}{See infra Part VA.2 (reviewing the scholarly consensus that limiting dead-hand control was merely one of the purposes of the RAP).}
\footnote{68.}{Tentative Draft, supra note 19, at 131.}
\footnote{69.}{See id. at 131-32; see also Waggoner, supra note 44, at 4-5.}
\footnote{70.}{See Tentative Draft, supra note 19, § 27.1 cmt. a, at 136 (“The Rule is no longer a rule against remoteness of vesting that only applies to a contingent future interest: The distinction between a contingent and a vested future interest is irrelevant.”).}
The authors further asserted that the Rule had not been designed either to lengthen or shrink the mean duration of the perpetuities period and concluded that “[a]lthough the length of the two periods will be different in individual cases, the average length will probably work out to be . . . the same.”

The ALI did not directly compare its new Rule to the USRAP’s ninety-year wait-and-see formulation, despite recognizing that it, and not the Second Restatement’s Rule, is the one currently followed by those states that have not moved toward RAP repeal. Because the USRAP effectively abandons the twenty-one-years formulation, arguments based in the two-generations Rule’s superiority over the traditional formulation have little purchase against the USRAP. Perhaps the authors might have adopted Professors Dukeminier and Krier’s argument against the ninety-year limit: because it removed the direct connection between the principles animating the Rule and the length of the perpetuities period, the ninety-year wait-and-see Rule led inexorably (and, to the authors’ mind, perniciously73) to the current widespread abolition of the RAP.74 Surely, the Third Restatement authors would assert that the ninety-years Rule resembles the traditional formulation in being less supple than the two-generations Rule in its responsiveness to the actual contours of families to whom the Rule will be applied—at least with regard to intrafamily continuing conditional gifts.

B. The ALI’s Justifications for Reviving the RAP at All

Of course, the ALI does not have the luxury of a world in which all (or even most) states have adopted and retained its Second Restatement Rule—or even the USRAP—and now must merely be convinced to transfer to its Third Restatement Rule. Rather, the majority of states have by now effectively or completely abolished

71. Id. at 130. Supporting arguments and explanations appear on pages 130-31 of the Tentative Draft. For a critique of this claim, see infra Part V.B.2.
72. Tentative Draft, supra note 19, at 118 n.19 (listing fifteen states that still follow the USRAP to some degree).
73. See id. at 119-29; infra Part III.B (reviewing ALI’s objections to RAP repeal); infra Part IV (critiquing these objections).
74. See Dukeminier & Krier, supra note 4, at 1309-11. The ALI authors very likely would not adopt this argument if given the opportunity, at least not explicitly, as the ALI’s Reporter for the Third Restatement of Property is Professor Waggoner, a chief author and defender of the USRAP and of the ninety-year period. See, e.g., Waggoner, supra note 26; Lawrence W. Waggoner, Perpetuities: A Progress Report on the Draft Uniform Statutory Rule Against Perpetuities, in THE TWENTIETH ANNUAL PHILIP E. HECKERLING INSTITUTE ON ESTATE PLANNING 700 (John T. Gaubatz ed., 1986).
their RAPs. To effect adoption of their new Rule, then, the ALI must convince states not only to swap RAPs, but to reintroduce a RAP after they have effectively or actually repealed theirs.

The authors made the point, recounted above, that the creation of the GST tax (along with its exemptions) in 1986 provided the impetus for the broad movement toward abolition of the RAP and asserted that, as a result, “[t]he policy issues associated with” removing the RAP’s curb on “dead-hand” control and “allowing perpetual or multiple-centuries trusts have not been seriously discussed in the legislatures.” Their own consideration of such policy issues led them to conclude that the consequences of the move were dire.

The move toward RAP abolition struck the authors as a betrayal by the states of their obligation to undergird what the authors asserted to be immutable federal tax policy. They worried that trust management carefully geared to avoid the GST tax by taking advantage of the federally created exemptions “[p]otentially . . . could, over time, lead to large concentrations of wealth within a relatively small number of family dynasties and financial institutions.” They deemed such developments “contrary to longstanding federal tax policy,” even though they recognized that “[d]espite the growing state-level movement to permit GST-exempt perpetual or multiple-centuries trusts, Congress has not acted to curb the duration of GST-exempt trusts,” an act wholly within its power, and that in fact Congress “has increased the amount that can initially be exempted”

75. See supra notes 29-36 and accompanying text (noting a state tide toward repealing RAP).
76. See supra Part I.  
77. Tentative Draft, supra note 19, at 123 (“The GST tax sparked a movement for states to abolish the Rule Against Perpetuities in order to allow transferors to create perpetual . . . trusts that persist through more than one generation.”). 
78. Id. at 126; see also Waggoner, supra note 43, at 1-2. In fact, the legislatures were spurred to action by at least one more consideration: “[l]awyer self-interest.” Stewart E. Sterk, Jurisdictional Competition To Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P., 24 CARDOZO L. REV. 2097, 2101 (2003). Professor Sterk explained that “[a]s state after state abolished or liberalized” the rules limiting who could sue attorneys for failures properly to apply the Rule, “the Rule’s complexity—and the potential for error—loomed as a potential source of lawyer liability.” Id.
79. For a critique of these arguments, see infra Part VA.1.
80. Tentative Draft, supra note 19, at 124; see also Ray D. Madoff, Op-Ed., America Builds an Aristocracy, N.Y. TIMES, July 12, 2010, at A19. This is in part because “[u]nder current tax law, once a trust qualifies for the GST[tax] exemption, the exemption continues as long as the property remains in the trust.” Tentative Draft, supra note 19, at 124.
from the GST tax in the manner detailed above. Nevertheless, they asserted that states’ willingness to alter their law to take advantage of this federal disposition regretfully and inappropriately “exhibited greater interest in generating trust business for in-state institutional trustees” and, presumably, creating tax savings for trust settlors “than in protecting the federal fisc.”

The authors also argued that abolition of the RAP would vitiate still-vital restrictions on dead-hand control of property in what the authors considered deeply deleterious ways. They suggested that abolition would, for instance, allow trusts to arise that would require payment to massively unwieldy numbers of beneficiaries, permit trustees to establish trusts on behalf of descendants only infinitesimally related to the transferor, and allow transferors to make dispositions that must grow irreparably incoherent in the fullness of time.

To support these claims, the authors first asserted that the only purpose of the RAP that needed to be considered was that of limiting dead-hand control of wealth, in the narrow sense of restricting conditions placed on how otherwise freely alienable and transmutable property could be spent by transferees. They waved aside the long-standing consensus that one of the original justifications for the RAP was that it provided a means of promoting free alienability of land and asserted that because free alienability can be achieved today even for conditional gifts of perpetual duration, the fact that free alienability might long have provided a central rationale for the RAP is irrelevant.

Next, the authors followed Professors Hobhouse and Leach in concluding that the “‘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’” is achieved by embracing the see-and-know standard, allowing donors “‘to exert

82. Id.; see supra notes 29-30 and accompanying text (describing increases in GST tax exemption through 2010).
83. Tentative Draft, supra note 19, at 124.
84. See id. at 113-14.
85. See infra Part V.A.2 (detailing long-standing consensus).
86. Tentative Draft, supra note 19, at 113-29 (“If the Rule had any effect in promoting the alienability of land, that effect has receded in importance with the rise of the management trust in which the trustee normally has the power to buy and sell trust assets.”); see id. (failing to recognize that the ability to achieve free-alienability without a perpetuities limitation undermines the modern rationale for a RAP). For a critique of this position, see infra Part V.A.2.
control through the youngest generation of descendants they knew and saw, or at least one or more but not necessarily all of whom they knew and saw.”  

A key premise of the know-and-see standard, they claimed, is that “it was the function of the courts to favour prudent and sensible dispositions, and, as a corollary, invalidate foolish ones.”

The authors then noted that perpetual trusts, if designed to support all of a transferor’s lineal descendants, would rapidly grow to unmanageable size. “On average, a transferor will have about 450 descendants (who are beneficiaries of the trust) 150 years after the trust is created, over 7,000 beneficiaries 250 years after the trust is created, and about 114,500 beneficiaries 350 years after the trust is created.” Such figures “put the perpetual or multiple-centuries trust on a collision course with core principles of trust administration.”

Meanwhile, the authors also noted that the genetic overlap between transferors and transferees in this variety of perpetual trust would rapidly decrease: “[T]he transferor’s great-great-great-grandchildren . . . are six generations removed from the transferor . . . and [will] have a genetic overlap with the transferor of a mere 1.5625 percent.”

These administrative problems, the authors feared, would exacerbate the problem that repealing the RAP would subject wealth to conditions over intervals for which “[n]o transferor has enough wisdom to make sound dispositions.” They note that many devises created hundreds of years ago “became archaic long ago” and deduced that “there is reason to suspect that that which is considered sophisticated today will be considered primitive 360 or more years from now.” Reviving the RAP becomes vital, they thus argued, because “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

88. Id. at 114-15 (quoting Waggoner, supra note 26, at 587) (citing SIR ARTHUR HOBHOUSE, THE DEAD HAND 188 (1880); Leach & Tudor, supra note 17, § 24.16, at 51).
89. Id. at 115 (quoting SIMPSON, LEADING CASES, supra note 3, at 78).
90. Id. at 120 (footnotes omitted). “A 1000-year trust created in 2010 could terminate in the year 3010 and have millions of beneficiaries.” Id. at 126.
91. Id. For a critique of this argument, see infra notes 216-221 and accompanying text.
92. Tentative Draft, supra note 19, at 119.
93. Id. at 126.
94. Id. at 126-27.
provisions.” 95 “[E]scape clause[s]” such as “nongeneral power[s] granted to each descendant-beneficiary to appoint trust principal outright to his or her descendants” 96 are insufficient substitutes for “returning full ownership to the control of the living, because outdated family definitions in the donor’s document [could] continue to limit the permissible appointees of each donee’s . . . exercise of the nongeneral power of appointment.” 97 Only a revival of the RAP would suffice.

IV. ADDITIONAL RESPONSES TO THE MOVEMENT TOWARD A BOLISHING THE RAP

The ALI authors asserted that “[t]he policy issues associated with allowing perpetual or multiple-centuries trusts [were not] seriously discussed in the legislatures” prior to movement by states to abrogate their RAPs. 98 After the movement gained definition, however, a few scholars did consider the policy considerations underlying these moves, and proposed their own responses. 99

Professors Dukeminier and Krier argued that modern dead-hand control problems, which they recognized to be the problems of changed circumstances, unsatisfactory trustees, and the multiplication of beneficiaries, 100 could be solved by greatly expanding beneficiaries’ powers to replace trustees or to reform or dissolve and distribute the trust upon unanimous agreement. 101 Professor Gallanis suggested, amidst a package of other reforms designed to modernize the law of

95. Id. at 127 (footnote omitted) (citing Ruth L. Deech, Lives in Being Revived, 97 L.Q.R. 593, 594 (1981)).
96. Id. at 126 n.50.
97. Id. at 127 n.56 (citation omitted).
98. Id. at 126.
100. See Dukeminier & Krier, supra note 4, at 1327-39. Professors Dukeminier and Krier also note that many have considered the issue of “first-generation monopoly” problematic, but show sympathy to Professor Gallanis’s argument that such fears are overblown, and to Professors Hirsch and Wang’s argument that first-generation monopoly concerns are misplaced in the modern context. See id. at 1322-25 (citing T.P. Gallanis, The Rule Against Perpetuities and the Law Commission’s Flawed Philosophy, 59 CAMBRIDGE L.J. 284, 287-90 (2000); Adam J. Hirsch & William K.S. Wang, A Qualitative Theory of the Dead Hand, 68 IND. L.J. 1, 17-18 (1992)). Dukeminier and Krier further suggest that the real concern that underlies first-generation worries is that of “the creation of family dynasties,” but they note that the RAP “has not prevented the creation of family dynasties,” and cannot. Id. at 1326-28.
101. See id. at 1327-42; see also Tate, supra note 24, at 597 (characterizing Dukeminier’s and Krier’s proposals as “enabling . . . trusts to be easily undone after the beneficiaries known to the settlor have died”).
future interests, placing a “direct limit on the duration of future interests,” with his proposed period being ninety years from the date the interests are established.\(^{102}\)

Similarly, though writing a few years before the RAP-abolition wave began to gather force, Professors Hirsch and Wang recognized that “[f]or all [of] its technical complexity, the [RAP] is curiously simple minded when it comes to” dealing with the qualitative content of dead-hand control.\(^{103}\) Rather than urging an elimination of the RAP entirely, however, Hirsch and Wang supported abolition only in the case of wholly discretionary trusts established in favor of spouses and descendants—the components of the nuclear family.\(^{104}\) For trusts that favored different beneficiaries or established less flexible or more “intrusive” conditions, Hirsch and Wang proposed increasingly strict perpetuities rules.\(^{105}\)

Though deeply interesting, each proposal is flawed. Dukeminier and Krier’s proposal would render any trust condition effectively meaningless upon the deaths of all beneficiaries alive at the time the conditional transfer was made, thus defeating donative freedom and intent at least as effectively as a robust RAP and allowing a specific generation of beneficiaries to deny late-coming, would-be beneficiaries the benefits that the transferor had intended for them without necessarily even objectively bettering their own positions.\(^{106}\) Gallanis’s proposal, though surely simpler than the RAP, similarly works with the same indiscriminately blunt force as the traditional or Third Restatement RAPs. Hirsch and Wang’s proposal, while more refined, unnecessarily limits the types of trusts to be excluded from the Rule and retains and in fact complicates the RAP instead of employing what this Article suggests to be simpler and more effective responses.

