

DIGITAL ACCESS TO SCHOLARSHIP AT HARVARD
DASH.HARVARD.EDU

HARVARD LIBRARY


Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust

Citation

Robert H. Sitkoff & Max Schanzenbach, Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust, 27 Cardozo L. Rev. 2465 (2006).

Published version

http://cardozolawreview.com/Joomla1.5/content/27-6/SITKOFF.WEBSITE.pdf

Link

http://nrs.harvard.edu/urn-3:HUL.InstRepos:14976388

Terms of use

This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Other Posted Material (LAA), as set forth at

https://harvardwiki.atlassian.net/wiki/external/NGY5NDE4ZjgzNTc5NDQzMGIzZWZhMGFlOWI2M2EwYTg

Accessibility

https://accessibility.huit.harvard.edu/digital-accessibility-policy

Share Your Story

The Harvard community has made this article openly available.
Please share how this access benefits you. Submit a story

PERPETUITIES OR TAXES? EXPLAINING THE RISE OF THE PERPETUAL TRUST

Max M. Schanzenbach[*]
Robert H. Sitkoff[**]

ABSTRACT

By abolishing the Rule Against Perpetuities, twenty-one states have validated perpetual trusts. The prevailing view among scholars is that enactment of the generation skipping transfer (GST) tax in 1986 prompted the movement to abolish the Rule by conferring a salient tax advantage on long-term trusts. However, an alternate view holds that demand for perpetual trusts stems from donors' preference for control independent of tax considerations. Proponents of both views have adduced supporting anecdotal evidence. Using state-level panel data on trust assets prior to the adoption of the GST tax, we examine whether a state's abolition of the Rule gave the state an advantage in the jurisdictional competition for trust funds. We find that, prior to the GST tax, a state's abolition of the Rule did not increase the state's trust business. By contrast, in a prior study we found that, between the enactment of the GST tax and 2003, states that abolished the Rule experienced a substantial increase in trust business. Accordingly, we conclude that the enactment of the GST tax prompted the rise of the perpetual trust. These findings bear on the debate over proposals to liberalize the law of trust termination and modification and to amend the GST tax. Our findings also contribute to the literature on the bequest motive.

[*] Assistant Professor of Law, Northwestern University.

[**] Professor of Law, New York University (effective Fall 2006); Associate Professor of Law, Northwestern University (through Summer 2006). The authors thank Ronen Avraham, David English, Mary Louise Fellows, Marcel Kahan, Andrew Koppelman, John Langbein, Richard Nenno, Laura Rosenbury, Joshua Tate, Tobias Wolf, and workshop participants at Northwestern and at the Symposium on Trust Law in the 21st Century at Cardozo for helpful comments and suggestions; Georgia Alexakis, Pegeen Bassett, Ben Frey, Jason Friedman, Kathryn Hensiak, and Heidi Kuehl for superb research assistance; and the Searle Fund for Policy Research and the Victor Family Research Fund for financial support.

CONTENTS

Introduction 2466
I. The Rule Against Perpetuities 2470
A. The Rule and Its Policies 2470
B. Twentieth Century Reform 2472
C. Toward the Twenty-First Century: Repeal 2474
II. Current Understandings 2476
A. The Dominant View: The GST Tax 2476
B. The Alternate View: Perpetual Control 2481
C. A Look Abroad: Scotland 2482
III. Empirical Analysis 2484
A. The Data 2484
B. Identification Strategies 2486
C. Graphical Analysis 2488
D. Regression Analysis 2493
1. Trust Assets Per Capita (Tables 1A and 1B) 2494
2. Average Account Size (Tables 2A and 2B) 2495
3. Aggregate Trust Assets (Tables 3A and 3B) 2495
E. Summary of Empirical Findings 2496
Conclusions and Implications 2496

INTRODUCTION

By year-end 2005, twenty-one states had validated perpetual trusts by abolishing the Rule Against Perpetuities (the Rule or the RAP) as applied to interests in trust.[1] On one view, these states responded to demand by donors for perpetual control independent of tax considerations. If so, the perpetual trust might be reckoned as the modern counterpart to the fee tail and strict settlement,[2] another effort

