

## THE LURKING RULE AGAINST ACCUMULATIONS OF INCOME

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### I. INTRODUCTION

The Rule Against Perpetuities is dying an ignoble death. To attract trust business and the lawyers' fees and trustees' commissions that come with it, twenty-one states have abolished the Rule as applied to interests in trust.<sup>1</sup> These states have thus authorized perpetual trusts. Real money is at stake. In a recent empirical study, Max Schanzenbach and I found that, through 2003, roughly \$100 billion in trust assets have poured into the abolishing states.<sup>2</sup> Not surprisingly, perpetual trust legislation is under consideration in several of the states that have not yet abolished the Rule.<sup>3</sup>

But the Rule Against Perpetuities is not the only rule of property law that bears on trust duration. Another, the rule against accumulations of income, limits the time during which a settlor may direct the trustee to accumulate and retain income in trust to the applicable perpetuities period.<sup>4</sup> In the typical case, compliance with the Rule Against Perpetuities ensures compliance with the rule against accumulations. Hence, for 200 years, the rule against accumula-

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<sup>1</sup> The position of all the states is collected in Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 *YALE L.J.* 356, 430–33 tbl.5 (2005).

<sup>2</sup> The \$100 billion figure is a point estimate. For discussion of its calculation and confidence interval, see *id.* at 404 n.125. Note also that we could not ascertain the extent to which these assets are in perpetual or transfer-tax-exempt trusts. See *id.* at 411.

<sup>3</sup> See Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 *U. KAN. L. REV.* 595, 604 n.45 (2005) (collecting pending legislation).

<sup>4</sup> According to the *Restatement (Second) of Property: Donative Transfers*:

An accumulation of trust income occurs when part or all of the current income of the trust can be and is retained in the trust, or can be and is so applied by the trustee as to increase the fund subject to the trust, and such retention or application is not found to be merely in the course of judicious management of the trust.

RESTATEMENT (SECOND) PROP.: DONATIVE TRANSFERS § 2.2(4) (1983).

tions of income has lurked in the shadow of its older and more distinguished cousin, the Rule Against Perpetuities.

With the erosion of the Rule Against Perpetuities, however, the rule against accumulations of income may have newfound relevance. Perpetual trusts are more likely than ordinary trusts to prescribe accumulations of income,<sup>5</sup> and such trusts are designed to endure beyond the traditional perpetuities period of lives in being plus twenty-one years. This Essay examines the lurking rule against accumulations of income, its relation to the rise of the perpetual trust, and the contemporary policy soundness of the accumulations rule. Part II reviews the Rule Against Perpetuities. Part III offers a history of the rule against accumulations of income. Part IV discusses the rise of the perpetual trust and relevant estate and income tax considerations. Part V assesses the relevance of the rule against accumulations for perpetual trusts. Part VI assesses the contemporary policy soundness of the rule against accumulations. Part VII concludes.

## II. THE RULE AGAINST PERPETUITIES

The Rule Against Perpetuities is a rule against remote vesting. The classic formulation is that of John Chipman Gray: “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.”<sup>6</sup> The period of the Rule reflects a common law policy that a transferor should be allowed to tie up property only for as long as the life of anyone possibly known to the transferor plus the period of the next generation’s minority (hence lives in being plus twenty-one years).<sup>7</sup>

The Rule is said to have two purposes: (1) to keep property marketable, and (2) to limit “dead hand” control. Preventing indefinite fracturing of property ownership implements the first purpose. The idea is that ownership of land periodically will be reconstituted into fee simple because all contingent future interests in the property must vest or fail within the perpetuities period.

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<sup>5</sup> This claim is defended *infra* notes 48–53 and accompanying text.

<sup>6</sup> JOHN C. GRAY, THE RULE AGAINST PERPETUITIES § 201, at 191 (4th ed. 1942). The Rule as it is known today originated in the *Duke of Norfolk’s Case*, (1682) 22 Eng. Rep. 931 (Ch.). See JESSE DUKE-MINIER, STANLEY M. JOHANSON, JAMES LINDGREN & ROBERT H. SITKOFF, WILLS, TRUSTS AND ESTATES 672 (7th ed. 2005); LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 1172–74 (3d ed. 2002); George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19 (1977).

<sup>7</sup> See 6 AMERICAN LAW OF PROPERTY § 24.16, at 51 (A. James Casner ed., 1952) (noting that the Rule permits “a man of property . . . [to] provide for all of those in his family whom he personally knew and the first generation after them upon attaining majority”). As Hobhouse put it:

A clear, obvious, natural line is drawn for us between those persons and events which the Settlor knows and sees, and those which he cannot know and see. Within the former province we may trust his natural affections and his capacity of judgment to make better dispositions than any external Law is likely to make for him. Within the latter, natural affection does not extend, and the wisest judgment is constantly baffled by the course of events.

ARTHUR HOBHOUSE, *The Devolution and Transfer of Land, Delivered at the Social Sciences Congress at Leeds*, in THE DEAD HAND 188 (London, Chatto & Windus 1880).

However, if a future interest is created in trust and the trustee has the power to sell the trust property, as is typical,<sup>8</sup> the trust form overcomes the concern with marketability.<sup>9</sup>

The dead-hand rationale for the Rule is best understood as a response to the disagreeable consequences that can arise from unanticipated circumstances.<sup>10</sup> The Rule implements this anti-dead-hand policy by curbing future interests that, after some period of time and change in circumstances, tie up the property in potentially disadvantageous arrangements. As Brian Simpson explains, “given that one can, to a limited extent only, foresee the future and the problems it will generate, landowners should not be allowed to tie up lands for periods outside the range of reasonable foresight.”<sup>11</sup> Forever is a long time.

