Northwestern University School of Law
Law and Economics Papers

Year 2005 *Paper* 2

The Lurking Rule Against Accumulations of Income

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Abstract

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 states have abolished the Rule as applied to interests in trust. But the Rule Against Perpetuities is not the only rule of property law that bears on trust duration. Another is the rule against accumulations of income, which limits the timeframe during which a settlor may direct the trustee to accumulate and retain income in trust. For 200 years, the rule against accumulations of income has lurked in the shadow of its older and more distinguished cousin, the Rule Against Perpetuities. But with the race to abolish the Rule Against Perpetuities, the rule against accumulations of income may have newfound relevance. Perpetual trusts are more likely than ordinary trusts to involve accumulations of income in trust. Accordingly, the task for this short essay is to examine the lurking rule against accumulations of income and its potential impact on the $100 billion perpetual trust industry.

Draft of August 19, 2004
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Abstract

For 200 years the rule against accumulations of income, which limits the time during which a settlor may direct the trustee to accumulate and retain income in trust, 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 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 permissible common law accumulations period. This essay assesses the relevance of the rule against accumulations for the rise of the perpetual trust. The essay also assesses the contemporary policy soundness of the accumulations rule.

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 states have abolished the Rule as applied to interests in trust.[2] These states have thus authorized perpetual trusts. Real money is at stake. In a recent empirical study, Max Schanzenbach and I find that, through 2003, roughly $100 billion in trust assets have poured into the abolishing states.[3] Not surprisingly, perpetual trust legislation is under consideration in several of the states that have not yet abolished the Rule.[4]

But the Rule Against Perpetuities is not the only rule of property law that bears

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* Associate Professor of Law, Northwestern University. The author thanks Joel Dobris, Thomas Gallanis, John Langbein, James Lindgren, Max Schanzenbach, and Lawrence Waggoner for helpful comments and suggestions; Kathryn Hensiak for crucial research assistance; and the Searle Fund for Policy Research for financial support. Portions of this essay draw on Chapter 11 of Jesse Dukeminier, Stanley M. Johanson, James Lindgren, & Robert H. Sitkoff, Wills, Trusts, and Estates (7th ed. 2005).

[2] The position of all the states is collected in Robert H. Sitkoff & Max Schanzenbach, Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes, 115 Yale L. J. ___, ___ (Table 5) (2005).

[3] The $100 billion figure is a point estimate. For discussion of its calculation and confidence interval, see id. at __, n.__. Further, we could not ascertain the extent to which these assets are in perpetual or transfer-tax-exempt trusts.

[4] See Joshua C. Tate, Perpetual Trusts and the Settlor's Intent, 53 U. Kan. L. Rev. 595, 604 n.45 (2005) (collecting pending legislation).

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.[5] In the typical case, compliance with the Rule Against Perpetuities ensures compliance with the rule against accumulations. Hence, for 200 years, the rule against accumulations 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,[6] 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 and its potential impact on the rise of the perpetual trust. 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 IV assesses the relevance of the rule against accumulations for perpetual trusts. Part V assesses the contemporary policy soundness of the rule against accumulations. Part VI 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."[7] The period of the Rule reflects a common law policy that a transferor should be allowed to tie up property only for so 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).[8]

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[5] "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) of Property, Donative Transfers §2.2(4) (1983).

[6] This claim is defended in the text accompanying infra notes 49-54.

[7] 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, 22 Eng. Rep. 931 (Ch. 1682). See Jesse Dukeminier, 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).

[8] 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 push 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.

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, from time to time, ownership of land will be reconstituted into fee simple because all contingent future interests in the property must vest or fail within the perpetuities period. However, if a contingent future interest is created in trust and if the trustee has the power to sell, which is typical,[9] the trust form overcomes the concern with marketability.[10]

The dead-hand rationale for the Rule is best understood as a response to the disagreeable consequences that can arise from unanticipated circumstances.[11] 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."[12] Forever is a long time.