[1] *See* 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) (collecting the states' perpetuities laws). As in our prior study, we define "abolition" as any modification of the Rule that would allow for a perpetual trust of intangible personal property or that so lengthened the perpetuities period that it no longer represents a practical constraint on trust duration. Thus, we exclude Washington, which permits 150-year trusts, *see* WASH. REV. CODE § 11.98.130 (2004), because 150 years is not significantly longer than is possible through the use of a saving clause. *See* Sitkoff & Schanzenbach, *supra*, at 433 n.187. We have also excluded the District of Columbia, which abolished the Rule under our definition in 2001. *See* D.C. CODE ANN. § 19-904(10) (LexisNexis 2005). For a parsing of the variety of means by which the states have validated perpetual trusts, see Garrett Moritz, Note, *Dynasty Trusts and the Rule Against Perpetuities*, 116 HARV. L. REV. 2588, 2590-95 (2003).

[2] *See, e.g.*, J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 293-94 (4th ed. 2002) (discussing the strict settlement); JOSEPH BIANCALA, THE FEE TAIL AND THE COMMON RECOVERY IN MEDIEVAL ENGLAND (2001) (examining the entail); JESSE DUKEMINIER & JAMES

by one generation to control the disposition of the family patrimony by subsequent generations. On the other hand, as is so often the case in the development of estate planning techniques, tax incentives may be the root cause of the rise of the perpetual trust. The 1986 enactment of the generation skipping transfer (GST) tax conferred a specific and salient tax advantage on long-term trusts, and nearly all of the states that have abolished the Rule did so after 1986. Proponents of both views have adduced supporting anecdotal evidence.

This Article assesses the foregoing competing explanations for the rise of the perpetual trust. Prior to the enactment of the GST tax, three states had abolished the RAP (Idaho, South Dakota, and Wisconsin).[3] Hence, because the choice-of-law rule treats the law of the trust's situs as governing,[4] if settlors demanded perpetual trusts prior to the GST tax then these states should have had a disproportionate share of the nation's aggregate trust business prior to 1986. Using state-level panel data, we compare reported trust asset levels among states. Our approach thus has the advantage of analyzing revealed preferences. Inasmuch as donors had the option prior to the GST tax of settling a trust in a state that had abolished the Rule, evidence of whether they in fact did so is a good proxy for whether they wanted to do so.[5]

We find no evidence that, prior to the GST tax, abolishing the Rule increased a state's trust business. Hence, although there are limitations in the pre-1985 data, and only three states abolished the Rule before the GST tax, our results strongly imply that there was little demand for perpetual trusts before the enactment of the GST tax. By contrast, in a prior empirical study we found that from the enactment of the GST tax through 2003, a state's abolition of the Rule increased its reported trust assets by about $6 billion and its average trust account size by roughly $200,000.[6] That study's findings imply that, from the time the GST tax

E. KRIER, PROPERTY 215-19 (5th ed. 2002) (discussing both entails and strict settlements); Jeffrey Evans Stake, *Evolution of Rules in a Common Law System: Differential Litigation of the Fee Tail and Other Perpetuities*, 32 FLA. ST. U. L. REV. 401, 410-19 (2005); *see also* A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 125-38 (2d ed. 1986) (discussing means of breaking entails).

3 *See infra* note 32 and accompanying text.

4 We examine the relevant choice-of-law considerations in Sitkoff & Schanzenbach, *supra* note 1, at 374-75. *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, 2103-04 (2003). An important related development is the shift from land to easily portable financial assets as the primary mode of accumulating wealth. *See* John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988); *cf.* Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 38 (1996) (observing that "the world recognizes the right of an owner of liquid wealth to move it to any nation that offers a better deal").

5 We discuss *infra* potential problems with using what donors did as a proxy for what donors wanted in the text accompanying notes 104-105.

6 *See* Sitkoff & Schanzenbach, *supra* note 1, at 410.

took effect through 2003, roughly $100 billion in trust assets moved as a result of the Rule's abolition.[7] Accordingly, we conclude that the 1986 enactment of the GST tax sparked the movement to abolish the Rule and the rise of the perpetual trust.[8]

We do not deny the possibility that some perpetual trust settlors want perpetual control independent of tax considerations. Moreover, because perpetual trust forms are now readily available (reducing the transaction costs of settling a perpetual trust) and the widespread use of perpetual trusts to achieve tax savings has brought into focus the non-tax benefits of perpetual trusts,[9] we suspect that if the transfer taxes were abolished,[10] some demand for perpetual trusts might persist. However, in such a scenario the continued popularity of perpetual trusts would still be due to the salience that the GST tax gave to perpetual trusts.[11] Virtually all non-tax benefits of a perpetual trust that are currently available were also available prior to the GST tax. Yet we find no evidence that abolishing the RAP prior to the GST tax increased a state's trust business.