In a jurisdiction that has retained the Rule Against Perpetuities, the identity of all persons with a claim to the underlying trust property will be ascertained within the perpetuities period. Once all the beneficiaries are ascertained, they can terminate the trust when the perpetuities period expires. The settlor cannot prevent this. If the beneficiaries do not terminate the trust, the trust corpus will be distributed to the principal beneficiaries when the preceding life estates expire.<sup>12</sup>

### III. THE RULE AGAINST ACCUMULATIONS OF INCOME

The rule against accumulations of income originated in *Thellusson v. Woodford*,<sup>13</sup> a decision of the House of Lords rendered in 1805. At issue was the will of Peter Thellusson, “an enormously rich merchant and financier” who died in 1797.<sup>14</sup> Thellusson’s will provided that the bulk of his considerable estate, plus all the income it would earn during the lives of his nine surviving male descendants, should be accumulated for the ultimate benefit of his

<sup>8</sup> The modern trustee’s default powers are broad. See UNIF. TRUST CODE §§ 815–816 (2000); RESTATEMENT (THIRD) OF TRUSTS § 85 (Tentative Draft No. 4, 2005); DUKEMINIER ET AL., *supra* note 6, at 777–78; John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 640–43 (1995).

<sup>9</sup> See LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 40–42 (1955).

<sup>10</sup> Compare T.P. Gallanis, *The Rule Against Perpetuities and the Law Commission’s Flawed Philosophy*, 59 CAMBRIDGE L.J. 284 (2000), with ENGLISH LAW COMM’N, THE RULES AGAINST PERPETUITIES AND EXCESSIVE ACCUMULATIONS 5, 8, 20 (1998), and SIMES, *supra* note 9, at 58–59.

<sup>11</sup> A.W.B. SIMPSON, LEGAL THEORY AND LEGAL HISTORY 159–60 (1987). Simpson continues: “The good patriarch looks into the future, but not too long. . . . The compromise which English law adopted was to allow property to be tied up for the lifetime of someone in existence at the time of the settlement and a reasonable period thereafter—for example, a minority.” *Id.* at 160.

<sup>12</sup> RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 2.1 (1983); 1A AUSTIN W. SCOTT, LAW OF TRUSTS § 62.10 (William F. Fratcher ed., 4th ed. 1987); see also ELIAS CLARK ET AL., GRATUITOUS TRANSFERS 769 (4th ed. 1999).

<sup>13</sup> (1805) 32 Eng. Rep. 1030 (Ch.). See generally RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 2.2 cmt. a; WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES 485–87 (3d ed. 2004); PATRICK POLDEN, PETER THELLUSSON’S WILL OF 1797 AND ITS CONSEQUENCES ON CHANCERY LAW (2002).

<sup>14</sup> POLDEN, *supra* note 13, at 1.

oldest surviving male descendant at the end of that period.<sup>15</sup> Thellusson thus deviated substantially from the normal practice in which the father left his estate either to the oldest son or to all the sons equally.<sup>16</sup> As Patrick Polden explains, “This placed the family in an unprecedented and disturbing situation. Like some perverted tontine, it left some of them, who were themselves unable to enjoy any of the money, postponing by their continuing existence its distribution to those golden lads for whom it seemed destined.”<sup>17</sup>

Thellusson’s family challenged the will. Eventually the case made it to the House of Lords. Speaking through Lord Eldon, the House of Lords concluded that there was no violation of the Rule Against Perpetuities. The interest in Thellusson’s oldest male descendant would vest at the end of the specified measuring lives. It mattered not that none of the measuring lives was a beneficiary.

Lord Eldon then turned to the question of whether the bequest violated a separate rule against excessive accumulations of income:

[A]nother question arises out of this Will; which is a pure question of equity: whether a testator can direct the rents and profits to be accumulated for that period, during which he may direct, that the title shall not vest, and the property shall remain unalienable; and, that he can do so, is most clear law.<sup>18</sup>

Thus the House of Lords held that, under the common law, a direction to accumulate income during the period of the Rule Against Perpetuities is valid.

Although sanctioned by the House of Lords in 1805, Thellusson’s accumulation plan was both sensational and quite unpopular. Given the magic of compound interest, “[t]he English public was shocked at the possibilities of accumulating large fortunes after the manner of the Thellusson will.”<sup>19</sup> One well-known estimate projected that Thellusson’s accumulation would grow from £600,000 to somewhere between £19 and £38.4 million.<sup>20</sup> The Lord Chancellor who heard the case prior to its appeal to the House of Lords called Thellusson’s plan “unkind” and “illiberal.”<sup>21</sup> Tapping into these intuitions, the family’s counsel “came up with the phrase ‘posthumous avarice,’ which has attached itself to Thellusson’s will ever since.”<sup>22</sup>

Thellusson’s accumulation plan was so unpopular that soon after the Lord Chancellor upheld it, before the House of Lords rendered its decision on ap-

<sup>15</sup> Polden excerpts the relevant provisions of Thellusson’s will and cogently summarizes them in modern English. *Id.* at 138–40.

<sup>16</sup> *Id.* at 133.

<sup>17</sup> *Id.* at 4; see also W. Barton Leach, *Perpetuities in Perspective: Ending the Rule’s Reign of Terror*, 65 HARV. L. REV. 721, 726 (1952) (stating that the “family-dynasty mentality flourished in the eighteenth century and reached a fine fruition in the will of Peter Thellusson”).

<sup>18</sup> *Thellusson*, 32 Eng. Rep. at 1043.

<sup>19</sup> SIMES, *supra* note 9, at 86.

<sup>20</sup> POLDEN, *supra* note 13, at 194, 258.

<sup>21</sup> *Thellusson v. Woodford*, (1799) 31 Eng. Rep. 117, 173 (Ch.).