In a jurisdiction that has retained the common law Rule Against Perpetuities, the identity of all persons with a claim to the underlying trust property will be ascertained within lives in being plus twenty-one years from the time the trust becomes irrevocable. 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.[13]

III. THE RULE AGAINST ACCUMULATIONS OF INCOME

The rule against accumulations of income originated in *Thellusson v. Woodford*,[14] a House of Lords decision rendered in 1805. At issue was the will of Peter

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Arthur Hobhouse, The Dead Hand 188, 183-185 (1880).

[9] The modern trustee's default powers are broad. See Uniform Trust Code §§815-16 (2000); Restatement (Third) of Trusts §85 (T.D. No. 4, 2005); Dukeminier et al., supra note 7, at 777-78; John H. Langbein, The Contractarian Basis of the Law of Trusts, 105 Yale L.J. 625, 640-43 (1995).

[10] See Lewis M. Simes, Public Policy and the Dead Hand 40-42 (1955).

[11] Compare T.P. Gallanis, The Rule Against Perpetuities and the Law Commission's Flawed Philosophy, 59 Cambridge L.J. 284 (2000), with English Law Commission, The Rules Against Perpetuities and Excessive Accumulations, Report No. 251, at 5, 8, 20 (1998), and Simes, supra note 10, at 58-59.

[12] 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.

[13] Restatement (Second) of Property, Donative Transfers §2.1 (1983); 1A Austin W. Scott, Trusts §62.10 (William F. Fratcher 4th ed. 1987). See also Elias Clark et al., Gratuitous Transfers 769 (4th ed. 1999).

[14] 32 Eng. Rep. 1030 (Ch. 1805). See generally Patrick Polden, Peter Thelluson's Will of 1797 and

Thellusson, "an enormously rich merchant and financier" who died in 1797.[15] Thellusson's will provided that the bulk of his considerable estate, plus all the income it would earn during the lives of the nine male descendants who survived him, should be accumulated for the ultimate benefit of his oldest male descendant at the end of that period.[16] Thellusson thus deviated substantially from the normal practice of leaving one's estate either to the oldest son or to all the sons equally.[17] 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."[18]

The 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 the rule against 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.[19]

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 good.

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, "The English public was shocked at the possibilities of accumulating large fortunes after the manner of the Thellusson will."[20] One well-known estimate projected that Thellusson's accumulation would grow from £600,000 to somewhere between £19 and £38.4 million.[21] The Lord Chancellor who heard the case before its appeal to the

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Its Consequences on Chancery Law (2002); William M. McGovern, Jr. & Sheldon F. Kurtz, Wills, Trusts and Estates 485-87 (3d ed. 2004); Restatement (Second) of Property §2.2 cmt. a (1983).

[15] Poldon, supra note 14, at 1.

[16] Poldon excerpts the relevant provisions of Thellusson's will and cogently summarizes them in modern English. Id. at 138-40.

[17] Id. at 133.

[18] Id. at 4-5.

[19] 32 Eng. Rep. at 1043.

[20] Simes, supra note 10, at 86.

[21] Poldon, supra note 14, at 194, 258.

House of Lords called Thelluson's plan "unkind and illiberal."[22] 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."[23]

Thellusson's accumulation plan was so unpopular that soon after the Lord Chancellor upheld it, before the House of Lords even rendered its decision, Parliament enacted the Thellusson Act.[24] The Act required that accumulations of income must be limited to (1) the life 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.[25]

Just as the fear of compounding interest and geometrically growing fortunes tied up in trust inflamed passions about the dead hand in England, Peter Thellusson's "posthumous avarice" 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."[26] Several states adopted statutes similar to the Thellusson Act or, in the case of New York and a few others, an even more restrictive one.[27]

History, however, has proved the worry over Peter Thellusson's accumulation scheme to be misplaced. When his grandson Charles died in 1856, Thellusson's trust came to an end, but the predicted vast fortune had not materialized. As Polson aptly observes, "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."[28]

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."[29] Further, as compared to

[22] Thellusson v. Woodford, 31 Eng. Rep. 117, 173 (1799).

[23] Poldon, supra note 14, at 144.

[24] 39 and 40 Geo. III c. 98 (1800). The statute did not apply in the litigation over Thellusson's will.

[25] 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 Commission, Report Number 251, supra note 11, at 128-29. Parliament has not acted on this recommendation.