In our prior study, we concluded that transferors who desire a perpetual trust but live in a state that has retained the Rule have had little difficulty in creating perpetual trusts in spite of the additional transaction costs of settling a trust out of state.[12] To the extent that the

---

[7] We caution that the $100 billion figure is only a point estimate. For discussion of this estimate and its confidence interval, see *id.* at 404 & n.125.

[8] In her commentary on this article, Mary Louise Fellows examines "the components that made up the dry tinder on which [the GST tax] spark fell." Mary Louise Fellows, *Why the Generation-Skipping Transfer Tax Sparked Perpetual Trusts*, 27 CARDOZO L. REV. 2511, 2511 (2006).

[9] *See, e.g.*, RICHARD W. NENNO, DELAWARE DYNASTY TRUSTS, TOTAL RETURN TRUSTS, AND ASSET PROTECTION TRUSTS 163-73 (2005) (providing a sample generation-skipping-trust agreement), *id.* at 26-27 (discussing reasons apart from the GST tax for a perpetual trust).

[10] The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) repeals the GST tax and the estate tax (but not the gift tax) as to transfers in 2010. *See* Pub. L. No. 107-16, 115 Stat. 38 (2001) (codified as amended in scattered sections of 26 U.S.C.). EGTRRA also reduces somewhat the marginal tax rates while increasing the lifetime exemption in the years before 2010. *See infra* notes 46, 48. But for transfers occurring in 2011 and beyond, EGTRRA reinstates both the GST tax and the estate tax at their 2001 levels. One imagines that gift certificates for sky-diving and tickets for trips to dangerous parts of the world might be popular gifts from children to parents in 2010. On the political economy of EGTRRA and the estate tax repeal movement, see MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH (2005). *See also* David G. Duff, *The Abolition of Wealth Transfer Taxes: Lessons from Canada, Australia and New Zealand* (Univ. of Toronto, Legal Studies Research Paper Series, Paper No. 05-08, 2005), *available at* http://ssrn.com/abstract=719744 (follow "Social Science Research Network" link to download).

[11] There is a loose analogy to the phenomenon of information cascades and herding. *See, e.g.*, Abhijit V. Banerjee, *A Simple Model of Herd Behavior*, 107 Q.J. ECON. 797 (1992); Sushil Bikhchandani, David Hirshleifer & Ivo Welch, *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992 (1992); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 721 (1999).

[12] *See* Sitkoff & Schanzenbach, *supra* note 1, at 414.

policies that underpin the Rule continue to have contemporary relevance, it is therefore necessary to look elsewhere to implement those policies.[13] Understanding the motivation for the movement to abolish the Rule illuminates the pros and cons of alternative means of implementing the Rule's underlying policies.

For example, because Jesse Dukeminier and James Krier assume that the primary rationale for using a perpetual trust is to minimize taxes, they have endorsed liberalizing the rules of trust modification and termination, and of trustee removal, to allow courts to adapt the terms of the trust in light of unanticipated changed circumstances.[14] If the settlor's primary purpose was to minimize taxes, allowing modification or termination in the event of unanticipated changed circumstances probably advances the settlor's intent. The 2000 Uniform Trust Code, already adopted by fourteen states and the District of Columbia, liberalizes the common law of trust modification and termination based on similar reasoning.[15] By contrast, Joshua Tate believes that settlors create perpetual trusts to ensure perpetual control irrespective of tax considerations. Tate therefore cautions that liberalizing modification and termination rules would in many cases frustrate, not advance, the settlor's intent.[16]

Empirical analysis of the rise of the perpetual trust also speaks to the current policy debate over reforming the federal wealth transfer taxes. The staff of the Joint Committee on Taxation (JCT) as well as various commentators have proposed amending the tax code to strip perpetual trusts of their tax advantage.[17] Our conclusion that the typical

---

[13] *See* Ira Mark Bloom, *The GST Tax Tail Is Killing the Rule Against Perpetuities*, 87 TAX NOTES 569, 570-71 (2000); Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1317-39 (2003); Eric Rakowski, *The Future Reach of the Disembodied Will*, 4 POL. PHIL. & ECON. 91 (2005); Sterk, *supra* note 4, at 2108-17; Angela M. Vallario, *Death by a Thousand Cuts: The Rule Against Perpetuities*, 25 J. LEGIS. 141, 154-62 (1999); Moritz, *supra* note 1, at 2595-2608.