<sup>22</sup> POLDEN, *supra* note 13, at 144.

peal, Parliament enacted the Thellusson Act.<sup>23</sup> The Act limited accumulations of income to (1) the life of the settlor; (2) twenty-one years from the death of the settlor; (3) the minority of any person living (or in gestation) at the time of the settlor's death; or (4) the minority of any person who, upon majority, would be entitled to the income being accumulated. This statutory rule against accumulations remains good law in England today.<sup>24</sup>

Just as the fear of compounding interest and exponentially growing trust funds inflamed passions about the dead hand in England, Peter Thellusson's "posthumous avarice" was likewise met with hostility in this country. Indeed, one Pennsylvania judge expressed fear that such a trust might "draw into its vortex all the property in the state."<sup>25</sup> Several states adopted statutes similar to the Thellusson Act or, in the case of New York and a few other states, an even more restrictive one.<sup>26</sup>

History, however, has proved the worry over Peter Thellusson's accumulation scheme to have been misplaced. When his grandson Charles died in 1856, Thellusson's trust came to an end, but the predicted vast fortune had not materialized. As Polden aptly observed, "nearly sixty years of accumulation had not produced one million pounds let alone thirty. From being a public menace, Peter Thellusson had become a laughing stock."<sup>27</sup>

For an accumulation trust to amass a concentration of disproportionate wealth, its investment portfolio must outperform all other investments—a nearly impossible feat. Indeed, until recently trust investment law encouraged overinvestment in "long-term fixed-return obligations such as mortgages and bonds."<sup>28</sup> Moreover, as compared to outright ownership, the trust form introduces additional fees and commissions—particularly where, as in Thellusson's case, the trust is a testamentary trust that remains subject to court supervision.<sup>29</sup>

Not surprisingly, other accumulation plans have also failed. Perhaps the most famous, the design of which (but not the result) was probably known to Thellusson when he executed his will, is Benjamin Franklin's.<sup>30</sup> When Frank-

<sup>23</sup> 1800, 39 & 40 Geo. 3, c. 98. The statute did not apply in the litigation over Thellusson's will.

<sup>24</sup> See D.J. HAYTON, *THE LAW OF TRUSTS* 107–08 (4th ed. 2003); PAUL TODD & SARAH WILSON, *TEXTBOOK ON TRUSTS* 191–93 (6th ed. 2003). In 1998 the English Law Commission recommended repealing the rule against accumulations. See *ENGLISH LAW COMM'N*, *supra* note 10, at 128–29. Parliament has not acted on the Law Commission's recommendation.

<sup>25</sup> *Hillyard v. Miller*, 10 Pa. 326, 336 (1849).

<sup>26</sup> See *RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFER* § 2.2 statutory note (1983); 5 WILLIAM J. BOWE & DOUGLAS H. PARKER, *PAGE ON THE LAW OF WILLS* § 42.14, at 317–22 (rev. ed. 1962); SIMES, *supra* note 9, at 86–88. For discussion of the more restrictive statutes, see 10 POWELL ON REAL PROPERTY ¶¶ 834–835 (Michael Allan Wolf ed., 2000).

<sup>27</sup> POLDEN, *supra* note 13, at 7.

<sup>28</sup> John H. Langbein & Richard A. Posner, *Market Funds and Trust-Investment Law*, 1976 AM. B. FOUND. RES. J. 1, 4. The modern law is discussed *infra* notes 79–80 and accompanying text.

<sup>29</sup> See *DUKEMINIER ET AL.*, *supra* note 6, at 318–19.

<sup>30</sup> See POLDEN, *supra* note 13, at 146–47.

lin died in 1790, he left two charitable trusts of £1000 each that were directed to accumulate income with no payouts for 100 years, then to spend most of the principal for the benefit of public purposes in Boston and Philadelphia, and then to accumulate again for another 100 years.<sup>31</sup> Both trusts performed relatively poorly, with the Boston trust drawing less than \$5 million into its vortex by 1990 and the Philadelphia trust sucking in less than half that amount.<sup>32</sup> As David Hayton puts it: “The economic and social fears of accumulation have proved groundless.”<sup>33</sup>

In the twentieth century, “the tide turned in this country against the strict type of legislation for which the Thellusson Act was a model.”<sup>34</sup> Today, in states with a statutory rule against accumulation of income in private trusts, the accumulation period is typically the same as the period of the Rule Against Perpetuities.<sup>35</sup> Under such statutes Thellusson’s will would be upheld.

In part because the English courts did not develop their accumulations rule before American independence, ambiguity remained in states without accumulations statutes about whether there was an American common law rule against accumulations, and if so, for what duration accumulations would be permitted. This ambiguity was resolved in 1941 by the D.C. Circuit’s authoritative decision in *Gertman v. Burdick*.<sup>36</sup>

At issue in *Gertman* was a bequest in trust to accumulate income during the lives of two named people and then for twenty-one years after the death of the survivor of them. In a learned opinion by Judge Fred Vinson, who would later become Chief Justice of the United States, the court upheld the bequest: “[A] rule permitting accumulations for as long as the period of the Rule Against Perpetuities . . . has been the common law of this country.”<sup>37</sup> The rule

<sup>31</sup> Charitable trusts are exempt from the Rule Against Perpetuities and the rule against accumulations.

<sup>32</sup> See Clark DeLeon, *Divvying up Ben: Let’s Try for 200 More*, PHILA. ENQUIRER, Feb. 7, 1993, at B2.

In the amusing case of *Marsh v. Frost National Bank*, 129 S.W.3d 174 (Tex. App. 2004), the court held that a bequest “to provide a million dollar trust fund for every American 18 years or older” by accumulating income for 346 years on the proceeds from the sale of certain property was not charitable and hence violated the Rule Against Perpetuities. The testator had wanted the trust “to be called the James Madison Fund to honor our fourth president, James Madison, the Father of the Constitution” and for the President, Vice President, and the Speaker of the House of Representatives to be the “permanent Trustees of the Fund.” *Id.* at 176. If *Marsh* had arisen in a state that had abolished the Rule Against Perpetuities, the trust might still have been invalid for want of an ascertainable beneficiary. See RESTATEMENT (THIRD) OF TRUSTS § 44 (2003).

<sup>33</sup> HAYTON, *supra* note 24, at 108.

<sup>34</sup> SIMES, *supra* note 9, at 88.

<sup>35</sup> See, e.g., CAL. CIV. CODE § 724 (West 2005) (keyed to the “time . . . permitted for the vesting of future interests”); N.Y. EST. POWERS & TRUSTS LAW § 9-2.1(b) (McKinney 2005) (keyed to Rule Against Perpetuities); 20 PA. CONS. STAT. ANN. § 6106(b) (2005) (keyed to Rule Against Perpetuities).