This Article seeks to build on the insights generated by all of these proposals and to present a RAP alternative that avoids their design flaws.

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103. Hirsch & Wang, supra note 100, at 54.

104. Id. at 51-52. “So long as the scope of discretion is broadly defined, as when the testator imposes a trust without further managerial trammels or a special power of appointment that comprehends an entire family, the estate plan lacks arbitrariness and could even provide some benefits” and so should be excluded from the RAP. Id.

105. Id. at 52-53.

V. WHY THE RAP SHOULD GO AND WHAT SHOULD REPLACE IT

If we are to have a RAP, the one proposed by the ALI is certainly much simplified from the now largely discarded traditional Rule (though it is not, withal, simpler than the once widely adopted USRAP ninety-year, wait-and-see version). Nevertheless, replacing the effective or outright revocation of the RAP that has been the trend of the last quarter century with the ALI’s Third Restatement RAP would still involve the reintroduction of a complication that these states have eliminated. There are thus two general sources of objection to the ALI’s proposed RAP: (1) objections to the reintroduction of any RAP given the contours of modern society and property law and (2) objections or likely obstacles to introducing even the ALI’s relatively simplified and modernized RAP in states that have—for whatever reasons—eliminated their Rules. Of course, the distinction between these two categories is not absolute, and there is room to quibble with the way the various arguments have been divided. Those quibbles to one side, the first category of critique appears in Subpart A below, the second in Subpart B.107

A. No RAP Can Efficiently or Wisely Address Problems Relevant to Modern Property Law and Practice

The various arguments posited by the ALI authors in favor of reviving the RAP have been summarized in detail in Part II.B above. These arguments are founded on the assertion that the RAP just is not relevantly about alienability of assets, an assertion that allows the authors to conclude that it simply does not matter that modern property holdings can be made freely alienable even if they form the res of a potentially perpetual conditional gift. The ALI authors express concerns that RAP abolition involves a betrayal of state obligations to

107. The authors note that the enactment of the GST tax (and exemptions to it) in 1986 provoked the stampede toward abolishing the RAP and that “it appears that transferors had little desire to take advantage of the absence of a Rule in those states in order to establish perpetual trusts for their descendants from time to time living forever.” Tentative Draft, supra note 19, at 119 (citing Max M. Schanzenbach & Robert H. Sitkoff, Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust, 27 CARDOZO L. REV. 2465 (2006)). This appears to be true. See Schanzenbach & Sitkoff, supra. It also appears to be true, however, that in the wake of the movement to abolish the RAP, transferor interest in perpetual trusts—for reasons other than simply achieving happy tax consequences—has awakened. See Tate, supra note 24, at 611-20. Meanwhile, neither the genesis of the evolution away from the RAP nor the behavior of transferors before that evolution provides any reason not to seize the opportunity of so many states having abolished or quasi-abolished the RAP to consider whether the RAP represents a just, wise, and efficient means of achieving appropriate public policy goals in the modern world. Accord Dukeminier & Krier, supra note 4, at 1314-15, 1317.
the federal treasury and to supposedly inviolate and unchanging federal tax policy; that truly perpetual, true dynasty trusts would become unwieldy; that genuine blood connection between transferors and transferees will grow extremely dilute over time; that plans made by long-dead ancestors would eventually grow incoherent or unfulfillable; and that, at all events, long-term dead-hand control becomes, eventually, inherently illegitimate. Each of these arguments is addressed below, as are a variety of additional objections to resurrection of the RAP.

1. Congress, the States, and Federal Tax Policy

The ALI authors urge the states to revive the RAP as part of an obligation to facilitate long-fixed and unchanging federal tax policy. They assert that it has been “longstanding federal tax policy” to employ federal estate and gift taxes to avoid and break up “large concentrations of wealth within a relatively small number of family dynasties and financial institutions.” They further assert that the states labor under an obligation to support this unchanging tax policy and that the states abjured that obligation by changing their perpetuities rules to allow their citizens to take advantage of the opportunities offered by the GST tax exemption. Finally, they urge states to return to their duty to support this supposedly immutable federal tax policy by reviving their perpetuities rules, and specifically by adopting the Third Restatement RAP.

This argument suffers from significant flaws. First, as the ALI authors themselves demonstrate, there can hardly be said to be a single, unchanging federal tax policy—even with regard to the estate tax itself. As they note, language in the 1981 Economic Recovery Act suggested that the estate tax had historically served the function of “break[ing] up large concentrations of wealth,” but it made that observation in the context of radically increasing the exemption to the estate and gift taxes in order to protect “estates of a relatively small size, including those containing family farms or locally held businesses” that had been brought within the ambit of the estate tax by inflation and the inaction of previous Congresses. Moreover, as part of the 1981 Economic Recovery Act, these changes to estate and gift

108. See supra Part III.B.
110. See id.
taxes constituted a segment of a sweeping package of tax reforms, one that both radically altered tax rates and relied on significantly different theories of taxation, economics, and government than previous tax packages.\textsuperscript{112} Federal tax policy was subsequently changed in 1982, 1983, 1986 (a significant set of reforms that introduced the GST tax and its exemption, which in turn set off the movement to abolish the RAP), 1994, 1997, 2001, 2002, 2003, and 2010.\textsuperscript{113} It will continue to change in future years.\textsuperscript{114}

There is, then, no consistent federal tax policy, nor anything like it. Neither is there a consistent policy with regard to the estate tax. As noted, the 1981 Economic Recovery Act significantly changed the size of estates to which estate and gift taxes applied. Similar changes have continued since, culminating in the full elimination of estate and gift taxes in 2010. That elimination, included in the 2003 tax reform bill, was designed to sunset in 2011—for reasons related to internal Senate rules governing the filibuster and the reconciliation process\textsuperscript{115}—which would have revived a fifty-five percent estate and gift tax for estates worth more than approximately $1 million.\textsuperscript{116} Attempts were made in 2010 to reinstate retroactively the GST tax for 2010, but they were unsuccessful.\textsuperscript{117} In the closing days of 2010 a new estate tax emerged at a rate of thirty-five percent to be levied on estates worth more than $5 million.\textsuperscript{118} This new rate lasts for only two years, though, and the debate will begin anew in 2012.\textsuperscript{119} All of these changes have been accompanied by a spirited national debate about the purpose, meaning, and propriety of the estate (or as its opponents call it, the “death”)

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{112} See generally Harry L. Gutman, Reforming Federal Wealth Transfer Taxes After ERTA, 69 VA. L. REV. 1183, 1185 (1983).
\item \textsuperscript{114} See Jon M. Bakija & William G. Gale, Effects of Estate Tax Reform on Charitable Giving, URB. INST. ISSUES & OPTIONS, July 2003, at 1.
\item \textsuperscript{116} See Richard Schmalbeck & Jay A. Soled, Many Unhappy Returns: Estate Tax Returns of Married Decedents, 21 VA. TAX REV. 361, 368 (2002).
\item \textsuperscript{117} See Responsible Estate Tax Act, S. 3533, 111th Cong. § 2 (2010).
\item \textsuperscript{118} See Saunders, supra note 113.
\item \textsuperscript{119} Id.
\end{enumerate}
\end{footnotesize}
There is no more a fixed, immutable federal estate-tax policy than there is a fixed federal tax policy generally.

Even if there were a fixed and unchanging federal tax policy, however, the federal government would not need to rely on the states to enact it. As the authors themselves recognized, Congress established the GST tax and its exemptions, can change them when it wishes, and need not in any way rely on state perpetuities rules in crafting federal policy or the size of tax exemptions under the GST tax or otherwise.121 In fact, the Obama Administration’s 2012 budget expressly proposed limiting the GST tax-exemption period to ninety years without any reference to state perpetuities rules (though the provision has little chance of becoming law in 2012).122

Similarly, the states face no moral or legal obligation to assist the federal government in enacting its tax policy.123 The authors accuse the states of “exhibit[ing] greater interest in generating trust business for in-state institutional trustees than in protecting the federal fisc.”124 No doubt the states were also interested in securing for their citizens (or citizens doing business in their territory) opportunities that the federal government had permitted and that citizens considered to be valuable benefits.125 Whatever their individual motivations, however, the states do not exist as subsidiaries of the federal government, but as separate sovereigns, free to develop policy to aid themselves and their polities.126

The practical structure of American government supports this theoretical division: state lawmakers owe their maintenance in office to their voters, not to members of Congress or IRS regulation writers. Meanwhile, because of the constantly changing nature of federal tax

123. Cf. Dukeminier & Krier, supra note 4, at 1343 (“The short of it is that Congress has come to be in charge of trust duration. The future of perpetual trusts is in its hands, to be dealt with through the tax system. The role of the states is to develop affordable means for modifying and terminating trusts when that is in the best interests of the beneficiaries.

124. Tentative Draft, supra note 19, at 124.
125. See, e.g., Tate, supra note 24, at 611-20.
126. See, e.g., U.S. CONST. amend. X; Parker v. Brown, 317 U.S. 341, 359 (1943) (“The governments of the states are sovereign within their territory . . . .”).
law and policy, the states could not have crafted their perpetuities rules coherently to reflect federal tax policy even if they had tried. Rather, unless the states committed themselves to making regular changes to their law, they could at best only have frozen in amber some specific iteration of changing federal policy.

In fact, the entire episode of the GST tax exemption and the states’ response to it demonstrates that the RAP specifically, and state property law generally, makes an extraordinarily poor backstop to, or subordinate vehicle of, federal tax policy. A change in federal tax policy that allows states to create benefits for their citizens and those doing business in their states by changing state law is, predictably, quite likely to generate the relevant change. If Congress makes another such state-law-dependent change, states are likely to act exactly as they have behaved in abolishing the RAP: they will take advantage of the opportunity. Unless there exists some vital need to tie together state property law and federal tax law, they should be kept separate.

Federal tax policy changes, and it can achieve its changing purposes without relying on state perpetuities rules. If it becomes national policy, expressed in federal tax law, to avoid concentrations of wealth by taxing away significant portions of large estates, federal tax law can achieve that policy unaided. If a state were to decide to thwart the descent of its own citizens’ large estates, it could do so with state tax policy. State property law, and particularly state perpetuities rules, neither need nor should be crafted in anticipation of federal tax law generally, nor with the specific purpose of assisting the federal government to tax away large estates. The RAP must stand or fall on the basis of considerations other than those of projected future federal tax policy or the desire to tax away wealth accumulations at death.

2. Limits on Inalienability: A Central Historical Justification of the RAP, Now Eliminated

Despite the ALI’s claims to the contrary, the fact that well-crafted trusts can condition distribution of trust property without limiting alienability of that property significantly undermines the case for retaining or reviving the RAP.

127. The relative merits or demerits of taxing wealth transfers have been well rehearsed elsewhere. See, e.g., Schanzenbach & Sitkoff, supra note 107, at 2496 n.107 (collecting scholarship).
The ALI authors make the novel claim that the sole relevant purpose of the RAP initially was and now remains that of limiting dead-hand control. The novelty of this claim arises first from the fact that it contradicts the ALI’s own previous positions. In the First and Second Restatements, the ALI recognized that a fundamental purpose of the RAP was to “‘forward[] the circulation of property’ . . . by prohibiting those categories of future interests which would make either impossible or improbable sales of land for long periods of time.” These Restatements identified limitation of dead-hand control as a second purpose and identified a third purpose that might best be described either as a special case or modernized corollary of dead-hand limitation. The novelty of the ALI’s new position is compounded by the fact that leading scholars in the field have long similarly accepted the standard purposes of the RAP, including the purpose of limiting periods of inalienability of property.