[26] Hillyard v. Miller, 10 Pa. 326, 336 (1849).

[27] See Statutory Note to Restatement (Second) of Property, Donative Transfers §2.2 (1983); Simes, supra note 10, at 86-88; 5 William J. Bowe & Douglas H. Parker, Page on the Law of Wills §42.14, at 317-22 (rev. ed. 1962). For discussion of the more restrictive statutes, see 10 Powell on Real Property ¶¶834-35 (Michael Allan Wolf ed., 2000).

[28] Poldon, supra note 14, at 7.

[29] John H. Langbein & Richard A. Posner, Market Funds and Trust-Investment Law, 1976 Am. B.

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.[30]

Not surprisingly, other accumulation plans have likewise failed. Perhaps the most famous, the design of which (but not the result) was probably known to Thelluson when he executed his will, is Benjamin Franklin's.[31] When Franklin died in 1790, he left two charitable trusts of £1,000 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.[32] 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.[33] As David Hayton puts it: "The economic and social fears of accumulation have proved groundless."[34]

In the twentieth century, "the tide turned in this country against the strict type of legislation for which the Thellusson Act was a model."[35] Today, in states with a statutory rule against accumulation of income in private trusts, the accumulation period is typically the same as the period for the Rule Against Perpetuities.[36] 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

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Found. Res. J. 1, 4. The modern law is discussed in the text accompanying infra notes 83-84.

[30] See Dukeminier et al., supra note 7 at 318-19.

[31] Id. at 146-47.

[32] Charitable trusts are exempt from the Rule Against Perpetuities and the rule against accumulations.

[33] See Clark DeLeon, Divvying up Ben: Let's Try for 200 More, Philadelphia Enquirer, Feb. 7, 1993, at B2.

In the amusing case of Marsh v. The 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 (charitable trust are not subject to the Rule). 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." If *Marsh* had arisen in a state that had abolished the Rule Against Perpetuities, the trust would still be invalid for want of an ascertainable beneficiary. See Restatement (Third) of Trusts §44 (2003).

[34] Hayton, supra note 25, at 108.

[35] Simes, supra note 10, at 88.

[36] See, e.g., Cal. Civ. Code §724 (2004) (keyed to the "time permitted for the vesting of future interests"); N.Y. Est. Pow. & Tr. L. §9-2.1(b) (2004) (keyed to Rule Against Perpetuities); Pa. Conn. Stat. Ann. §6106(b) (2004) (keyed to Rule Against Perpetuities).

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*.[37]

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."[38] The rule 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.

All interests created by this transfer are valid under the Rule Against Perpetuities. *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. Accordingly, all interests will vest or fail within lives in being plus twenty-one years.

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.[39]

IV. TAXES AND THE RISE OF THE PERPETUAL TRUST[40]

[37] 123 F.2d 924 (D.C. Cir. 1941). On the authoritativeness of *Gertman*, see Reporter's Note 3 to Restatement (Second) of Property, Donative Transfers §2.2; Simes, supra note 10, at 93.

[38] Id. at 930-31.

[39] "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." Reporter's Note 1 to Restatement (Second) of Property, Donative Transfers §2.2 (1983)

[40] 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 2, on which this section freely draws.

Since 1986, nearly half the states have abolished the Rule Against Perpetuities as applied to interests in trust.[41] The driving force for this abrupt turnabout was not a careful reconsideration of the ancient policy against perpetuities, but rather a 1986 reform to the federal tax code. Under the 1986 code (as amended through 2005), a transferor can pass $1 million during life or $1.5 million at death free of federal estate, gift, and generation-skipping transfer (GST) taxation (collectively the federal wealth transfer taxes).[42] By placing this $1 million or $1.5 million in a trust, successive generations can benefit from the trust fund, free from federal transfer taxes, for so long as state perpetuities law will allow. In a state that has abolished the Rule, successive generations can benefit from the trust fund, free of 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.[43] In contrast to the days in which the patrimony was typically ancestral land, wealth today generally takes the form of liquid financial assets,[44] 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

[41] 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 1,000 years) perpetuities periods such that in those states the Rule is barely recognizable. In still others the Rule, which had always been 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., Garrett Moritz, Note, Dynasty Trusts and the Rule Against Perpetuities, 116 Harv. L. Rev. 2588, 2590-95 (2003); Tate, supra note 4, 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 refer to any change that would allow a perpetual trust. See Sitkoff & Schanzenbach, supra note 2, at Table 5.