<sup>36</sup> 123 F.2d 924 (D.C. Cir. 1941). On the authoritativeness of *Gertman*, see RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 2.2 reporter’s note 3 (1983); SIMES, *supra* note 9, at 93.

<sup>37</sup> *Gertman*, 123 F.2d at 931.

against accumulations was therefore recognized as a doctrine independent from the Rule Against Perpetuities, though the accumulations rule's durational limit was that of the applicable perpetuities period.

Because the durational limit under the two rules is the same, compliance with the Rule Against Perpetuities typically ensures compliance with the rule against accumulations—but not always. Here is an example of a transfer that is valid under the Rule Against Perpetuities but offends the rule against accumulations:

*O* bequeaths a fund in trust to *T* “to pay so much of the income to *A* during *A*'s life as *T* may determine, then to pay so much of the income to *A*'s children for their lives as *T* may determine, then to pay the remainder to *B*.” At *O*'s death, *A* has no children.

*A*'s life estate is vested in possession upon *O*'s death; the life estate in *A*'s children will vest in possession or, if there are no children, fail, upon *A*'s death; and *B*'s remainder is vested in interest upon *O*'s death. Because all interests will vest or fail within lives in being plus twenty-one years, the transfer is valid under the Rule Against Perpetuities.

However, *T* has discretion to accumulate income in the trust after the perpetuities period for this trust, which is twenty-one years after the death of the survivor of *A* and *B*. This could happen, for example, if *A* has a child *C* who survives *A* and *B* by more than twenty-one years. In some states, the accumulation is void as to the excess; in others, the accumulation is void in its entirety.<sup>38</sup>

#### IV. TAXES AND THE RISE OF THE PERPETUAL TRUST<sup>39</sup>

Since 1986, a host of states have abolished the Rule Against Perpetuities as applied to interests in trust.<sup>40</sup> The driving force for this abrupt turn-

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<sup>38</sup> “There is judicial support for the position that an accumulation is void only as to the excess, with some jurisdictions at common law holding that a direction for accumulation is wholly void if for a period in excess of that allowed by the common law.” RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 2.2 reporter's note 1.

<sup>39</sup> With a tip of the hat to Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303 (2003). See also Sitkoff & Schanzenbach, *supra* note 1, on which this Part freely draws.

<sup>40</sup> This statement glosses over a host of doctrinal nuances. Some states have abolished the Rule altogether. Some have abolished it as applied to trusts in which the trustee has the power to sell the trust assets and then reinvest the proceeds (in the technical jargon, as applied to trusts that do not suspend the power of alienation). Some have abolished it as applied to personal property. Some have established such lengthy (360 or even 1000 years) perpetuities periods that in those states the Rule is barely recognizable. In still others, the Rule, which had always been viewed as a mandatory rule to curtail the dead hand, has been changed to a default rule that applies unless the settlor provides otherwise. These distinctions have been parsed elsewhere. See, e.g., Note, *Dynasty Trusts and the Rule Against Perpetuities*, 116 HARV. L. REV. 2588, 2590–95 (2003); Tate, *supra* note 3, at 603 n.44. Because these distinctions are immaterial to the present discussion, however, for the sake of simplicity the term “abolition” is used to

about was not a careful reconsideration of the ancient policy against perpetuities, but rather a 1986 reform to the federal tax code.<sup>41</sup> Under the 1986 code (as amended through 2005), a transferor can pass \$1 million during life or \$1.5 million at death free from federal estate, gift, and generation-skipping transfer (“GST”) taxation (collectively the federal wealth transfer taxes).<sup>42</sup> By passing this \$1 million or \$1.5 million in trust, a transferor can ensure that successive generations benefit from the trust fund, free from federal transfer taxes, for as long as state perpetuities law will allow the trust to endure. In a state that has abolished the Rule, successive generations can benefit from the trust fund, free from federal wealth transfer taxation, *forever*.

Accordingly, the race to abolish the Rule is a race to attract trust funds by opening a loophole in the federal wealth transfer taxes. In contrast to the days of old, in which the patrimony was typically ancestral land, wealth today generally takes the form of liquid financial assets,<sup>43</sup> which are easily moved from one state to another. To ensure the desired choice of law, the settlor is usually advised not only to provide in the trust instrument what law is to govern, but also to give the chosen state a nexus by naming an in-state trustee and giving that trustee custody of the trust fund.<sup>44</sup> Therein lies the political economy of the Rule’s demise. Local bankers and trust lawyers have lobbied for its abolition.<sup>45</sup>

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refer to any change that would allow a perpetual trust. See Sitkoff & Schanzenbach, *supra* note 1, at 377–78.

On the erosion of the Rule Against Perpetuities, see generally Bloom, *infra* note 42; Verner F. Chaffin, *Georgia’s Proposed Dynasty Trust: Giving the Dead Too Much Control*, 35 GEORGIA L. REV. 1 (2000); Joel C. Dobris, *The Death of the Rule Against Perpetuities, or the RAP Has No Friends—An Essay*, 35 REAL PROP. PROB. & TR. J. 601 (2000); Dukeminier & Krier, *supra* note 39; Stephen E. Greer, *The Alaska Dynasty Trust*, 18 ALASKA L. REV. 253 (2001); Eric Rakowski, *The Future Reach of the Disembodied Will*, 4 POL. PHIL. & ECON. 91 (2005); Sitkoff & Schanzenbach, *supra* note 1; Steven E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097 (2003); Tate, *supra* note 3; Angela M. Vallario, *Death by a Thousand Cuts: The Rule Against Perpetuities*, 25 J. LEGIS. 141 (1999).

<sup>41</sup> See Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes: Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. (forthcoming 2006) (concluding that tax considerations, not transferors’ desire for control, sparked the movement to abolish the Rule).

<sup>42</sup> The specifics of the wealth transfer taxes that have stimulated the race toward perpetual trusts are detailed in Sitkoff & Schanzenbach, *supra* note 1, at 370–73. See also Ira Mark Bloom, *The GST Tax Tail Is Killing the Rule Against Perpetuities*, 87 TAX NOTES 569 (2000); Dukeminier & Krier, *supra* note 39, at 1312–13.