In support of their effort to read away inalienability as a central historical purpose of the RAP, the authors relied primarily on A.W.B. Simpson. They claimed that he, in his legal-historical studies, has “concluded . . . that promoting free inalienability of land was not the original purpose of the Rule.” In fact, Simpson appears to have made no such claim. Rather, he expressly acknowledged that there always existed for the RAP a “connection with the value of freedom of

128. Tentative Draft, supra note 19, at 113-14.
130. RESTATEMENT (SECOND) PROP.: DONATIVE TRANSFERS ch. 1, at 8, intro. note (“[T]he rule against perpetuities provides an adjustment or balance between the desire of the current owner of property to prolong indefinitely into the future his control over the devolution and use thereof and the desire of the person who will in the future become the owner of the affected land or other thing to be free from the dead hand.”).
131. Id. (“I[t] is well established law that the rule against perpetuities applies not only to limitations made concerning intangibles, such as bonds and shares, but also to limitations of the beneficial interests under a trust where the trustee has unqualified power to change the trust res. Both of these situations have one common factor, namely, that a given quantum of wealth is sought to be committed to the satisfaction of specific and stated ends. Such a commitment, for its duration, lessens the availability of these assets for the meeting of current newly arising exigencies.”). The RAP’s “function has broadened to include the prevention of limitations which ‘freeze’ or ‘tie up’ property for too long a time, even though no specific thing has been made inalienable, even for a moment.” Id.
132. See, e.g., Dukeminier & Krier, supra note 4, at 1319-39 (dividing the purposes of the RAP as dealing with the problem of alienability, the problem of first-generation monopoly, and the problem of duration); Gallanis, supra note 102, at 559 (“[T]he main purposes of the rule against perpetuities [are] ‘to make property more fluid, to free capital from testamentary restrictions, and to stay the influence of the dead hand.’” (quoting Schuyler, supra note 102, at 922)).
133. Tentative Draft, supra note 19, at 113-14.
What he did conclude was that the original rationale for the desire to limit inalienability did not derive from “economic theor[ies] about the merits of a free market in land,” in that “seventeenth-century lawyers had not read Adam Smith”—an unsurprising development given that Smith had not yet been born.135 Instead, the original rationale for limiting inalienability arose from the market and social conditions that actually existed in the seventeenth century: “In aristocratic circles freedom of land disposition was valued because it enabled the current head of a family to make appropriate dispositions to perpetuate and aggrandize his family and its power, as by making alliances by marriage. If his hands were tied, he could not do this.”136

In other words, Simpson agreed that the desire to limit the inalienability of property, particularly land, was a central concern of the RAP, and a reason for its existence, from the first. It does not—or should not—come as any surprise that the reasons why society cared about limits on alienability might have shifted and grown as the economic foundations and social structure of the society shifted away from agrarianism and aristocracy and toward commerce, industry, and equality of station, and as thinkers like Smith penned new theories and generated new insights about the novel characteristics of this new society.137

134. SIMPSON, LEADING CASES, supra note 3, at 79; SIMPSON, LEGAL THEORY, supra note 3, at 159 (noting that originally in the seventeenth and eighteenth centuries the rule was “concerned . . . with the fettering of the power of alienation”).

135. Adam Smith was born on June 16, 1723 in Kirkcaldy, Fife, Scotland. See JOHN RAE, LIFE OF ADAM SMITH 1 (1895).

136. SIMPSON, LEADING CASES, supra note 3, at 76, 79 (“Indeed the principal reason a patriarch might wish to tie up the family lands in perpetuity was fear of folly of his descendants, who might, if given the power, fritter away the family patrimony in drink or dissipation, and bring his house to poverty, and his name to dishonour and oblivion.”). As Simpson recognized elsewhere, once the commercial and industrial theories of Smith and others became current, they were employed as justifications for favoring alienability of land. See, for example, SIMPSON, LEGAL THEORY, supra note 3, at 143 (quoting JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON (B. Birbeck Hill ed., 1887)), in which Boswell reports Dr. Johnson as having averred:

Entails . . . are good, because it is good to preserve in a country, series of men, whom the people are accustomed to look up to as their leaders. But I am for leaving a quantity of land in commerce, to excite industry, and [to] keep money in the country; for, if no land were to be bought in the country, there would be no encouragement to acquire wealth, because a family could not be founded there.

Id.

137. Review of another source relied on by the ALI authors, Haskins, supra note 3, noted in Tentative Draft, supra note 19, at 113-14 nn.1, 4, makes this point in a slightly different way. Haskins argues that contrary to previously accepted historical accounts, the
The very structure of the traditional RAP similarly undermines the authors’ claims that inalienability limitation did not serve as a central and abiding rationale for the Rule. They claim that the traditional Rule’s focus on the time at which future interests might vest “has some merit but is not well aligned with the purpose of the Rule, which is to limit dead-hand control.” Their proposed Rule, they explain, focuses on the time of termination of the trust rather than the time of vesting of contingent interests, “because the time of termination is when the property comes under the control of the ultimate beneficiaries.” The authors fail to consider that a vesting rule makes much more sense if one of the traditional purposes of the RAP was in fact limiting periods of inalienability. Once all legal future interest holders were identified, they could alienate property by common agreement. As long as contingent future interests lie unvested, though, such common agreement was impossible.

Of course, this inalienability-limiting rationale for the RAP has essentially grown moot. Trustees generally have the power to sell any given item of property included in a trust (and most states that permit

seventeenth-century England in and for which the Duke of Norfolk’s Case was penned was not yet a realm “of capitalist triumph.” Id. at 23. Rather, the case represented “the climax of a long struggle between the conveyancers who wanted more freedom for the landed classes to control their estates and the royal judges who stood firm against these efforts for centuries,” in which “[t]he conveyancers and their clients, not the judges, were the ultimate victors.” Id. at 21. As such, he suggests, the rule handed down in Norfolk’s Case would better be characterized as “a rule of perpetuities, not a rule against perpetuities.” Id. (emphasis added).

To the extent all of this is true, it reveals not that limitations on alienability were not a central and vital justification of the rule against perpetuities as it developed, but that the specific details of Norfolk’s Case are irrelevant to modern conditions and any consideration of the Rule Against Perpetuities in the United States. For surely, in both Britain and the United States, the eighteenth century would see capitalism blossom even if the seventeenth century did not, and certainly the United States never had any sort of landed nobility obliged to consider—or be driven by—the considerations Haskins claims were at the heart of Norfolk’s Case. And it is not the nebulous rule of Norfolk’s Case that informs current debate, but the strict, detailed, ponderous forms of Gray’s life-in-being-plus-twenty-one-years-rule, which was articulated at the end of the nineteenth century, far into the merchant’s and the industrialist’s ascendancy. And that rule, it is universally acknowledged, has always survived—or fallen—with limitations on inalienability as a central (and arguably necessary) pillar.

139. Id.
perpetual trusts require that the trustee enjoy such authority).\textsuperscript{141} Minor adjustments to laws governing trusts and to default rules for reading conditional grants outside of trusts could make this alienability power virtually universal.\textsuperscript{142} It does not follow from this fact that the importance of inalienability limitation as an original and sustaining justification for the RAP merely falls away, however. Rather, to the extent that the RAP existed as a bar against the problem of perpetual (or even long-term) inalienability, its services are no longer required.

3. The Dead Hand: A Critically Diminished Concern That a RAP Can No Longer Coherently Address

With the inalienability-limitation justification for the Rule no longer operative, the RAP’s revival must be justified either on the grounds that it is the best (or only) way to limit pernicious dead-hand control, or because estate and gift administration will spiral hopelessly out of control without RAP restrictions. The administrative issue is considered below.\textsuperscript{143} The dead-hand control issue must be divided into two parts. Before determining whether the RAP serves a useful role in limiting dead-hand control, it must be determined whether what is generally called dead-hand control is genuinely problematic—or is even, in any real sense, dead-hand control.

As Professor Simpson has noted, “The world in which the rule evolved was that of the landed aristocracy and gentry” governed by “the conventions of upper-class land owning society.”\textsuperscript{144} It existed to place limits on the length of time that “the patriarch . . . could make binding dispositions of the family estates.”\textsuperscript{145} Dead-hand control presents a very real problem in a land-based economy, especially the land-based economy of a small, island nation where land is not only quite scarce, but also provides a significant basis for political and social power.\textsuperscript{146} Precious little more of it can be manufactured.\textsuperscript{147} If previous generations have entailed or otherwise devised the whole stock of land into dim perpetuity, it is fair to suggest that they have “tie[d] up all existing capital for an indefinitely long period of time,”

\begin{flushleft}
\textsuperscript{141} See Dukeminier & Krier, supra note 4, at 1321.
\textsuperscript{142} See infra Part VI.D.
\textsuperscript{143} See infra notes 216-221 and accompanying text.
\textsuperscript{144} SIMPSON, LEADING CASES, supra note 3, at 76.
\textsuperscript{145} Id.
\textsuperscript{146} See, e.g., Haskins, supra note 3, at 20-21.
\end{flushleft}
so that “future generations will have nothing to dispose of by will except what they have saved from their own income; and the property which each generation enjoys will already have been disposed of by ancestors long dead.”

While this argument makes significant sense in a society in which the primary store of wealth is essentially fixed, it makes far less sense in a society in which wealth is not a fixed stock, but is fluid, so that each generation can produce its own wealth without regard to whether or what sorts of inheritance they receive.

If wealth is a constant, and one generation monopolizes the benefits of bequeathing it, subsequent generations suffer a clear cost in the loss of those same benefits. That cost, borne forever, must outweigh the benefit to the one generation that imposes it. But in modern times, when each generation can produce its own wealth, the loss of opportunity to bequeath prior wealth does not clearly crowd later comers to their overall detriment.

In a very real sense, a grantor’s control of fully alienable wealth in a fluid-wealth society constitutes so different a species of “control” that it requires a designation different than that of “dead-hand control.” This is because classic dead-hand control had two components. First, classic dead-hand control exerted control over the wealth that was subject to the conditions established by the grantor. Thus, for instance, if a grantor left that sturdy old manse, Blackacre, to “my sons who shall conform to the Established Church,” the grantor has exerted control over how the wealth should be distributed or employed. But classic dead-hand control worked to control not only the distribution of the wealth subject to the conditions, but also the lives of the parties subject to the grant. If wealth in a society lay in land, and the land was parcelled out such that there was essentially no more to be had (and, besides, nothing with which to purchase it without any wealth—wealth that was of course denominated in the currency of land), then the conditions set by grantors over access to land effectively became complete controls over the lives of descendants. The descendants either did their ancestors’ bidding or forfeited their access to the means and modes of wealth, social standing, and political power.

Modern “dead-hand control” exhibits only the first of these two types of control. A modern settlor leaves in trust her fortune “to those of my children who graduate from law school.” The settlor has

149. Hirsch & Wang, supra note 100, at 17-18 (footnotes omitted).
certainly established the conditions under which her fortune will be distributed. She has not, though, in any meaningful sense, exerted the second kind of control. By locking up some or all of her fortune, she has not effectively controlled her descendants’ lives, but merely made one of their options relatively more attractive. Her descendants remain free to pay their own way to medical school; to become painters; or to go into business, amass their own fortunes, and then establish trusts that pay out only to descendants who have nothing whatever to do with the law. Some empathy might rise for any irritation felt by any of the settlor’s descendants who preferred some path other than law school. It would be deeply strange, though, to call the conditional opportunity established by the settlor “control” of the descendants’ lives, especially in a society such as that of the United States, wherein descendants have no claim of right to any transmission of wealth from ancestors in the first place.\footnote{ Cf. Hodel v. Irving, 481 U.S. 704, 717-18 (1987). The United States has broad authority to regulate descent and devise, but the Takings Clause is implicated if rights of descent and devise are wholly terminated. \textit{Id.} Notably, a right to \textit{receive} property from ancestors is not suggested or implicated. \textit{Id.}} (The claim of “control” becomes even less tenable if the conditional gift arises in favor of nondescendants. If our settlor were to have left her conditional gift “to the descendants of my friend James,” clearly her beneficence would in no way have controlled James’ descendants lives, but merely have provided them a wonderful additional opportunity.)

Modern conditional gifts differ from classic dead-hand control in another important way. If land is the primary store of wealth, and wealth is essentially a fixed stock, then only the “conqueror” of the land has any moral claim to place any conditions on its transmission. The “creator” of the wealth, or the ancestor who originally brought the land into the family and thus elevated or secured the familial status, could reasonably have set permanent conditions on its passage. For all lineal descendants after that ancestor, though, any attempt to set permanent conditions on the land’s descent would have represented a moral overreach; by what right might a current steward of ancestral lands secured by another set perpetual conditions, and thereby control the futures of later stewards whose claims to the land and its emoluments were neither greater nor smaller than his own? In a world of fixed-stock wealth, such an overreach had, as has been considered, profound implications. As a result, the law rightly bounded such an
interim steward to “making prudent provision for people he knew, and for contingencies he could anticipate as likely to occur.”

Modern conditional gifts, made in a world of a fluid and expandable stock of wealth, place the grantor in a vastly different situation. First, the grantor is much more likely to have been the creator of the wealth being conditionally transmitted. Such wealth creators surely enjoy the moral authority to place conditions by which potential beneficiaries might enjoy the fruits of their wealth creation. With regard to later-generation transmitters of an ancestor’s wealth, two arguments can be made. It might be argued that recipients of wealth generated by others have no right to add conditions to the further transmission of that wealth. This argument would read into unconditional grants of wealth an implied condition that the wealth be transferred (presumably) to the recipients’ descendants without condition. On the other hand, it might also be argued that if the wealth-creating ancestor placed no conditions on the transmission of wealth to descendants, then those descendants are free to do with that wealth what they wish—including themselves transmitting it with conditions. The latter is a cleaner solution, because it does not require reading implied (if negative) conditions into previous grantors’ grants; it recognizes that the original grantor could have included, but did not, an explicit condition that the property be passed along to some certain future takers; it avoids the obligation to guess the original grantor’s intent about whom the implied future takers should be; and it cuts down on litigation. Moreover, it would be odd if a recipient of wealth without conditions could give away that wealth to charity or to a neighbor, or could burn it in a bonfire, or could simply spend it all, but could not make a conditional gift of it to any qualifying future takers of her choice. (Proposed rules responding to both of these interpretations are considered below.) Whichever interpretation is preferred, the placement of conditions on recently generated wealth in a world of fluid wealth creation runs afoul of few of the neutral-stewardship concerns that appended to conditions placed on a family’s sole source of wealth by generations subsequent to the wealth conqueror in a world in which more wealth could not realistically be created.