On the erosion of the Rule Against Perpetuities, see generally Bloom, supra 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 40; 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); Sterk, supra note 13; Sitkoff & Schanzenbach, supra note 2; Tate, supra note 4; Angela M. Vallario, Death By A Thousand Cuts: The Rule Against Perpetuities, 25 J. Legis. 141 (1999).

[42] The specifics of the wealth transfer taxes that have stimulated the race toward perpetual trusts are detailed in Sitkoff & Schanzenbach, supra note 2, at ___. See also Ira Mark Bloom, The GST Tax Tail is Killing The Rule Against Perpetuities, 87 Tax Notes 569 (2000); Dukeminier & Krier, supra note 40, at 1312-13.

[43] See Max 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, stimulated the movement to abolish the Rule).

[44] See John H. Langbein, The Twentieth-Century Revolution in Family Wealth Transmission, 86 Mich. L. Rev. 722 (1988).

fund.[45] Therein lies the political economy of the Rule's demise. Local bankers and trust lawyers have lobbied for its abolition.[46]

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 find 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.[47] These estimates imply that, through 2003, roughly $100 billion in trust funds have poured into to the states that have abolished the Rule.[48] 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.[49] 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.[50] 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

[45] The relevant choice of law considerations are examined in Sitkoff & Schanzenbach, supra note 2, at ___. See also Sterk, supra note 13, 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 (David Hayton ed., 2002).

[46] 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 a public choice story of jurisdictional competition in trust law. See Sitkoff & Schanzenbach, supra note 2, at __; Sterk, supra note 13, at 2103-04. See also Robert H. Sitkoff, Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters, 69 U. Chi. L. Rev. 1103, 1143-44 (2002) (applying public choice theory to jurisdictional competition in corporate law); Jonathan R. Macey & Geoffrey P. Miller, Toward an Interest-Group Theory of Delaware Corporate Law, 65 Tex. L. Rev. 469 (1987) (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).

[47] See Sitkoff & Schanzenbach, supra note 2, at __.

[48] To repeat, the $100 billion figure is a point estimate. For discussion of its calculation and confidence interval, see id. at __, n. __. Further, we could not ascertain the extent to which these assets are in perpetual or transfer-tax-exempt trusts.

[49] 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).

[50] See Sherman, supra note 49, at 5, 37; 1 CCH Standard Federal Tax Reporter 1987 ¶421.05 (74th ed. 1986). See also Jeffrey N. Pennell, Wealth Transfer Planning and Drafting 17-2 (2005) (stating that the rate applicable to trusts "by far are the most onerous applicable to any taxpayer under the Code); McGovern & Kurtz, supra note 14, at 705. Prior to 1986, accumulations in ordinary trusts were more common. See Restatement (Second) of Property §2.2 cmt. b (1983). The current rates are stated in I.R.C. §1.

trust income follow a similar pass-through model,[51] 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 notwithstanding the federal income tax penalty. Income accumulated in such a trust is exempt from subsequent wealth transfer taxation, but it loses its exempt status upon distribution to a beneficiary. The federal income tax penalty for accumulating income in trusts is not trivial, but it pales in comparison to the impact of the federal transfer taxes, the top rate for which is forty-seven percent in 2005 and will be forty-six percent in 2006.[52] 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 an even 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 (witness the stereotype of the profligate trust fund baby). 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.[53] To the extent any of the trust income is not needed by the beneficiary, retaining it 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 find that, by itself, whether a state levies 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.[54] This suggests that settlors of perpetual trusts are quite sensitive to state

[51] See Bradley E.S. Fogel, State Income Taxation of Trusts, Prob. & Prop. Jul.-Aug. 2005, at 39; Max Gutierrez & Frederick R. Keydel, ACTEC Study 6: State Taxation on Income of Trusts with Multi-State Contacts 12 (2001).