<sup>43</sup> See John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988).

<sup>44</sup> The relevant choice of law considerations are examined in Sitkoff & Schanzenbach, *supra* note 1, at 117. See also Sterk, *supra* note 40, at 2103–04; Jeffrey A. Schoenblum, *Reaching for the Sky or Pie in the Sky: Is U.S. Onshore Trust Reform an Illusion?*, in EXTENDING THE BOUNDARIES OF TRUSTS AND OTHER RING-FENCED FUNDS IN THE TWENTY-FIRST CENTURY 291 (David Hayton ed., 2002).

<sup>45</sup> Dobris puts it bluntly: “When the bankers want something, they get it.” Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don’t Have to Think of England Anymore*, 62 ALB. L. REV. 543, 572 (1998). This is an interest group story of jurisdictional competition

The amount of money at stake is staggering. In an empirical study based on state-level panel data assembled from annual reports by institutional trustees to federal banking authorities, Max Schanzenbach and I found that, through 2003, a state's abolition of the Rule increased its trust assets by \$6 billion (a twenty percent increase on average) and increased its average trust account size by \$200,000.<sup>46</sup> These estimates imply that, through 2003, roughly \$100 billion in trust assets have moved as a result of the abolition of the Rule.<sup>47</sup> That figure represents roughly ten percent of the total reported trust assets in 2003 of about \$1 trillion.

There is yet another relevant tax consideration. For federal income tax purposes, trusts are treated as conduit or pass-through entities.<sup>48</sup> Income distributed to a beneficiary in the year it is received is taxable to the beneficiary, not to the trust; income that is not so distributed is taxable to the trust, not the beneficiary. For the last twenty years, the federal tax rates applicable to individuals have been significantly less than those applicable to trusts.<sup>49</sup> The Internal Revenue Code thus creates an incentive for trust income to be distributed to the beneficiaries in the year it is received. Moreover, because the states that levy a tax on retained trust income follow a similar pass-through model,<sup>50</sup> state income taxes are likewise avoided.

Unlike an ordinary trust, however, a transfer-tax-exempt perpetual trust has a different timeframe and purpose that might warrant accumulation of income in spite of the federal income tax penalty. Income accumulated in such a trust is exempt from subsequent wealth transfer taxation, but those dollars lose their exempt status upon distribution to a beneficiary. The federal income tax penalty for accumulating income in trust is not trivial, but its effect is less severe than that of the federal transfer taxes, the top rate for

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in trust law. See Sitkoff & Schanzenbach, *supra* note 1, at 416–18; Sterk, *supra* note 40, at 2103–04; see also Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987) (applying public choice theory to jurisdictional competition in corporate law); Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. CHI. L. REV. 1103, 1143–44 (2002) (same). In a related vein, Larry Ribstein has argued that lawyer licensing “encourages lawyers to participate in lawmaking by capitalizing the benefits of their law-improvement efforts in the value of the law license.” Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 299 (2004).

<sup>46</sup> See Sitkoff & Schanzenbach, *supra* note 1, at 410–11.

<sup>47</sup> To repeat, the \$100 billion figure is a point estimate. Further, we could not ascertain the extent to which these assets are in perpetual or transfer-tax-exempt trusts. See *supra* note 2.

<sup>48</sup> See Jeffrey G. Sherman, *All You Really Need to Know About Subchapter J You Learned from This Article*, 63 MO. L. REV. 1, 12 (1998).

<sup>49</sup> See *id.* at 5, 37; 1 STAND. FED. TAX REP. (CCH) 1987 ¶ 421.05; see also MCGOVERN & KURTZ, *supra* note 13, at 705; JEFFREY N. PENNELL, *WEALTH TRANSFER PLANNING AND DRAFTING* 17-2 (2005) (stating that the rates applicable to trusts “by far are the most onerous applicable to any taxpayer under the Code”). The current rates are stated in I.R.C. § 1 (LexisNexis 2005).

<sup>50</sup> See MAX GUTIERREZ & FREDERICK R. KEYDEL, *ACTEC STUDY 6: STATE TAXATION ON INCOME OF TRUSTS WITH MULTI-STATE CONTACTS* 12 (2001); Bradley E.S. Fogel, *State Income Taxation of Trusts*, PROB. & PROP., July–Aug. 2005, at 36, 39.

which was forty-seven percent in 2005 and is forty-six percent in 2006.<sup>51</sup> In contrast to the income tax, which reduces the trust's rate of growth, the wealth transfer taxes eat into the corpus of the trust. Hence, for a transfer-tax-exempt trust, it may be a sensible long-term strategy to incur a present income tax liability in order to avoid a bigger future transfer tax bill. Further, unless some income is retained, the trust will lose value because of inflation.

Against this it could be argued that distributed income will be spent by the beneficiary and so not subject to the estate tax. The relevant perspective, however, is that of the settlor *ex ante*. In view of the foregoing tax considerations, authorizing the trustee to retain income is both sensible and standard boilerplate in perpetual trust forms.<sup>52</sup> To the extent any of the trust income is not needed by the beneficiary, retaining that income in trust preserves the option of passing it to the next generation free of transfer taxation.

The foregoing intuitions are consistent with the results of my empirical study with Schanzenbach. We found that, by itself, whether a state levied an income tax on trust funds attracted from out of state had no observable effect on the state's reported trust assets. But when we tested the interactive effect of a state's income tax and perpetuities laws, we found that only those states that did not tax the income in trusts attracted from out of state experienced an inflow of assets after abolishing the Rule.<sup>53</sup> These results suggest that settlors of perpetual trusts are quite sensitive to state taxation of retained trust income, a consideration that is relevant only if the settlor contemplates accumulation of income in the trust.

So there is good reason to suppose that many perpetual trusts at least give the trustee discretion to accumulate income. Because such trusts may endure for longer than the common law perpetuities period of lives in being plus twenty-one years, the question arises, do they violate the rule against accumulations?