Modern dead-hand control thus only faintly resembles, and exerts much less actual control than, classic dead-hand control. The amount of control that is exerted, meanwhile, has in a very real sense been

151. SIMPSON, LEADING CASES, supra note 3, at 77.
152. See infra Part VI.D.
earned. Justifying a revival of the RAP on the basis of its value as a
death-hand control limitation, then, requires demonstrating that this
earned, very limited control nevertheless proves so pernicious that it
should be curtailed at the cost of inflicting a RAP (and, specifically,
the Third Restatement’s RAP) on society.

In fact, though, the control exerted by the modern death-hand
proves mostly beneficial, or at least neutral. As this Article
demonstrates directly below, the conditions levied by transferors can
be divided into essentially two types: principal-preserving conditions
and gate-keeping conditions.\textsuperscript{153} Neither type proves anything like
categorically pernicious. In fact, no principled objection can be raised
to principal-preserving conditions as such. And while some public
policy objections might reasonably be raised to a few narrow and
seldom-invoked varieties of gate-keeping conditions, the RAP does not
provide a coherent means of restricting such arguably objectionable
conditions. The right response would be to ban the objectionable
subcategory of conditions \textit{from the beginning}, not to sunset them some
decades or generations in the future. Meanwhile, even if the RAP did
provide a coherent means of restricting inappropriate conditions, it is
incapable of distinguishing good or neutral conditions from bad ones,
and so is a fatally flawed vehicle.

This leaves the RAP revivers a single argument: that conditions
that start out as stable and reasonable will inevitably—or at least with
significant regularity—dissolve into instability and incoherence in the
face of changing social, economic, and other conditions, thus
necessitating (or at least justifying) a revival of the RAP. But this is
wrong. If the res of the transferred interest is freely alienable, then it
cannot be expected with any confidence that principal-preserving
conditions attached to a transfer will become either unstable or out of
touch, or less effectively advance social welfare ends than trust
distribution. Meanwhile gate-keeping conditions—namely, conditions
that texture either the pool of beneficiaries or the conditions under
which a pool of beneficiaries may take—are generally either positive
or benign when they are established. Concerns about conditions
growing out of step with social, technological, or legal realities as time
passes are overblown, but to the extent they are real, they can in vast
part be dealt with by small alterations to the rules employed when
interpreting conditional gift provisions. The few that grow truly

\textsuperscript{153} Of course, if the transferor has placed no conditions on the transfer, then the
transferor has exerted no death-hand control, so neither the issue, nor the specter of the RAP
arises.
noxious over time can be revised on public policy grounds when actual noxiousness arises.

In other words, there is no reason to believe that all or even most conditions will deteriorate over time so that they will no longer faithfully and stably effect the nonoffensive will of the transferor over time, and there is good reason to think that most of them will not. The RAP cannot distinguish between stable and continuingly appropriate conditions, on one hand, and unstable conditions on the other, any more than it can distinguish between good and bad conditions, and there are other, far more nuanced means of dealing with those rare conditions that prove unstable or that grow problematic with time. For these reasons, the revival of the RAP cannot be justified on the grounds of the potential long-term effects of either principal-preserving or gate-keeping conditions, either. All of this is demonstrated in detail in the two Subparts that immediately follow.

a. Principal-Preserving Conditions

The first type of transfer conditions may be referred to as principal-preserving conditions: conditions that require regular distributions of interest or income to a named set of beneficiaries, but that reserve the principal so that it may generate income to be granted to later beneficiaries. It is difficult to formulate coherent objections to this type of condition. As has been noted, no beneficiaries enjoy a legal claim to transfers from others. Thus, the fact that some beneficiaries may be getting a smaller benefit than they would be getting if both interest and principal were distributed to them cannot form a cognizable complaint, as the beneficiaries never had any meaningful claim to anything, much less to more. It has been argued that descendants should, as they do in civil law countries and in Louisiana, have a legal entitlement to some portion of their ancestors’ estates, but this is really an argument for wholly reworking

154. This statement is admittedly somewhat tautological: parties that do enjoy a legal claim to transfers from others are not “beneficiaries”; they are, broadly, creditors. But the point is that grantees of gifts, in whatever form—including those who take from ancestors’ estates—are not creditors; they have no legal claim on their ancestors’ or other grantors’ largesse.


the American law of estate descent, not an argument against long-lasting, principal-preserving conditions within the American system.

Some scholars have argued against principal-preserving conditions on the grounds that trustees are too conservative in their investment strategies, so that principal-preserving conditions create a net social-wealth cost. In fact, though, concerns about inefficient principal-preserving conditions can be addressed without reference to a RAP and cannot effectively be addressed by a Rule. First, to the extent that trustees find themselves free of alienability restrictions, they are essentially free to invest as the transferor would, except insofar as they are bound by a general obligation to be prudent. While this obligation presumably stops trustees from making highly speculative investments, speculative investments by their nature produce widely variant results. To the extent that prudential investment rules have resulted in subpar returns, they can be—and have been—steadily revised without in any way relying on or implicating a RAP. Second, one cannot make this social-wealth-cost claim without positing a credible baseline of what the beneficiaries would have done with the principal had it been transferred to them instead of being preserved to create income for future beneficiaries. It is not credible to suggest that all such principal distributees will invest all of the principal transferred to them at a return universally higher than that achieved by the trustee. Some may do that, of course, but some will invest less wisely, and make a lower return. Some will spend or squander, rather than investing, some significant portion of the principal distributed to them. To the extent they do this, the prudent trustee’s investments seem clearly superior. Surely, the parties that would have been interest

157. See, e.g., id. at 239.
159. See supra Part V.A.2 (alienability no longer a concern).
160. Trustees have historically been bound tightly to conservative investment strategies—first by lists of properties in which they could invest, and later by the “prudent man” standard. See, e.g., Stephen P. Johnson, Trustee Investment: The Prudent Person Rule or Modern Portfolio Theory, You Make the Choice, 44 SYRACUSE L. REV. 1175, 1176 (1993). These restrictions have been significantly relaxed in recent years with the rise of the prudent investor standard. See id. at 1177, 1182-83.
162. See Johnson, supra note 160, at 1182-83.
163. In fact, as noted below, the notion that a RAP will serve to break up large concentrations of family wealth relies on such malinvestment and squandering.
beneficiaries of the trust but for the disgorgement of principal would think so.

Meanwhile, note how this argument flies directly in the face of a second argument raised by opponents of perpetual principal-preserving conditions, including the ALI authors: that such perpetual principal-preserving trusts will facilitate the emergence of ultrawealthy dynasties and trust managers who exert too much market power by their control of too-massive trusts.\(^{164}\) As discussed above, the tax code provides the only appropriate venue for establishing policy about the descent of inherited wealth.\(^{165}\) This argument further demonstrates why. The only effect that a RAP has on a principal-preserving trust is eventually to require that the principal be distributed to some set of then-current beneficiaries, with the exact set of beneficiaries established by the mechanism of the relevant RAP. This being the case, there is only one presumption under which it is true both that family dynasties actually constitute a meaningful concern and that a RAP can have any dampening effect on the development of such dynasties. The presumption is that the beneficiaries, upon receiving the disbursement, will make \textit{materially less-productive} use of the principal than had the trustee. Only if the transferees who receive the principal squander it, or invest it poorly, will the putative dynasties have less capital—and less opportunity to create or maintain the

\(^{164}\) See Tentative Draft, supra note 19, at 123-24 (“The trustee . . . can be authorized to hire sophisticated investment managers and invest in assets not traded in the public securities markets, assets such as hedge funds, private equity, venture capital funds, and real estate . . . . Potentially, the perpetual or multiple-centuries trust movement could, over time, lead to large concentrations of wealth within a relatively small number of family dynasties and financial institutions . . . .” (footnotes omitted)). The specific concern about too-powerful private dynasty-trust managers exerting too much control over the economy cannot be taken seriously unless the proponents of the argument propose as well the dissolution of pension-management funds, including government-held pension-management funds. Managers of these funds in the United States alone controlled $9.03 trillion in assets at the end of 2008 (down nineteen percent from the end-of-2007 total, retreating to or below end-of-2005 totals), constituting more than half of all fiduciary assets and dwarfing entirely the funds controlled by trusts for private individuals or families, which stood at somewhere in the neighborhood of a trillion dollars over the same general period, represented only six percent of fiduciary assets, and were spread across approximately 1.1 million accounts of approximately $1 million in size, on average. See 2009 Global Pension Assets Study, WATSON WYATT WORLDWIDE 9 (Jan. 2009), http://www.apapr.ro/images/BIBLIOTECA/statisticiglobale/ww%20assets%202009.pdf (assets controlled by pension funds); 2005 FDIC Trust Report, FED. DEPOSIT INS. CORP. (Dec. 5, 2007), http://www.fdic.gov/bank/individual/trust/report 2005.html; see also Adam Corey Ross, Special Report: Best and Worst State Funded Pensions, FISCAL TIMES, Mar. 24, 2011, at 1. New York State's pension fund, the second-largest in the country, alone controls $237 billion in assets, while Wisconsin's fund, ninth largest, controls nearly $79 billion. \textit{Id.}

\(^{165}\) See Liebman, supra note 41.
dynasty—than before the distribution. If the transferees invest it as well as the trustee had, then the dynasty’s wealth has not been diminished; if they invest more successfully, the dynasty has grown wealthier. This means, though, that the RAP addresses the “problem” of dynastic accumulations of wealth only and only to the extent that it diminishes overall social welfare by championing and facilitating the squandering or malinvestment of capital. Such a move is by definition inefficient and pretty patently unjust as well.

Professors Hirsch and Wang concur that principal-preserving trusts should be freed from any RAP restrictions, but only if the testator “simply designate[s] the beneficiaries of a gratuity and then delegate[s] to someone else the responsibility of parceling it out among them.” It is unnecessary, though, to add this limitation on the types of gifts that should be excluded from the RAP. The very conditional transfer that Hirsch and Wang most approve includes both a principal-preserving condition and a “positive” gate-keeping condition, in that it circumscribes (as all conditional gifts must) the class of potential beneficiaries. A direction from a testator that all members of a beneficiary class should take equally (or in some fixed shares not alterable by a trustee) is in effect a “negative” gate-keeping condition, one that keeps all beneficiaries “in,” and at a fixed rate. For the reasons discussed next, gate-keeping conditions, whether positive or negative, no more justify RAP revival than do principal-preserving ones.

b. Gate-Keeping Conditions

The second type of transfer conditions could be called principle-preserving conditions, as they serve to texture access to the transferor’s largesse on the basis of some principle or in the advancement of some purpose that the transferor considers important. For the sake of clarity, however, they are probably better described as gate-keeping conditions.

Even were the gate-keeping conditions actually imposed by transferors universally morally abhorrent, such repugnance would not

166. There is a second presumption under which the RAP could diminish the prospect of family dynasties, but it undermines entirely the concern about family dynasties. If, after the principal distribution, the transferees, regardless of how successfully they invested the principal distribution, gave it away to beneficiaries “outside” the family dynasty, then they would thereby diminish the wealth retained by the dynasty. But exactly to the extent that transferees do make that choice, they have also rendered hollow the initial concern about wealthy families being driven to establish and maintain family dynasties at all.

counsel applying a RAP to them. Rather, it would demand the complete prohibition of gate-keeping conditions on the grounds of public policy. Most gate-keeping conditions, though, prove morally admirable, or at very worst neutral.¹⁶⁸ Many transferors require that would-be beneficiaries complete school, or work to contribute to their own support, or otherwise behave as responsible members of society.¹⁶⁹ Others limit access to trust property to potential beneficiaries who demonstrate a need for support.¹⁷⁰ Such conditions can raise no moral objections.¹⁷¹

The ALI authors do raise what might be called a practical objection to spendthrift clauses, which allow would-be beneficiaries to access a trust only to pay certain necessities and permit access to those beneficiaries' creditors only for the same purposes.¹⁷² They and others express wariness about spendthrift trusts out of fear that, as Professor

¹⁶⁸ One might argue that it is morally wrong that some members of society have a private stock of wealth to rely on that others have not, or financial incentives to strive for that others lack. But such arguments are, again, cries against inheritance of wealth, not in favor of eventual application of a RAP.

¹⁶⁹ See, e.g., Note, Conditions on Testamentary Gifts as a Device of Control, 36 COLUM. L. REV. 439, 453-54 (1936). Embracing a RAP on this ground would require embrace as well of the underlying premise: that tools for encouraging productivity (or learning, or thrift) in future generations ought to be knocked out of the hands of the wealthy exactly because the wealthy will not remain wealthy as long if the descendants of wealth creators are in essence subsidized to live lives of sloth. This is a rather unlovely proposition.