[52] IRC §§2641, 2001.

[53] Here is a model clause devised by Richard Nenno, 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).

[54] See Sitkoff & Schanzenbach, supra note 2, at __.

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 mayendure 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,[55] have each dealt with the interaction of the rule against accumulations and perpetual trusts by legislation. Delaware abrogated the rule against accumulations,[56] Illinois now provides that the accumulations rule does not apply to trusts when the settlor opts out of the Rule Against Perpetuities,[57] and South Dakota repealed its statutory rule against accumulations.[58]

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.[59] In 1999, however, the Supreme Judicial Court of Maine held oppositely in *White v. Fleet Bank of Maine*.[60] 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."[61] The trust was to continue, "following the lines of direct descent, as long as the Trust may be made to endure."[62]

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

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[55] See id. at __.

[56] Del. Code, tit. 25, §506.

[57] Ill. Comp. Stat. Ann. ch. 765, §315/1.

[58] 1998 S.D. Laws ch. 282, §27.

[59] See William R. Cohen, The Rule Against Accumulations and "Wait and See," 33 Temp. L. Q. 34, 55-57 (1959).

[60] 739 A.2d 373 (Me. 1999). See William P. LaPiana, Recent Non-Tax Developments, in ALI-ABA Course of Study Materials: Estate Planning in Depth, SE90 ALI-ABA 117, 131-32 (2000); McGovern & Kurtz, supra note 14, at 486; Karen J. Sneddon, Comment, The Sleeper Has Awakened: The Rule Against Accumulations and Perpetual Trusts, 76 Tulane L. Rev. 189 (2001); Valerie J. Vollmar et al., An Introduction to Trusts and Estates 1010-11 (2003); Ronald Volkmer, New Fiduciary Decisions: Rule Against Accumulations, 27 Est. Plan. 185 (2000).

[61] White, 739 A.2d at 375.

[62] Id. at 376.

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.[63] In *White*, it was possible that all future income interests would vest within twenty-one years of the death of the last life in being.

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.[64] 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."[65] Applied to the facts in *White,* because the reinvestment clause did not reference any life in being, this 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[66]).

The decision in *White* notwithstanding, 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 problem exists 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 banks 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. Under wait-and-see, the court waits for the duration of the perpetuities period to see if, in light of actual instead of possible events, a contingent interest will vest or fail outside of the perpetuities period. Wait-and-see legislation does not actually lengthen the perpetuities period. Instead, it modifies the application of that period.

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[63] See Dukeminier et al., supra note 7, at 698; Waggoner et al., supra note 7, at 1234-35.

[64] White, 739 A.2d at 380.

[65] Restatement (Second) of Property, Donative Transfers §2.2 (1983). See White, 739 A.2d at 380.

[66] See Dukeminier et al., supra note 7, at 511; Restatement (Third) of Trusts §7 (2003).

By contrast, in a state that has abolished the Rule Against Perpetuities so as to permit 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,[67] and in an article on perpetuities reform Jesse Dukeminier reasoned similarly.[68] Consider again Lord Elson's opinion in *Thelluson*: "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."[69] 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 accumulation rule reflects sound policy. So I conclude this essay with some normative reflections on the rule against accumulations.[70] Here it is useful to draw a distinction between discretionary and directed accumulations of income.

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.[71] 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.[72] 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, it is challenging enough merely to keep

[67] Powell , supra note 27, at 76–22.

[68] 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, Perpetuity Reform, 81 Mich. L. Rev. 1718 (1983); 85 Colum. L. Rev. 1648-1747 (1985) (comprising five(!) articles); Lawrence W. Waggoner, The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period, 73 Cornell L. Rev. 157 (1988).

[69] Id. at 1043.

[70] On the rise of the perpetual trust, see Sitkoff & Schanzenbach, supra note 2, at ___; sources cited in supra note 41.

[71] See supra note 53 and text accompanying.