## V. THE LURKING RULE AGAINST ACCUMULATIONS

Delaware, Illinois, and South Dakota, which are among the most aggressive of the perpetual trust states, have each dealt with the interaction of

<sup>51</sup> I.R.C. §§ 2641, 2001.

<sup>52</sup> Here is a model clause devised by Richard Nanno, managing director and trust counsel at the Wilmington Trust Company in Delaware:

During the beneficiary's life, Trustee may, from time to time, distribute to the beneficiary and his or her issue all, some, or none of the net income and/or principal as Trustee, in its sole discretion, deems appropriate, after taking account of all other sources of funds available to them. Trustee shall accumulate any net income not so distributed and add it to principal, to be disposed of as a part of it.

RICHARD W. NENNO, DELAWARE DYNASTY TRUSTS, TOTAL RETURN TRUSTS, AND ASSET PROTECTION TRUSTS 163–64 (2005).

<sup>53</sup> See Sitkoff & Schanzenbach, *supra* note 1, at 410–11.

the rule against accumulations and perpetual trusts by legislation. Delaware abrogated the rule against accumulations,<sup>54</sup> Illinois now provides that the accumulations rule does not apply to trusts in which the settlor opts out of the Rule Against Perpetuities,<sup>55</sup> and South Dakota repealed its statutory rule against accumulations.<sup>56</sup>

In states without legislative action, the law is less clear. Because the common law rule against accumulations absorbs the period of the applicable Rule Against Perpetuities, it is arguable that statutory perpetuities reform likewise reforms the accumulations rule.<sup>57</sup> In 1999, however, the Supreme Judicial Court of Maine held oppositely in *White v. Fleet Bank*.<sup>58</sup> At issue in *White* was a holographic will that contained a bequest in trust from which three-fourths of the income would be paid to the testator's lineal descendants and the other one-fourth would be "reinvested annually for the increase of funds in the Trust."<sup>59</sup> The trust was to continue, "following the lines of direct descent, as long as the Trust may be made to endure."<sup>60</sup>

Regarding the Rule Against Perpetuities, the court held that the quoted language was a saving clause such that, under the then-applicable Maine wait-and-see legislation, the bequest was valid. Under the wait-and-see mode of perpetuities reform, the court waits to see if, in light of actual rather than possible events, an interest will vest or fail outside of the perpetuities period.<sup>61</sup> In *White*, it was possible that all future income interests would vest within the perpetuities period.

The next issue was whether the bequest offended the rule against accumulations of income. The trustee argued that Maine's wait-and-see perpetuities reform also applied to the accumulations rule.<sup>62</sup> On this approach, the reinvestment clause would be "valid until the period of the rule against perpetuities expires . . . and any accumulation thereafter [would be] invalid."<sup>63</sup> Applied to the facts in *White*, because the reinvestment clause did not refer-

<sup>54</sup> DEL. CODE ANN. tit. 25, § 506 (2004).

<sup>55</sup> 765 ILL. COMP. STAT. ANN. 315/1 (West 2001).

<sup>56</sup> 1998 S.D. Sess. Laws 417.

<sup>57</sup> See William R. Cohen, *The Rule Against Accumulations and "Wait and See,"* 33 TEMP. L.Q. 34, 55–57 (1959).

<sup>58</sup> 739 A.2d 373 (Me. 1999); see MCGOVERN & KURTZ, *supra* note 13, at 486; VALERIE J. VOLLMAR ET AL., AN INTRODUCTION TO TRUSTS AND ESTATES 1010–11 (2003); William P. LaPiana, *Recent Non-Tax Developments*, in ALI-ABA COURSE OF STUDY MATERIALS: ESTATE PLANNING IN DEPTH 131–32 (2000); Ronald Volkmer, *New Fiduciary Decisions: Rule Against Accumulations*, 27 EST. PLAN. 184 (2000); Karen J. Sneddon, Comment, *The Sleeper Has Awakened: The Rule Against Accumulations and Perpetual Trusts*, 76 TUL. L. REV. 189 (2001).

<sup>59</sup> *White*, 739 A.2d at 375.

<sup>60</sup> *Id.* at 376.

<sup>61</sup> See DUKEMINIER ET AL., *supra* note 6, at 698; WAGGONER ET AL., *supra* note 6, at 1234–35.

<sup>62</sup> *White*, 739 A.2d at 380.

<sup>63</sup> RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 2.2 (1983); see *White*, 739 A.2d at 380.

ence any life in being, the trustee's approach would permit twenty-one years of accumulation.

The court rejected the trustee's argument, holding instead that the Maine wait-and-see legislation applied only to the Rule Against Perpetuities. The court thus held the reinvestment clause void from the outset because it was not limited to the applicable perpetuities period of twenty-one years. Since there was no provision for distribution of the trust corpus or accumulated income, the court ordered the property subject to the reinvestment clause to be disbursed to the testator's intestate heirs on resulting trust (a resulting trust is an equitable reversion).<sup>64</sup>

Notwithstanding the decision in *White*, for at least three reasons perpetual trusts that prescribe accumulations of income are probably not vulnerable to attack on the basis of the common law rule against accumulations. Two are practical. First, the issue arises only in the subset of perpetual trusts involving accumulations of income that are located outside of states such as Delaware, Illinois, and South Dakota that have addressed the question through legislation. Second, if the lurking rule against accumulations does undermine perpetual trusts, corrective legislation is likely to ensue. Local bankers and lawyers who were able to secure abolition of the Rule Against Perpetuities are likely also to be able to get the rule against accumulations revised in the legislatures.

Third, the reasoning in *White* is distinguishable in a jurisdiction that has abolished the Rule Against Perpetuities in a deliberate effort to authorize perpetual trusts. Recall that *White* involved not the abolition of the Rule, but rather the enactment of wait-and-see. Wait-and-see legislation does not actually lengthen the perpetuities period. Instead, it modifies the application of that period.