¹⁷¹ Permitting facially morally neutral conditions to flourish can have materially morally positive effects even aside from the moral value of maximizing non-harm-generating transferor freedom. This is illustrated by the fact that an additional practical effect of the Third Restatement RAP will be to reduce charitable giving. An illustration provided by the ALI authors themselves demonstrates this point. See Tentative Draft, supra note 19, illus. 3, at 155. A transferor makes a conditional gift to a school district if the property is used for school purposes; if it is not, it goes instead to the transferor's descendants. Because the remainder here is not charitable, the gift of the remainder is not exempted from the RAP. As a result, the condition “if the land is used for school purposes” is defeated at the end of the perpetuities period, and the gift becomes absolute. Two objections to this result arise. First, this was rather obviously not the transferor’s intent. Why not transfer to descendants when the incentive to retain the gift as school land disappears? If the answer is that it is administratively impractical, that problem can be dealt with by the rule of administrative efficiency proposed infra Part VI.A and does not require a RAP. Meanwhile, if the transferor is aware that her condition will be terminated at a certain time, and if she obviously cares about this condition being followed, the fact that the condition will eventually evaporate will make her some increment less likely to make the charitable gift at all (because if she cared not at all about the existence of the condition, she would not have created a conditional gift, but would have made an outright gift, perhaps including some precatory, nonbinding language about her wishes for how the gift would be used).

Gray so pungently put it, the effect of “[t]he general introduction of spendthrift trusts would be to form a privileged class, who could indulge in every speculation, could practic[e] every fraud, and yet, provided they kept on the safe side of the criminal law, could yet roll in wealth.” 173 To the extent that spendthrift clauses create these problems for creditors, though, the clauses create problems immediately—not some number of generations in the future. If the rules governing spendthrift clauses need to be reformed, they should be. A RAP, whether that of the Third Restatement or some other version, though, does not do that reforming work—so undesirable practical side effects of spendthrift clauses provide no justification for reviving the RAP.

Other gate-keeping conditions are less obviously noble, but still cannot be considered meaningfully problematic. Consider again our transferor above who made a conditional gift permitting would-be beneficiaries to take “if they graduate from law school.” The insistence on law school graduation in this example speaks perhaps more to the transferor’s personal predilection than to straightforward nobility, but the grant certainly does no positive harm. In fact, according to those who worry about the creation of family dynasties, such a gate-keeping condition, however idiosyncratic, serves a positive good: it ensures that some—perhaps many—of the members of these potential dynasties will be denied access to ancestral largesse and will have to make their way in the world like everyone else.174

Finally, some gate-keeping conditions raise some legitimate public policy concerns. In a recent example, an Illinois testator made his fortune available to his descendants, conditional upon their marrying within his faith.175 This condition placed no bar whatsoever on the descendants’ religious affiliation or their freedom to marry; it just made a gift available upon marriage consistent with the condition.176 The Illinois Supreme Court upheld the gift, largely on

173. John Chipman Gray, Restraints on the Alienation of Property § 262 (1883).

174. Such conditions could only contribute to the development and maintenance of family dynasties if the conditions successfully created incentives for the beneficiaries to achieve levels of productivity and wealth generation that they would not have achieved but for the existence of the conditions. But, as with the disbursement-to-foster-squandering presumption considered above in the context of principal-preserving conditions, see supra Part V.A.3.a, neither efficiency nor justice will permit objecting to gate-keeping conditions precisely on the grounds that such conditions promote positive and productive contribution to society.

175. See In re Estate of Feinberg, 919 N.E.2d 888 (Ill. 2009).

176. See id. at 891.
these grounds. Many people would not inflict such a condition on their descendants, and those same people may consider such a condition morally unjustifiable. The proper response for those who hold such an opinion, however, and who would take the further step of banning this or other gate-keeping conditions that they find morally repugnant, is not to advocate a revival of the RAP, which would do nothing to remove the gate-keeping condition—and thus the relevant incentive structure—for generations of the testator’s descendants. Rather, as with the spendthrift clauses considered above, the relevant and coherent response would be to seek legislative or judicial rejection of the specific, narrow varieties of gate-keeping conditions found objectionable.

The initial content of gate-keeping conditions neither does nor can provide any justification for reviving the RAP. All that remains to supporters of RAP revival, including the ALI, is the argument that gate-keeping conditions that pass muster when initially established are likely over time to begin to chafe—to fail the “real” will of the transferor in ways that deeply offend public policy. For these reasons, the best response to the potential chafing is to establish a blanket rule cutting off all such conditions at a given time. This argument, though, is based on a pair of false assumptions: that testators are incapable of or unwilling to establish gate-keeping conditions that are in their terms responsive to the social, economic, and other changes the future holds and that the law is incapable, without a RAP, of dealing with inflexible gate-keeping conditions in a coherent manner when and if the need arises.

In support of their proposition, the ALI authors concern themselves particularly with obsolete family class-gift designations. They claim that “no perpetual or multiple-[generation] trust drafted today will be able to anticipate concepts of family and descent as they change and adjust over vast intervals in the future” and that “[n]o trust drafted in 1650 or earlier could have contained provisions anticipating

177. See id. at 897.
178. This is just what the Pennsylvania Court did with a materially similar provision in 1974. See In re Estate of Coleman, 317 A.2d 631 (Pa. 1974). For consideration of where and how this public policy line has been and should be drawn, see Alan Newman, The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?, 38 AKRON L. REV. 649, 681-84, 689-92 (2005).
179. See Tentative Draft, supra note 19, § 27.2. When the Third Restatement’s RAP attaches, “the court shall modify a disposition . . . in a manner that most closely approximates the transferor’s manifested plan of distribution.” Id. at 153.
180. See id. at 127.
the possibility of adopted children, children of assisted reproduction, or children born to a surrogate mother, much less second-parent adoptions or posthumously conceived children.”\textsuperscript{181} The ALI authors’ concerns, though, are misplaced. Modern drafting talent and the relevant pool of precedent are both more supple and clever than the ALI authors suppose, and to the extent they are not, these concerns are easily dealt with by the adoption of one or both of a pair of interpretive presumptions considered below.

First, the laws of the past do not—any more than the laws of today—prove categorically restrictive of developments that those laws did not anticipate. Heirs and descendants in England of 1650 were defined as “[a]ll persons born within marriage . . . unless there is an apparent impossibility that they . . . be generated by the husband.”\textsuperscript{182} Thus, even the strictest seventeenth-century interpretations of “heirs” and “descendants” would plainly include many of those that the ALI authors worry about being excluded, such as children produced from the material of both spouses by the application of assisted reproduction technologies during a valid marriage.

Moreover, the courts of that era, in striving to find legitimacy wherever they could, sometimes invoked fictions of marital parentage where the facts pointed incontrovertibly in another direction. A married traveler went abroad for three years, returning to discover “his” month-old daughter.\textsuperscript{183} The townspeople, of course, were perfectly aware that the daughter was not his, and yet the court found her legitimate and able to inherit, “for the privacies of man and wife can not be known, and he may have come . . . by night” and engendered the plaintiff.\textsuperscript{184} Similar fictions were applied even when it was perfectly clear that neither the husband nor the wife were the natural parents of the child, the “strong inclination” of the law being “to treat as legitimate any child whom the husband has down to his death accepted as his own and his wife’s child, even though proof be forthcoming that it is neither the one nor the other.”\textsuperscript{185} This fiction—already extant in the seventeenth century—would prove broad enough to allow nimble modern courts, were they faced with the task of interpreting a trust of 1650s vintage, to permit adoptive children—at

\textsuperscript{181} Id. at 128 (footnote omitted); see also Waggoner, supra note 43, at 9-12.

\textsuperscript{182} 1 Matthew Bacon, A New Abridgement of the Law 749 (1832); see also 4 Charles Viner, A General Abridgement of Law and Equity 215 (2d ed. 1748) (stating a child born in wedlock is legitimate unless special circumstances are demonstrated).

\textsuperscript{183} See 2 Pollock & Maitland, supra note 10, at 398.

\textsuperscript{184} Id.

\textsuperscript{185} Id. at 398-99.
least children held out by married couples as their own—as “heirs” and “descendants.” The fiction is even broad enough to include same-sex couples, at least in states where such couples may marry: a married couple holds out a child as its own; the law refuses to question the presumption, even though the child is manifestly not the issue of both spouses. Why should it matter to our modern court that some particulars of the couple’s identity might have startled the courts that had developed the doctrine? Thus, even if a settlor in 1650 had included a provision requiring that his beneficiaries forever be defined “according to the definitions now in force,” then many of the redefinitions of the terms that have occurred over the intervening centuries would still have been accommodated. The ALI authors’ concerns about staleness, then, prove significantly overstated from the outset.

Additionally, the authors need not worry that long-term trusts will be (or have been) incapable of anticipating changing concepts of family and descent: examples exist of testators having rendered the gate-keeping conditions attached to their gifts amenable to changing constructions of family and inheritance law, and the language to achieve such purposes is hardly obscure. Perhaps no settlor in 1650 could have anticipated exactly some of these developments (though it is worth noting, for instance, that anyone in 1650 with even a passing knowledge of the Roman imperial dynasty—a thing that Shakespeare demonstrates was generally available—had some sense of the institution of adoption, and that while the English system largely rejected formal adoption, the institution was contemporaneously alive and well on the European continent. There is, though, no reason whatsoever that any settlor in 1650 would have needed to anticipate such developments with any precision in order to create a trust that

186. See Tentative Draft, supra note 19, at 128 n.60.
187. See, e.g., Minary v. Citizens Fid. Bank & Trust Co., 419 S.W.2d 340 (Ky. 1967). A decedent settlor establishes a trust, then subject to the Kentucky RAP, and declares that upon termination, the trust “shall be distributed to my then surviving heirs, according to the laws of descent and distribution then in force in Kentucky.” Id. at 341.
188. See id. at 341. Establishing a trust that is open, subject to whatever other gate-keeping conditions might append, to the relevant beneficiary class (for example, heirs, descendants, cousins) “according to the laws of descent and distribution then in force” does quite nicely. Id.
189. See, e.g., WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 2.
191. Huard, supra note 190, at 745-47.
would remain coherent and nonobjectionable today. Had testators in that era designated the beneficiary class (namely, “my descendants”) and added language indicating that the class should be defined “according to the laws of descent and distribution then in force” (namely, at the time of any distribution), then they could have anticipated and accommodated social and legal change expressly. But even the very standard term “my descendants,” or some variant of that construction, unadorned, would prove sufficient to accommodate social and legal evolution with the assistance of just the merest legal presumption: that unless transferors expressly indicate otherwise, conditional gifts to classes such as “my descendants,” “my heirs,” and the like will be interpreted using the legal definitions in force at the time of distribution, rather than at the time of the creation of the trust. Adoption of such a presumption, recommended below as part of the package of minor reforms necessary to deal effectively with the modern dead-hand problem, would eliminate entirely the ALI authors’ concerns about increasingly stale class definitions in long-term trusts, as long as the settlor did not include language requiring the employment of the laws and definitions in place at the time of settlement.

Of course, the obvious problem remains. While the laws of descent of 1650 were supple enough to accommodate some of the innovations that subsequent centuries have witnessed, they cannot make room for them all. There are still wide categories of what we today consider descendants who would be excluded as descendants from the hypothetical 1650 transfer made to “my descendants, as that term is defined by the laws now in force.” Because legitimacy so thoroughly defined descendant status in that age, children born of unwed mothers who remained unwed, under whatever conditions, could never be considered descendants. Rather startlingly for our age, children of a divorced couple became illegitimate thereby. And while the law of 1650 legitimated children born after the death of a parent, this exception applied only to children conceived within the lifetime of the parent and so expressly would not stretch to cover the

192. The current presumption, as the ALI authors note, is the reverse. See Tentative Draft, supra note 19, at 136.
193. See infra Part VI.B.
194. See, e.g., Waggoner, supra note 43, at 11 (raising this concern).
195. See 2 POLLOCK & MAITLAND, supra note 10, at 397.
196. See 1 BACON, supra note 182, at 752; 4 VINER, supra note 182, at 219.
197. An ancient principle permitted children born within the gestational period after the father's death to be treated as legitimate but posthumous children of the decedent father, if
category of children, permitted by the modern lights of a beneficent
science, whose conception can occur long after the death of a parent.
Modern and future law can be expected to prove similarly capacious,
but also not infinitely elastic. This creates hazard, for as soon as a
jurisdiction were to adopt the presumption just proposed—that
transfers that do not explicitly require interpretation “by the laws in
place at the time of settlement” be interpreted using the laws in place
at the time of each distribution—trust drafters in that jurisdiction
would begin to include just that requirement as boilerplate. A second,
stronger presumption may be employed greatly to reduce this problem
as well, however. States could add a short section to the relevant
probate and trust codes to the effect that beneficiary-class definitions
in place at the time of each distribution will apply to transfers, despite
boilerplate to the contrary in settlement documents, unless the
application of a redefinition would directly violate a specific, explicit
restriction established by the transferor.