[72] See Uniform Trust Code §814 (2000); Restatement (Third) of Trusts §50 cmt. c (2003); Dukeminier et al., supra note 7, at 540-41. In Nenno's model trust, the trustee is given "sole discretion" to accumulate income. See supra note 53.

pace with inflation, much less grow an enormous fund. Indeed, perhaps in recognition of this, there is authority that exempts from the rule retention of income for the purpose of preserving the trust corpus.[73]

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 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."[74] 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.[75]

(1) 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."[76] And trust investments do not outperform all other investments; trustees do not have systematically better information than other market participants. Further, even after the recent-modernization of trust investment law, as compared to outright ownership the trust form carries with it additional agency costs,[77] an extra layer of fees and commissions,[78] and higher rates of federal income taxation.[79] Each of these factors imposes drag on trust fund performance.

In a recent article assessing the rise of the perpetual trust, Dukeminier and Krier concluded that, through the estate tax, "Congress has come to be in charge of trust duration."[80] The same may be said of accumulation trusts. Through the in-

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[73] Powell, supra note 30, at 76–12, 76–14 - 76–15. See also Restatement (Second) of Property, Donative Transfers §2.2 cmt. j & Reporter's Note 8 (discussing the "judicious management" exception).

[74] Poldon, supra note 14, at 177. See also id. at 194 (examining the legislative history of the Thellusson Act); Restatement (Second) of Property, Donative Transfers §2.2 cmt. e (reviewing the "undesirable social consequences" of accumulations).

[75] 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).

[76] Macey, supra note 75, at 311.

[77] See Robert H. Sitkoff, An Agency Costs Theory of Trust Law, 89 Cornell L. Rev. 621 (2004). See also Stewart E. Sterk, Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P., 24 Cardozo L. Rev. 2097, 2111-14 (2003).

[78] 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 is $67,500. See also Restatement (Third) of Trusts §39 (2003); Uniform Trusts Code §708 (2000).

[79] See text accompanying supra notes 49-50.

[80] Dukeminier & Krier, supra note 40, at 1343.

come tax, Congress has come to be in charge of accumulations in trust.[81] 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,[82] not through obscure property rules of limited application.

(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 adopted by statute in all but one state,[83] 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."[84] This change in the law is significant. In a new empirical study, Max Schanzenbach and I find that adoption of modern standards of prudence leads to a statistically significant shift from investment in fixed-return obligations to investment in equity.[85]

[81] See McGovern & Kurtz, supra note 14, at 485.

[82] There is a significant literature on intergenerational wealth transfer, the estate tax, and the intersection of the two. On intergenerational wealth transfer and wealth accumulation, see, e.g., 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 Bequests on Aggregate Saving and Capital Accumulation, in Death and Dollars: The Rule of Gift and Bequests in America 319 (Alicia H. Munnell and Annika Sunden, eds.); Edward N. Wolff, The Impact of Gifts and Bequests on the Distribution of Wealth, in id. at 345. On the estate tax, see e.g., 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 S.M.U. 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 Munnell and Sunden eds., supra, at 213; Edward J. McCaffery, The Uneasy Case for Wealth Transfer Taxation, 104 Yale L.J. 283 (1994); Colloquium on 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, James R. Hines, Jr., & Joel Slemrod eds. 2001).

[83] See Max Schanzenbach & Robert H. Sitkoff, Did Reform of Prudent Investor Laws Change Trust Investment Practices? ___ (Table __) (unpublished manuscript on file with author).

[84] Restatement (Third) of Trusts: Prudent Investor Rule §227 (1992). Uniform Prudent Investor Act §2 (1994) is to a similar effect. 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).

[85] Schanzenbach & Sitkoff, supra note 83.

Against this it might be argued that a settlor could tie up vast sums of money 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 principle that a private trust must be for the benefit of the beneficiary, and judicially-approved deviation of administrative provisions.[86]

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.

VI. 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 200 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 traditional permissible period for 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 the modern economy.

[86] See John H. Langbein, Mandatory Rules in the Law of Trusts, 98 Nw. U.L. Rev. 1105, 1111-19 (2004); Langbein, supra note 84, at 663-65; Dukeminier et al., supra note 8, at 814-16. The leading case is In re Pulitzer, 249 N.Y.S. 87 (Sur. Ct. 1931), aff'd mem., 260 N.Y.S. 975 (App. Div. 1932).