By contrast, in a state that has abolished the Rule Against Perpetuities, permitting perpetual trusts, the effective period of the Rule is infinite—the perpetuities period itself is modified. Since the common law rule against accumulations of income absorbs the applicable perpetuities period, in such a state the permissible accumulation period should likewise be infinite. The most recent edition of the Powell treatise on property predicts that the cases will so hold,<sup>65</sup> and in an article on perpetuities reform, Jesse Dukeminier reasoned similarly.<sup>66</sup> Consider again Lord Eldon's opinion in *Thellusson*:

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<sup>64</sup> See RESTATEMENT (THIRD) OF TRUSTS § 7 (2003); DUKEMINIER ET AL., *supra* note 6, at 511.

<sup>65</sup> 10 POWELL ON REAL PROPERTY, *supra* note 26, ¶ 76-22.

<sup>66</sup> Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities, Ninety Years in Limbo*, 34 UCLA L. REV. 1023, 1041-42 (1987). This article is one of several in a long-running exchange on perpetuities reform between Dukeminier and Lawrence Waggoner. See also Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORNELL L. REV. 157 (1988); Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985); Lawrence W. Waggoner, *Perpetuities: A Perspective on Wait and See*, 85 COLUM. L. REV. 1714 (1985); Jesse Dukeminier, Comment, *A Response by Professor Dukeminier*, 85 COLUM. L. REV. 1730 (1985); Lawrence W. Waggoner, Comment, *A Rejoinder by Professor Waggoner*, 85

“[A] testator can direct the rents and profits to be accumulated for that period, during which he may direct, that the title shall not vest, and the property shall remain unalienable.”<sup>67</sup> If the testator can direct that title shall not vest for an infinite period, then it follows that he can likewise direct income to be accumulated for an infinite period.

## VI. ACCUMULATIONS IN CONTEMPORARY SOCIETY

For the foregoing reasons, it is unlikely that the rule against accumulations will undermine the growing perpetual trust industry. But this descriptive assessment does not speak to the normative question whether the rule reflects sound policy. So I conclude this Essay with some normative reflections on the rule against accumulations. Here it is useful to draw a distinction between discretionary and directed accumulations of income.

### A. Discretionary Accumulations of Income

Although perpetual trusts are more likely than ordinary trusts to allow for accumulation of income, professionally drafted perpetual trusts typically authorize—not direct—accumulation.<sup>68</sup> The distinction is significant; notice that both *White* and *Thellusson* involved mandatory accumulations. By contrast, the trustee’s exercise of permissive discretion to accumulate is subject to judicial review for abuse of discretion. This is true even if the trust instrument gives the trustee “absolute” or “sole” or “unconstrained” discretion.<sup>69</sup> As a result, the current beneficiary has leverage to pressure the trustee to disburse at least some of the income. Between these disbursements and the higher income tax rates applicable to retained trust income, merely keeping pace with inflation is difficult; growing an enormous fund is all but impossible. Indeed, perhaps in recognition of these considerations, there is authority that exempts from the rule retention of income for the purpose of preserving the trust corpus.<sup>70</sup>

### B. Directed Accumulations of Income

As applied to directed accumulation schemes such as Peter Thellusson’s, the rule against accumulations is said to answer two worries: (1) that

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COLUM. L. REV. 1739 (1985); Jesse Dukeminier, Comment, *A Final Comment by Professor Dukeminier*, 85 COLUM. L. REV. 1742 (1985); Lawrence W. Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718 (1983).

<sup>67</sup> *Thellusson v. Woodford*, (1805) 32 Eng. Rep. 1030, 1043 (Ch.).

<sup>68</sup> See *supra* note 52 and accompanying text.

<sup>69</sup> See UNIF. TRUST CODE § 814 (2000); RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. c; DUKEMINIER ET AL., *supra* note 6, at 540–41. In *Nenno’s* model trust, the trustee is given “sole discretion” to accumulate income. See *supra* note 52.

<sup>70</sup> 10 POWELL ON REAL PROPERTY, *supra* note 26, ¶¶ 76-12, 76-14, 76-15; see also RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 2.2 cmt. j & reporter’s note 8 (1983) (discussing the “judicious management” exception).

accumulations of income “place in the hands of one or two persons a vast fortune, creating over-mighty subjects,” and (2) that accumulations of income “would tend to distort the economy by obliging investments of large sums to be made in land . . . or whatever other object the settlor had directed.”<sup>71</sup> It is not clear, however, that these worries have cogence in the modern economy, or if they do, that the rule against accumulations is a good answer to them.<sup>72</sup>

*I. Vast Fortunes.*—The first worry is that accumulation trusts could produce a vast fortune concentrated in one or two beneficiaries. But as Jonathan Macey has observed, “unless trustees systematically are able to invest trust accumulations so as to outperform all other investments, there is no reason that permitting such accumulations will allow wealth to become more concentrated.”<sup>73</sup> And trust investments do not outperform all other investments; trustees do not have systematically better information than other capital market investors. Further, even after the recent modernization of trust investment law, as compared to outright ownership the trust form carries with it additional agency costs,<sup>74</sup> an extra layer of fees and commissions,<sup>75</sup> and higher rates of federal income taxation.<sup>76</sup> Each of these factors imposes drag on trust fund performance.

In a recent article assessing the rise of the perpetual trust, Jesse Dukeminier and James Krier concluded that, through the estate tax, “Congress has come to be in charge of trust duration.”<sup>77</sup> The same may be said of accumulation trusts. Through the income tax, Congress has come to be in charge of accumulations in trust. Today the issue of wealth accumulation and distribution has become a question of tax policy to be dealt with, if at all, through the income and estate taxes,<sup>78</sup> not through obscure property rules of limited application.

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<sup>71</sup> POLDEN, *supra* note 13, at 177; *see also id.* at 194 (examining the legislative history of the Thelusson Act); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 2.2 cmt. e (reviewing the “undesirable social consequences” of accumulations).

<sup>72</sup> In an earlier article, Jonathan Macey anticipated some of the ensuing analysis. *See* Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 EMORY L.J. 295, 311 (1988) (criticizing the traditional justifications for the rule against accumulations of income).

<sup>73</sup> *Id.* at 311.

<sup>74</sup> *See* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621 (2004); *see also* Macey, *supra* note 72, at 315–17; A.I. Ogus, *The Trust as Governance Structure*, 36 U. TORONTO L.J. 186 (1986); Sterk, *supra* note 40, at 2111–14.