This stronger presumption would effectively eliminate the
problem of staleness of trust terms entirely. Settlors would simply not
be able to exclude descendants on the basis of categories or
distinctions that they had not thought of—much less of those which
did not yet exist. It is difficult to imagine how a transferor in 1650
could have articulated trust terms to head off unforeseen developments
such as technology-assisted reproduction or same-sex parentage. It
would be passing strange to discover, in any transfer from 1650, a term
by which “I exclude from my grant any descendants, born by means of
any black magic that allows them to spring forth from the womb of
another, though it be the true-blood descendant of my lineage.”
Similarly, a 1650 settlor might well have been a bit baffled by the
notion of officially sanctioned same-sex marriages, though he was
surely aware of same-sex relationships. Conceivably, 1650 settlors
might have inscribed the restriction: “Nor shall any descendant take
should that descendant be a descendant of an ancestor who has
engaged in a sodomitical relationship,” or however they might have
phrased it. But the settlors did not pen such restrictions—or, at least, it
is difficult to imagine them doing so. They certainly did not exclude,
in terms, progeny from same-sex marriages that they cannot be
expected even to have imagined.

such treatment would prove beneficial to the child. See, e.g., 1 WILLIAM BLACKSTONE,
COMMENTARIES *130, *456.

198. See, e.g., Arno Karlen, The Homosexual Heresy, 6 CHAUCER REV. 44, 46 (1971);
see also HYDE H. MONTGOMERY, THE LOVE THAT DARED NOT SPEAK ITS NAME 43-44 (1970).
On the other hand, though, even this stronger presumption would leave space for settlors to place explicit restrictions arising from categories that they did explicitly anticipate. As this Article has noted, it is possible the settlor of 1650 was well aware of adoption, and could conceivably have anticipated its eventual introduction. If that settlor included, for instance, an explicit provision indicating that “yet no persons, however defined at law at the time of any distribution, shall take from the income of this trust unless such person shall be related to me by blood,” then this settlor has stated an express condition. This is not a circumstance of accidental staleness, but of clear—and expressly considered and asserted—intent. Such conditions should be honored unless they have, in the subsequent centuries, grown so noxious as to violate express public policy so gravely as to forbid their continued enforcement. 199

These two innovations, taken together, address without a RAP the ALI’s concerns about gate-keeping conditions. The ALI authors worried that gate-keeping conditions would grow stale, in part because of social, legal, or technological innovations that transferors could not reasonably anticipate. 200 These reforms eliminate this problem. As has been demonstrated, transferors by definition simply cannot build express conditions on the basis of social, legal, or technological changes that they cannot anticipate. Because these reforms would cause latter-day definitions of beneficiary classes to trump boilerplate declarations in the transfer documents, transferors would also lack the ability to veto unwittingly, or without careful thought, developments which they would have embraced, or at least accepted. 201

Accordingly, upon the adoption of these two reforms, the only gate-keeping conditions that would persist in the face of social, legal, and technological change would be conditions about changes that the testator not only explicitly contemplated, but for which he made express, specific and unconditional provision. The transferor, for

199. See infra Part V.C (discussing courts’ ability and duty to strike down noxious conditions, but to honor others).

200. Tentative Draft, supra note 19, at 127-29. Note that the germinal seeds for these two antistaleness provisions have already been planted in section 412(a) of the Uniform Trust Code. See UNIF. TRUST CODE § 412(a) (2005); Newman, supra note 178, at 666-67 (noting that “general statements of the kinds of circumstances the settlor anticipated, and with respect to which he or she would not want the trust modified or terminated, might not be specific enough to overcome” section 412(a)’s provision allowing reformation of trust provisions upon unanticipated circumstances).

201. See generally Tentative Draft, supra note 19, at 128-29 (“[T]rust-document definitions . . . become out of date over time [thus] constrain[ing] the ability of the trust to adjust to evolving concepts of family.”).
example, might for religious reasons exclude “all would-be beneficiaries who are conceived by a process of artificial insemination” (though almost surely in that instance the transferor would wish to exclude the would-be beneficiaries who undertook the artificial insemination, not merely the product of that process). Under these circumstances, there can be no doubt whatsoever what the will of the testator is. No failure of anticipation, no unintended boilerplate, obscures his purpose. Such a condition might strike some contemporaries as unnecessary or unpleasant, and it might seem increasingly unpleasant over time. If it is noxious ab initio, however, then it should be forbidden then on public policy grounds. If instead it becomes sufficiently noxious as time passes such that a later generation finds it insupportable, the polity then in place can then forbid its further application on public policy grounds. Such a measured course could fail on only two grounds. First, either the legislature could fail to pass, or the public could fail to support, prescription of the condition on public policy grounds. This, though, surely would indicate the sense of the community that the provision had not grown insupportably noxious. Second, the public could support the public policy determination, only to see it struck down on constitutional grounds. It can provide no defense of the RAP, though, that a massive check on testamentary and donative freedom be maintained in order to provide a surreptitious check on a few rare gate-keeping conditions that it would be unconstitutional to check overtly.

Neither can concerns about potential beneficiaries generations hence justify revival of the RAP, because a RAP will be of no benefit to them. Assume that a transferor today establishes a condition that no person cloned from a single individual’s genetic material, however accomplished, might inherit from him. Assume that such a cloned person, who would otherwise have qualified as a transferee, is born within the RAP period. That person will not take in a RAP-maintaining jurisdiction or in a jurisdiction adopting the reforms suggested in this Article. Assume instead that such a cloned person is born beyond the RAP. That person will not take in a RAP-maintaining jurisdiction, because the RAP will have effected the distribution of the

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202. See infra Part VI.C.

203. The ALI authors base much of their argument in favor of the RAP on their concern that family arrangements change over time. The reforms endorsed above would be responsive to changes in family or other class-beneficiary designations that occur inside of the RAP period (in ways that the Third Restatement RAP is not), a result to be expected if the pace of such change increases, as the vectors of history suggest they likely will.
trust res before the would-be beneficiary became available to take. He would also not take in a jurisdiction that has instead adopted these reforms. It might, of course, be hoped (as the ALI authors do hope) that upon the operation of the RAP, the parties who benefit from the distribution will turn around and devise the same trust that existed before, merely with updated terms.\footnote{204} This, though, is the sheerest speculation. It may equally be hoped that under the reform regime advocated here, the nonexcluded beneficiaries of our cloned person’s generation would recognize the continuing injustice of the exclusion and would throw their distributions into a hotchpot, to share and share alike—and such a hope would as well be nothing more than speculation. The RAP simply does not help individuals who would be part of a beneficiary class but for some specific exclusion.

In short, then, these two reforms answer all of the ALI authors’ concerns about gate-keeping conditions, without employing the vastly overinclusive and unsupple formalism of a RAP.\footnote{205}

4. The Quadruple Chimera of the Family-Dynasty Trust Problem

The ALI authors focus their arguments in favor of reviving the RAP almost entirely on family-dynasty trusts.\footnote{206} The concerns raised by the authors, though, prove misplaced or chimerical in four separate ways.

First, as has elsewhere been addressed,\footnote{207} the real, central objection to family-dynasty trusts is not the trust bit, but the family-dynasty part.\footnote{208} But, as discussed, the appropriate response to such concerns is attempted modification of tax policy, not maintenance of the RAP.\footnote{209}

Second, while many, and perhaps most, potentially perpetual trusts benefit only descendants and all descendants, not all such trusts do. The narrow focus on family-dynasty trusts obscures the fact that many objections to such trusts, whatever their validity, have no

\footnote{204. Tentative Draft, supra note 19, at 127-29.}
\footnote{205. The ALI authors leveled a similar charge against the traditional rule, arguing that it was inferior “because it defeats dispositions that do not violate” the limited-dead-hand-control policy that the ALI claims to be the sole justification for the rule. Id. at 116. As the discussion above illustrates, however, the Third Restatement RAP, or any recognizable RAP, will defeat innumerable conditions that, upon the minor innovations outlined above, would present no dead-hand control problems whatever.}
\footnote{206. Id. ch. 27.}
\footnote{207. See infra Part VI.}
\footnote{208. Tentative Draft, supra note 19, at 123-24.}
\footnote{209. Dukeminier & Krier, supra note 4, at 1327 (“If family dynasties are to be prevented, only the federal government, through income and death taxes, can do it.”).}
purchase when applied to conditional gifts designed either to benefit nonfamily members or to benefit only certain members of the family. No concerns about creating a permanent national leisure class based on inherited wealth can arise from conditional gifts that make beneficiaries of, say, the students in transferor’s autumn 2010 property class or “those of my descendants who graduate from law school.”

Third, and somewhat relatedly, the ALI authors worry that eventually descendants will bear only the smallest blood relationship with the transferor. This, though, by the ALI’s own lights, presents not a problem to be solved, but a benefit to be applauded. The Third Restatement RAP would continue to exempt charitable trusts. To the extent that families become mammoth pyramids of slight actual relationship over time, gifts to descendants of those families become functionally indistinguishable from charitable gifts. A gift for “educating the deserving aspiring law students of the Commonwealth of Pennsylvania”—or even of a much smaller geographical area—is a charitable gift exempted from this new RAP (and from previous iterations). A grantor might make that gift because of the grantor’s sentimental ties to his geographical homeland and his profession. The law permits such a gift to run in perpetuity and rewards its nobility with tax concessions. Given the speed with which genuine blood association dilutes over generations, a grant “educating the deserving aspiring law students who are descendants of my line” is based in the same generalized sentimentality and will serve the same functional purpose. The analogy extends: to the extent that a principal-conserving trust established with the income to be sprayed equally “to the members of the graduating class of my high school, so that they may have resources with which to begin adulthood” represents a charitable trust, so, too, does a fixed-sum distribution to family beneficiaries, effectively, after a few generations begin to resemble a charitable trust.

In other words, because of the very dilution in blood relationship that the ALI recognizes, private trusts eventually become functionally indistinguishable from charitable trusts. Yet, for no very coherent reason, not only does such a gift receive, after that “dilution point” is reached, no charitable tax exemption, but instead the gift is curtailed entirely—in favor of an unconditional disbursement of wealth to lineal

211. See id. § 27.3, at 158-63.
212. Id.; Restatement (Third) of Trusts § 28 (2003).
213. Restatement (Third) of Trusts § 28(b), (f) & cmts.
descendants—by the RAP where the Rule still exists. According to the ALI’s own logic, neither this distinction nor this result make sense. As noted elsewhere, it seems that the RAP’s application has primarily the deleterious effect of promoting the growth of an easy-living, unproductive overclass by eliminating valuable conditional enticements to industry and thrift, and instead bestowing an unconditioned windfall on certain arbitrarily favored descendants of highly successful wealth generators.  

The point here is not that family-directed trusts should eventually be afforded charitable trust status, necessarily. Rather, it is that the ALI authors’ putative concerns about the dilution of relationship between transferor and transferees are chimerical, and a RAP would provide no benefits as applied to the issue of dilution even if dilution were a genuine problem.

Fourth, the ALI authors worry that trusts unbounded by a RAP will result in thousands of trustees facing the impossible task of keeping up with tens of thousands or even millions of beneficiaries, threatened always by the specter of personal liability if they were to make a mistaken distribution or an unintentionally partial investment decision. Even the ALI authors themselves, though, recognize that this argument is a red herring, admitting:

Indeed, in a worst case scenario, the costs of administering a perpetual trust could become so large that they would consume the trust, leaving nothing for the settlor’s descendants, the supposed beneficiaries. But such an outcome would render the trust capricious, in violation of the rule of mandatory law that “a private trust, its terms and its administration must be for the benefit of its beneficiaries . . . .” Long before reaching that point, the trustee of such a trust would be under a fiduciary obligation to petition the court to terminate the trust to prevent such an outcome. In this sense, the perpetual trust is structurally illusory—it would self-destruct in the course of administration.

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214. See supra Part IV.
215. The Reporter for the Third Restatement RAP, Lawrence Waggoner, elsewhere suggested, in introducing the matter of steadily decreasing blood connection, that “[t]ransferees by nature prefer to benefit known descendants, not remote unknown descendants.” Waggoner, supra note 43, at 4. The problem is that this statement about human nature is refuted exactly to the extent that transferors are taking advantage of long-term or perpetual trusts. If Waggoner were right about what transferors “naturally” prefer, then perpetuities rules would never do any work. The fact that Waggoner feels obliged so forcefully to favor revival of the RAP demonstrates the flaw in his analysis.
217. Tentative Draft, supra note 19, at 122 n.36 (citation omitted); see also UNIF. TRUST CODE §§ 105(b)(4) (2005) (noting that a settlor cannot vary the rules of trust
In fact, then, there is no fear that trusts will become mere engines of administrative costs; the mechanism is already in place to avoid that result. Moreover, the already extant mechanism (sometimes called or analogized to equitable deviation and the cy pres doctrine) available for avoiding such a fate provides a firm basis upon which to enact another minor reform to achieve the purposes of the RAP without its liabilities. This reform could be called a “rule of administrative efficiency.” Building on the foundations just considered, it would direct a trustee to petition the court for modification of the terms of a trust any time more than some fixed percentage of the currently distributable portion of the trust (say twenty percent) were being lost to overhead. Modification should be made with an eye toward doing as much of the transferor’s intent as is possible, consistent with a total administrative cost projected to remain below the relevant ceiling. (Alternatively, the rule could allow trustees to make this determination and these modifications themselves, consistent with and bounded by their fiduciary duty.)