<sup>75</sup> For example, under the June 2004 fee schedule of the Chicago-based Northern Trust Company, the annual fee for a \$3 million trust is \$28,500, and for a \$10 million trust, the fee is \$67,500. *See also* UNIF. TRUSTS CODE § 708 (2000); RESTATEMENT (THIRD) OF TRUSTS § 39 (2003).

<sup>76</sup> *See supra* notes 48–49 and accompanying text.

<sup>77</sup> Dukeminier & Krier, *supra* note 39, at 1343.

<sup>78</sup> There is a significant literature on intergenerational wealth transfer, the estate tax, and their intersection. On intergenerational wealth transfer and wealth accumulation, *see*, for example, Laurence J. Kotlikoff & Lawrence H. Summers, *The Role of Intergenerational Transfers in Aggregate Capital Accumulation*, 89 J. POL. ECON. 706 (1981); William G. Gale & Samara Potter, *The Impact of Gifts and*

2. *Investment Distortions.*—The second worry—that accumulation trusts will distort the economy—reflects a zero-sum view of property that took root when land was the primary form of wealth. But wealth today is accumulated in liquid financial assets, not land. And accumulations of financial assets such as marketable securities do not have the same potential for economic distortion as accumulations of land in England may have had in 1797.

True, the modern trustee remains subject to the fiduciary duty of prudence in making trust investments. But to assume that the trustee will therefore invest overcautiously or unproductively reflects a dated view of trust investment law. Under the modern law, which has been widely adopted,<sup>79</sup> there are no categorical restrictions on investing trust assets. Instead the modern law directs the trustee to craft an “overall investment strategy” that reflects “risk and return objectives reasonably suited to the trust.”<sup>80</sup> This change in the law is significant. In a new empirical study, Max Schanzenbach and I find that adoption of modern prudent trust investment laws leads to a statistically significant shift from investment in fixed-return obligations to investment in equity.<sup>81</sup>

Against this it might be argued that a settlor could tie up vast sums of investment capital by opting out of the default law of trust investment in favor of a mandatory, value-impairing investment strategy. But the rule against accumulations of income does little to solve this problem; value-impairing investment instructions are problematic even if all the trust’s income is distributed each year. The answer to this problem lies instead in narrow constructions of uneconomic instructions, robust application of the

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*Bequests on Aggregate Saving and Capital Accumulation*, in DEATH AND DOLLARS: THE ROLE OF GIFTS AND BEQUESTS IN AMERICA 319 (Alicia H. Munnell & Annika Sunden eds., 2003) [hereinafter DEATH AND DOLLARS]; Edward N. Wolff, *The Impact of Gifts and Bequests on the Distribution of Wealth*, in DEATH AND DOLLARS, *supra*, at 345. On the estate tax, see, for example, Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69 (1990); Karen C. Burke & Grayson M.P. McCouch, *A Consumption Tax on Gifts and Bequests*, 17 VA. TAX REV. 657 (1998); Joseph M. Dodge, *Comparing a Reformed Estate Tax with an Accessions Tax and an Income-Inclusion System, and Abandoning the Generation-Skipping Tax*, 56 SMU L. REV. 551 (2003); Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259 (1983); Wojciech & Joel Slemrod, *Tax Consequences on Wealth Accumulation and Transfers of the Rich*, in DEATH AND DOLLARS, *supra*, at 213; Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283 (1994); Colloquy, *Wealth Transfer Taxation*, 51 TAX L. REV. 357 (1996) (discussing McCaffery’s proposal to abolish the federal estate and gift tax); James R. Repetti, *Democracy, Taxes and Wealth*, 76 N.Y.U. L. REV. 825 (2001); RETHINKING ESTATE AND GIFT TAXATION (William G. Gale et al. eds., 2001).

<sup>79</sup> See DUKEMINIER ET AL., *supra* note 6, at 797–98.

<sup>80</sup> RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227 (1992). The 1994 Uniform Prudent Investor Act provides likewise. UNIF. PRUDENT INVESTOR ACT § 2 (1994). For summary of the modern law, see Edward C. Halbach, Jr., *Trust Investment Law in the Third Restatement*, 77 IOWA L. REV. 1151 (1992); John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641 (1996).

<sup>81</sup> Max M. Schanzenbach & Robert H. Sitkoff, *Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?* (Sept. 27, 2005) (unpublished manuscript, on file with author).

principle that a private trust must be for the benefit of the beneficiary, and judicially approved deviation from administrative provisions.<sup>82</sup>

In sum, the shift in the nature of wealth from land to financial assets and the revolution in trust investment law, taken together, render obsolete the concern over economic distortions stemming from accumulations in trust.

## VII. CONCLUSION

The rule against accumulations of income limits the time during which a settlor may direct the trustee to accumulate and retain income in trust. At common law, the accumulations period was that of the applicable perpetuities period. Thus, for two hundred years the rule against accumulations has lurked in the shadow of its older and more distinguished cousin, the Rule Against Perpetuities. With the erosion of the Rule Against Perpetuities, however, the rule against accumulations of income may have newfound relevance. Perpetual trusts are more likely than ordinary trusts to involve accumulations of income, and such trusts are designed to endure beyond the common law period for permissible accumulations.

This Essay assessed the relevance of the rule against accumulations for the rise of the perpetual trust. In short, because repeal of the Rule Against Perpetuities probably also modifies the rule against accumulations, and if not the accumulations rule will likely be abolished by legislation, there is little reason to think that the accumulations rule will impede the rise of the perpetual trust. This Essay also assessed the continuing soundness of the accumulations rule, concluding that its underlying policies no longer have cogence in contemporary society.

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<sup>82</sup> The leading case is *In re Pulitzer*, 249 N.Y.S. 87 (Surr. Ct. 1931), *aff'd mem.*, 260 N.Y.S. 975 (App. Div. 1932). See also *DUKEMINIER ET AL.*, *supra* note 6, at 576–77, 814–16; John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1111–19 (2004); Langbein, *supra* note 80, at 663–65.