It is possible, as the ALI authors seem to imply, quite contrariwise, that a rule of administrative efficiency would effectively extinguish family-dynasty trusts before too many generations pass. If that is true, then such a rule neatly accomplishes the family-dynasty-related purposes used as justification for retaining the RAP. If it is not true, then the authors’ concerns about massively multiplying beneficiary pools have no applicability, even to family-dynasty trusts.

Additionally, to the extent that this concern about vast pools of beneficiaries is valid, it obviates the ALI authors’ professed concern that perpetual family-dynasty trusts will actually lead to massively wealthy and influential family dynasties. As logic and the rules of division dictate, and as history shows, no wealth, however great and
however productive, can be subdivided generationally for long and still provide much of a living for the later-coming beneficiaries, who at each generation find their slice of the wealth increasingly inconsequential.\textsuperscript{221}

The ALI authors paint with a broad brush, failing to recognize that many of the purposes for which the RAP once existed have functionally disappeared, thus fatally weakening the case for reviving the RAP. The various minor reforms proposed throughout this Part, and summarized in Part VI below,\textsuperscript{222} provide protection against all of the still-extant concerns that might justify reviving the RAP, all without curtailing the vast plethora of potentially nonproblematic long-term conditional gifts by operation of the massive mechanical overbreadth of the RAP. In this sense, the proposed reforms achieve what Professor Simpson identified as the primal purpose of the RAP before it became formalized—“to favour prudent and sensible dispositions, and, as a corollary, invalidate foolish ones.”\textsuperscript{223}

\textbf{B. The Particular Drawbacks of the Third Restatement Proposal}

The last Part demonstrated that the RAP, in fundamental purpose and design, is the product of a far different legal, political, and social era and is, in whatever specific form, a blunt and poor instrument for addressing the concerns that obtain to contemporary conditions. This Part demonstrates that the specific RAP proposed in the Third Restatement—like any specific version of a now-obsolete instrument—carries with it specific flaws that add to its general unattractiveness to state legislatures. A discussion of why the states are unlikely, in any case, to adopt the Third Restatement proposal appears at Subpart 1 below. Subpart 2 addresses problems unique to the Third Restatement RAP that will likely render adoption of this RAP even more unattractive to the states.

\textbf{1. States Unlikely To Adopt Third Restatement RAP in Any Event}

The ALI will face an uphill struggle in convincing states to adopt the Third Restatement RAP. Trust-settling constituents clearly favor RAP abolition, partly for reasons of tax benefit, but also because

\textsuperscript{221} See, e.g., Hodel v. Irving, 481 U.S. 704, 706-10 (1987) (demonstrating how rapidly worthless becomes a patrimony divided equally between all new descendants at each generation).

\textsuperscript{222} See \textit{infra} Part VI.

\textsuperscript{223} Tentative Draft, \textit{supra} note 19, at 115 (quoting \textsc{Simpson, Leading Cases, supra} note 3, at 78).
constituents appear independently to like the opportunity to create perpetual conditional gifts.\textsuperscript{224} Trust-\textit{crafting} constituents—such as attorneys and trust companies—clearly favor RAP abolition because it eliminates the concern of malpractice lawsuits if they misconstrue or misapply the Rule.\textsuperscript{225} States legislators will thus have virtually no incentive to revive the RAP as long as preferential tax treatment accrues to those who settle trusts in their states, and they will have strong reason to maintain RAP abolition thereafter.\textsuperscript{226}

History, meanwhile, suggests that the Third Restatement RAP will not fare well. In the Second Restatement, issued in 1979, the ALI proposed a wait-and-see RAP that nevertheless continued to use the traditional life-in-being-plus-twenty-one-years formula. Despite the fact that the wait-and-see revolution had already begun and was by then the modern trend,\textsuperscript{227} only Iowa adopted the Second Restatement RAP.\textsuperscript{228} Not until the USRAP, which offered states the innovation of a clear, simple ninety-year wait-and-see period, did additional states begin to jump on board.\textsuperscript{229}

The Third Restatement RAP mounts the stage under even less propitious circumstances. First, while it is marginally less complicated than the traditional RAP, it is arguably a good deal less user-friendly than a ninety-year wait-and-see period and vastly more complicated and restrictive than having no RAP at all. Thus, because other versions of the rule have superseded the traditional RAP everywhere,\textsuperscript{230} the Third Restatement RAP will represent not a simplification but a significant complication in virtually every state that might consider adopting it.

Additionally, momentum does not favor the Third Restatement RAP. As noted, by the time the USRAP’s innovations were introduced, wait and see had already become the modern trend. The case is the reverse for the Third Restatement RAP. For more than twenty years, all of the momentum in state legislatures has been toward simplifying, weakening, and abolishing the RAP, not strengthening and

\textsuperscript{224} See, e.g., Tate, supra note 24, at 611-20.
\textsuperscript{225} See Sterk, supra note 78, at 2100-01.
\textsuperscript{226} See id. at 2117-18 (cataloguing other reasons why legislatures are unlikely to act to revive the Rule).
\textsuperscript{227} See Dukeminier & Krier, supra note 4, at 1305-06 (adopting wait and see in Pennsylvania in 1947, with five other states following by 1979).
\textsuperscript{228} Id. at 1307.
\textsuperscript{229} Id. at 1307-08 & n.20.
\textsuperscript{230} See Tentative Draft, supra note 19, at 118-19.
complicating it. Moreover, no state has ever adopted a RAP that looks anything like the Third Restatement’s proposal. In short, the auguries bode ill for the Third Restatement RAP even without a deep examination of its content.

2. Specific Characteristics of the Third Restatement RAP Likely To Inhibit Adoption Further

The ALI is, then, as it were, starting in a hole: the states, especially those that have effectively or entirely abolished the RAP already, have significant interests in maintaining or continuing the abolition position. As this Article develops below, specific characteristics of the Third Restatement RAP seem destined to reinforce those interests and further inhibit the likelihood of adoption.

Perhaps the single specific characteristic of the Third Restatement RAP most likely to promote this reluctance is this: not only does the Third Restatement Rule broaden the application of the RAP—extending it to what has traditionally been considered vested interests unhampered by the Rule (such as reversions)—but it also, despite the authors’ protestations to the contrary, effectively reduces the perpetuities period as well. Thus, not only does the ALI have to convince states that have abolished the RAP to revive it, but to revive a specific version of the RAP radically more restrictive than those that they have discarded.

The perpetuities-period shortening effect of the Third Restatement RAP is demonstrated most clearly in the context of conditional gifts to nonfamily transferees, but the effect applies to all relevant gifts. Under the USRAP, conditional gifts to all parties are valid if they actually vest or terminate within ninety years after their creation. Under the Third Restatement Rule, however, conditional gifts to nonfamily transferees are valid if they terminate at the end of a measuring life “no more than the equivalent of two generations younger than the transferor.” For equivalencies, the Third Restatement Rule posits twenty-five-year-long generations, and it places the transferor at the middle of her generation as the baseline for establishing future generations. Thus, nonfamily transferees are

231. See id. § 27.1 cmt. a, at 136.
232. See id. at 130.
233. UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(b) (1990). The interests are also valid under the RAP if they would have been valid under the traditional common law RAP. See id. § 1(a).
234. Tentative Draft, supra note 19, § 27.1(a)-(b)(i), at 135-36.
considered to be members of the same generation if they are within twelve and a half years of the age of the transferor, the next generation if they are within twelve and a half and thirty-seven and a half years, and two generations if they are within thirty-seven and a half and sixty-two and a half years younger.

This creates a perpetuities period that is demonstrably and significantly shorter than the one created by the USRAP, as an example will demonstrate. Transferor T establishes a testamentary trust, leaving the interest generated by the trust, but not the principal, to A and A’s lineal descendants for as long as the relevant perpetuities rules will permit, and then making a gift of the principal to a local university. Under the USRAP, all of A’s descendants born (or adopted) for ninety years after his death will be qualified transferees, and the grants to each of them will immediately vest. As a result, T’s wishes will be honored for ninety years and potentially far longer, unless all beneficiaries agree to terminate or modify the trust. However, the Third Restatement’s Rule honors T’s conditional gift only for the life span of some party born within, at most, sixty-two and a half years of T’s birth. This means that if we assume that both T and T’s last qualified beneficiary live lives of the same length, then T’s gift will be honored for only at most sixty-two and a half years, and on average fifty years, after T’s death, and then will terminate entirely. This includes living parties who had already begun to share in the gift (unless those already-taking beneficiaries are under thirty, in which case the conditions may continue until, at most, those takers turn thirty). Compared to the ninety-year vesting period of the USRAP, followed by years of continuing execution, the Third Restatement Rule manifestly and significantly shortens the perpetuities period: in fact, it cuts it roughly in half.

The example above deals with grants to nonfamily members. The effect of the Third Restatement Rule on actual families will depend on the vagaries of birth patterns within those families. Given that the ALI explicitly designed the twenty-five-year generation designations to establish a perpetuity-limiting measuring life that is

235. See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. a (2003).
236. This effect is mitigated somewhat, but not much, if we assume, as I have elsewhere, that longevity will continue to increase, so that T’s last qualified beneficiary in fact lives perhaps as much as ten years longer than T.
237. The two-generation rule will allow conditional gifts to continue only as long as the conditions terminate within the life of a transferee born, on average, fifty years later than the transferor.
“the equivalent of two generations younger than the transferor,” though, it seems appropriate on the ALI’s own terms to expect that the perpetuity-period shortening effect will prove the same for intrafamily grants as for nonfamily grants. Rerunning the same hypothetical as appeared above, substituting T’s own lineal descendants for A’s, and positing descendants of the same longevity in each instance, will demonstrate this result.

This conclusion gains further strength from a careful reading of the ALI’s own consideration of the question of perpetuity-period lengths. It claims that its new Rule will not, on average, change the length of the perpetuities period. It supports this claim by suggesting that “[t]he generations-based perpetuity period will potentially be shorter than one based on lives in being,” though not, significantly, one based on a ninety-year wait-and-see period “if the transferor dies after the birth or conception of all of the beneficiaries of the transferor’s trust who are members of the second generation below the transferor’s generation.”

On the other hand, “The generations-based perpetuity period will potentially be longer than one based on lives in being if the transferor dies before the birth or conception of all of the beneficiaries of the transferor’s trust who are members of the second generation below the transferor’s generation.”

The authors fail to recognize, however, that in an era of increasing longevity, the odds that a transferor will die before the birth of all of her grandchildren grows ever slimmer, while the possibility of living to see a complete set of great- and even great-great-grandchildren born grows ever more likely. Moreover, the authors fail to recognize that the shift from requiring interests to vest within a certain period after a transferor’s death to requiring conditions to terminate within, in effect, a certain (much smaller) number of years after the transferor was born must have the effect, on average, of radically reducing the perpetuities period.

238. Tentative Draft, supra note 19, § 27.1(b)(1), at 136.
239. Id. at 130 (“Although the length of the two periods will be different in individual cases, the average length will probably work out to be about the same.”).
240. Id. at 131.
241. Id. at 131.
242. It is generally accepted that lifespans are headed upward in coming years, as they have been for more than a century. See, e.g., Laura B. Shrestha, CRS Report for Congress: Life Expectancy in the United States (2006). There are, however, doubters. S. Jay Olshansky et al., A Potential Decline in Life Expectancy in the United States in the 21st Century, 352 N. ENG. J. MED. 1138, 1138-45 (2005); Amanda Sonnega, The Future of Human Life Expectancy: Have We Reached the Ceiling or Is the Sky the Limit?, RES. HIGHLIGHTS DEMOGRAPHY & ECON. AGING, Mar. 2006, at 1, 1-4 (noting the increase may continue if behaviors change).
Meanwhile, increasing longevity will render the two-generation Rule increasingly restrictive in future years, and increasingly inconsistent with a fundamental purpose of the ALI in proposing revival of the RAP—ensuring that the construction of conditional gifts, and the law that applies to such gifts, remain supple to changing social and technological developments. If grandma lives to be 120 and to watch her great-grandchildren grow into adulthood and reproduce, then her functional perpetuities period is reduced to only one generation—and, even then, only to those members of that generation who happen to be alive when she dies. And the rule would not even permit her to establish a single trust for the benefit of all those living great-grandchildren; she would have to establish separate trusts for each one. If, meanwhile, by an unlucky accident, her great-grandchildren have reached adulthood, but have not yet reached the stage of reproduction, then her perpetuities period will not reach to any generation. Taken as a whole, this result effectively reduces the perpetuities period to nothing beyond the lives of those who happen to be in being upon the transferor’s death.

A final practical problem arises from the inability of the Third Restatement Rule to effect transfer or intent in the manner that it purports. Courts following the Third Restatement Rule would ostensibly face the obligation to do the transferor’s intent when the perpetuity period ends and the res must be distributed. Obviously, though, if a court finds itself having to make such a judicial modification, it will be because the transferor both did not intend for the res to be distributed, and made no express provisions for such a contingency. In such circumstances, the best that a court is likely to have is this negative inference: that whatever the transferor may have wanted, she did not want the conditional beneficiaries to take the res absent those conditions. And yet it will often be the case that the only plausible option available to the judge is to do that very single thing that was obviously not the intention of the transferor—namely, to give

244. Id. § 27.1 (b)(2), at 136.
245. See id. § 27.1 cmt. h, at 144. This rule creates obvious administrative and allocative inefficiency by requiring multiple instruments where one could suffice. Allocative inefficiency—and, ironically enough, an artificial strengthening of dead-hand control—is heightened even further when trusts must be created, and corpuses allocated, at an initial position for the benefit of one individual only, rather than allowing (though not of course requiring) a single trust to be created with a corpus that can be allocated as between some class of transferees at the discretion of a trustee capable of taking changing circumstances fully into account.
246. See id. § 27.2, at 153.
the res unconditionally to those very transferees—because no other single option out of the infinite combination of potential options presents itself as likely to have anything to do with the testator’s wishes at all.247 Section 27.2 of the Tentative Draft is thus something of a sham: the courts will often find the most (or only) plausible “modification” available to be the very thing that the transferor explicitly did not intend.248

The temper of the times, the incentives facing legislators, and the specific characteristics of the Third Restatement RAP, then, all suggest that it will—as it should—face a difficult path to adoption in the states.

VI. THE COUNTERPROPOSAL SUMMARIZED

The true extent—and limits—of genuine modern dead-hand control problems were addressed in Part IV.A, along with detailed explanations of the potential non-RAP solutions to those problems that this Article proposes as a replacement for the RAP. The proposed reforms are summarized as a package below.

A. The Rule of Administrative Efficiency

First, states should, either by judicial innovation or by legislation, expand the equitable doctrine that permits trustees to seek modification of a trust when further trust administration would be futile or impracticable into a clear and reliable “rule of administrative efficiency.”249 This rule would allow—or perhaps in fact require—modification of trust terms when the cost of administering the trust reached some fixed percentage of either the income or the res of the trust. (The relevant threshold would of course be larger if measured against trust income, smaller if measured against the res.) The states should establish this rule as a default, to apply unless the transferor has explicitly considered the issue of efficient trust administration, and has either set a different threshold for modification than the default, or has barred its application altogether. Were a transferor to take the latter

247. In fact, this very exercise of judicial modification was the only express example the authors provided of “doing the transferor’s intent.” See id. § 27.2 cmt. e, illus. at 154; see also Waggoner, supra note 44, at 5 (“In most cases, the form of modification will accelerate the right to possession of the beneficiaries of the trust or other disposition.”).

248. The rule of administrative efficiency would still require modification of trust conditions in some instances, and would therefore be liable to such problems as well—but, because of the flexibility inherent in the rule of administrative efficiency and lacking in the RAP, the problem would arise far less often. See infra Part VI.A.

249. See supra notes 216-219 and accompanying text (discussing doctrine).
course, the trustee would continue to administer the trust until the trustee exhausted the principal. While it is theoretically possible that a transferor might explicitly elect such an obviously counterproductive course, effective in the end to benefit only the trustee, practically, it is extremely unlikely.

States could determine by their own lights whether they prefer the modifications arising under the rule to proceed under court direction after petition by the trustee, or upon the independent judgment of the trustee, constrained by fiduciary duty. States could elect to make this a default rule as well. However the decision is made, states should design it to do the will of the transferor as far as possible while bringing total administrative costs under the relevant threshold, and putting administration on a footing designed to allow it to remain under that floor for the foreseeable future, or, alternatively, to wind up the trust (if such would do the preferred intent of the transferor, or if no way existed to continue administering the trust at an appropriate level of expense). While there is some small danger that achieving the transferor’s intent in this process will prove as difficult as upon dissolution of the trust at the end of the RAP period, the added flexibility provided by the abolition of the RAP’s dissolution imperative will render that result far less likely. Returning to our regular example, assume that a transferor has established a trust, with the income from the trust to pay the educational expenses of “those of my descendants who attend law school.” The settlor’s intent here is not perfectly plain, but the things he obviously did not intend are quite clear: he did not intend that any descendants who did not attend law school should be beneficiaries; he did not intend that law-school-attendee descendants should receive benefits for purposes other than paying for law school; he did not intend that some but not all of his descendants who attended law school should benefit; and he did not intend that the principal of the trust be invaded to achieve his purposes.

Modifying this trust—either because so many descendants take advantage of it that administrative costs grow prohibitive, or because law school tuition continues to rise at so much faster a rate than market returns that the trust’s income proves insufficient to satisfy all demands—will of course require deviation from some of the transferor’s wishes. Specifically, either this modification will exclude

250. But see UNIF. TRUST CODE §§ 105(b)(4), 412(b) (2005) (providing, where adopted, that the settlor cannot vary by instrument the power of the court to modify an administration term that is “wasteful”).

251. See supra notes 246-248 and accompanying text.
some would-be beneficiaries, or the modifications will invade the
principal. Because the option of maintaining the trust remains,
however, some solution could be crafted that fulfills most of the
intentions of the transferor for as long as possible—a genuine second-
best result.

Compare this result to the result upon the forced distribution of
the trust at the end of the RAP period. The transfer, and the
transferor’s demonstrable intent, is the same. The court’s (or the
trustee’s) ability to establish and do the testator’s second-best intent,
however, is profoundly diminished. While the transferor explicitly did
not intend unconditional distributions to any beneficiaries, dissolution
of the trust requires it. But to whom should the distributions occur,
and for what purposes? To non-law school attendees? To law school
attendees for nontuition purposes? To some third party not
contemplated by the transferor at all for noncontemplated but
conceivably relevant purposes—say, to a local law school to establish a
scholarship fund? All of these are equally bad, and equally intent-
defeating options. All are unnecessarily forced by the RAP.

While the rule of administrative efficiency is presented in the
preceding paragraphs as a rule of trust administration, states could
extend it to apply to legal future interests as well as equitable ones—
assuming that states do not elect to abolish legal future interests
entirely.252 The rule would allow owners of conditional or fractional
legal interests to petition for modification of the conditional gifts when
the costs of administering the relevant interests reach a certain
threshold, or when, by contrast, the income or value of the property
subject to the relevant interests is sufficiently reduced as a result of the
conditional or fractional interests involved.253

B. Two Antistaleness Presumptions

Second, in response to the concern that conditions established by
nonprescient transferors will potentially continue to guide distributions
long into the future, states should adopt one of a pair of presumptions
to protect against inartful or incomplete drafting that could render the
conditions unintentionally stale in the face of changes in the law of
families and descent and/or social or technological developments. The
first of these presumptions would, in the absence of express language

252. See infra Part VI.D.
253. This rule is discussed in additional detail supra notes 216-221 and accompanying
text.
to the contrary, interpret class gifts so that the class of beneficiaries (for example, descendants, heirs) is determined using the definitions of those terms in place at the time each individual distribution is made, not the definitions in place when the transferor established the conditions. This will ensure that unless the transferor had expressed a contrary intent, the conditions established by the transfer will evolve along with changing legal, social, and technological conditions. A second, stronger measure (which would, unlike the first presumption, likely require legislative action) would deem changes in relevant beneficiary-class definitions to apply to transfers established before the change was made, despite any general language such as “as presently defined at law,” unless the application of a redefinition would directly violate a specific, explicit restriction established by the transferor. This stronger provision would, as considered above, make it virtually impossible for a transferor to guard against changed circumstances that the transferor could not foresee, and avoid any possibility that the transferor would accidentally fix her conditions to a single, time-fixed set of legal and social precepts as a result of language that could be characterized as boilerplate. Only classes that the transferor had defined specifically to include or exclude certain explicit characteristics would remain immutable—and only with regard to those explicit characteristics—in the face of change. Which of these options each state selects would be determined by how it balances the competing interests of donative freedom and social evolution, and whether it considers phrases like “as presently defined at law” to be boilerplate.

C. Public Policy Rejection of Noxious Conditions When They Become Noxious

Next, to avoid conditional gifts that create incentives or affect third parties in ways that the public determines to be insupportable, courts and legislatures must act at the time the conditions become noxious to forbid or texture their further application. Such conditions can potentially be seen, for example, in transferor efforts to influence would-be beneficiaries to make certain faith-based or life style decisions or to protect assets from a beneficiary’s creditors. If these conditions really are insupportable, then they should not be

254. See supra notes 179-201 and accompanying text.
255. See supra notes 175-178 and accompanying text (marry-in-faith discussion).
256. See supra notes 175-178 and accompanying text (discussion of spendthrift trusts).
supported—from the moment they grow insupportable, not from a couple of generations hence. Conditions that do not meet the threshold of noxiousness, though—and particularly conditions against which no reasonable objection can be raised—ought not to be mechanically struck down by a RAP. Determinations of nonenforcement should be made only warily and hesitantly, remembering always that the transferor had no obligation to make any transfer at all. Judges should also remember that the would-be beneficiary who is excluded from taking by a condition therefore has no cognizable claim to take, and is free always to live as she would have had no conditional transfer ever been made; and that but for the inclusion of the contested condition, the transferor might well have made a different transfer altogether. Hence, judges should almost always defer to the transferor’s express intent and permit the condition, unless the legislature has expressed the public policy of the state by forbidding such conditions, or unless the condition would violate a constitutional imperative.

D. Abolish the Rule Against Perpetuities, While Guarding Against Inalienable Long-Term Gifts

Finally, of course, those states that have not yet wholly abolished their RAPs should do so.

Of course, the argument mounted in this Article in favor of abolishing the RAP is premised on the notion that the conditional transfers under consideration are made free of alienation restrictions, a safe conclusion for the vast majority of such gifts in the modern world. It is always possible, though, that a transferor might attempt to make a perpetual, inalienable gift, such as a string of perpetual life estates in a fixed piece of family property. This hypothetical possibility could be dealt with in a number of ways. Jurisdictions could follow the British model and simply abolish legal life estates, instantly transforming any attempts at establishing such life estates into equitable interests as a matter of law. Alternatively, states could follow Professor Gallanis’s suggestion of imposing a fixed-term

257. See supra Part V.A.2.
—but only on attempts to establish perpetual, inalienable, conditional transfers. Thus, states could allow such transfers to remain inalienable for a certain number of years (Gallanis proposed ninety), and convert them automatically into fully alienable trusts after the end of the fixed period. The latter seems preferable because it makes some attempt to respect the owner and transferor’s wishes that certain specified property remain in the family for as long as the state deems reasonable, given the testator’s inability to foresee potential future consequences of inalienability. It is with regard to inalienability specifically, not broader general questions about “dead-hand control,” that issues of “‘stri[k] a fair balance between the desires of members of the present generation, and similar desires of succeeding generations,’” in consideration of “‘those persons and events which the Transferor knows and sees, and those which he cannot know or see,’” become coherently operative. On the other hand, a state might reasonably conclude, as some have done, that a good swap can be made by eliminating the RAP but also eliminating alienability restrictions entirely. Either of these options deals effectively with the remnant possibility of perpetual inalienability conditions, without any need to revive the RAP.

A less-favored hedge against full abolition would be to save a last vestige of the Rule to apply where parties who are descendants of the transferor and who would be the final beneficiaries in the event of a dissolution can show that the property (or an amount of property equal to it) subject to the transferor’s conditions was not earned by the testator, but was instead passed unencumbered from some familial ancestor. For all the reasons discussed above, however, and because this issue is not important enough in any case to justify maintaining the rickety, otherwise wholly unnecessary RAP, the Rule should be entirely abolished.

VII. CONCLUSION

While some of the concerns that animated the rise of the RAP remain, changing social, technological, and legal realities have significantly reduced or wholly eliminated most of these concerns.

259. See supra note 102 and accompanying text. Gallanis, of course, proposed a ninety-year limit on all attempted perpetuities.

260. Tentative Draft, supra note 19, at 114 (quoting HOBHOUSE, supra note 88, at 188; Simes, supra note 87, at 723).

261. See, e.g., Dukeminier & Krier, supra note 4, at 1313 (citing IDAHO CODE § 55-111 (2000); S.D. CODIFIED LAWS § 43-5-1, -8 (1997); WIS. STAT. ANN. § 700.16 (West 2001)).
The concern that long-term or perpetual conditional gifts would lock up property in inalienable suspension has largely evaporated. Of the types of conditions that transferors can place on gifts, one type—principal-preserving conditions—cannot, \textit{a priori}, harm either general social welfare or the welfare of potential but as-yet unidentified beneficiaries, while the settlor can be expected fully to have accounted for the effects of the conditions on already extant beneficiaries. The other type—gate-keeping conditions—prove largely beneficial or innocuous. States can deal with those conditions that grow cumbersome or noxious with simple rules that will apply when those eventualities occur. Concerns that these gate-keeping rules will grow inconsonant with changing social or technological realities are overblown, but states can deal with them by small changes to interpretive presumptions.

The ALI authors have argued that states must revive the RAP to thwart perpetual, conditional gifts, in part because the conditions that inform those gifts might grow unfit for future purpose. In the end, though, it is the RAP that has outlived its usefulness—its blunt, unnuanced features designed for and fitted to an age long past. The Rule Against Perpetuities is the dead hand that must finally be interred.