[14] *See* Dukeminier & Krier, *supra* note 13, at 1339-42; *see also* Susan F. French, *Perpetual Trusts, Conservation Servitudes, and the Problem of the Future*, 27 CARDOZO L. REV. 2523, 2530-31, 2534-35 (2006).

[15] *See David M. English, The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 169-77 (2002); *see also* Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 REAL PROP. PROB. & TR. J. 697, 720 (2001); Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?*, 38 AKRON L. REV. 649, 654-69 (2005); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 658-63 (2004). Perhaps a useful analogy is to the doctrine of cy pres in charitable trusts, which are privileged with an exemption from the Rule. *See* JESSE DUKEMINIER, STANLEY M. JOHANSON, JAMES LINDGREN & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 737-42 (7th ed. 2005).

[16] *See* Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 U. KAN. L. REV. 595, 620-25 (2005).

[17] *See* STAFF OF JOINT COMM. ON TAXATION, 108TH CONG., OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES 392-95 (Comm. Print 2005) [hereinafter JCT

donor uses a perpetual trust primarily because of its tax advantage lends support to such proposals. Avoidance behavior suggests a deadweight loss.

Our empirical understanding of the reasons for the rise of the perpetual trust also contributes to the literature on the bequest motive. Scholars have long debated the relative importance of various motives for making donative transfers, both during life and at death, including altruism, tax planning, precautionary savings, the ability to extract services from one's kin, and dynastic impulses.[18] Although the rise of the perpetual trust might be viewed as evidence of a dynastic impulse, our findings suggest instead that the modern perpetual trust is primarily a creature of the federal transfer taxes.

The remainder of this Article is organized as follows. Part I reviews the Rule Against Perpetuities, including its purposes, its reform in the latter part of the twentieth century, and its recent demise. Part II surveys the anecdotal evidence and prior literature on what sparked the movement to abolish the Rule and casts a comparative glance abroad to Scotland. Part III presents our empirical analysis, which includes a description of our data, an explanation of our identification strategies, and both graphical and regression analyses. Part III also presents a non-technical summary of our main empirical findings. The Article ends with a short discussion of conclusions and implications.

I. THE RULE AGAINST PERPETUITIES[19]

A. *The Rule and Its Policies*

The Rule Against Perpetuities prohibits remote vesting of property interests. The classic formulation is that of John Chipman Gray: "No

Report], *available at* http://www.house.gov/jct/s-2-05.pdf; *see also infra* note 43 and accompanying text.

[18] *See, e.g.*, B. Douglas Bernheim et al., *The Strategic Bequest Motive*, 93 J. POL. ECON. 1045 (1985); Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 548-49 (1964); Franco Modigliani, *The Role of Intergenerational Transfers and Life Cycle Saving in the Accumulation of Wealth*, J. ECON. PERSP., Spring 1988, at 15; Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567; Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411 (1977); James Poterba, *Estate and Gift Taxes and Incentives for Inter Vivos Giving in the U.S.*, 79 J. PUB. ECON. 237 (2001); Steven Shavell, *An Economic Analysis of Altruism and Deferred Gifts*, 20 J. LEGAL STUD. 401 (1991). There is also a growing literature that draws on behavioral economics and sociobiology to examine this question. *See, e.g.*, Donald Cox, *Private Transfers Within the Family: Mothers, Fathers, Sons and Daughters*, *in* DEATH AND DOLLARS: THE ROLE OF GIFTS AND BEQUESTS IN AMERICA 168 (Alicia H. Munnell & Annika Sundén eds., 2003); Lee Anne Fennell, *Death, Taxes, and Cognition*, 81 N.C. L. REV. 567 (2003).

[19] This section draws on Sitkoff & Schanzenbach, *supra* note 1, at 364-78.

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."[20] 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).[21]

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.

The dead-hand rationale for the Rule is best understood as a response to the disagreeable consequences that can arise from unanticipated circumstances.[22] 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."[23] Forever is a long time.

---

[20] JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201, at 191 (4th ed. 1942).

[21] *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 DEAD HAND 188 (188); *see also id.* at 183-85 (1880).

[22] *Compare* T.P. Gallanis, *The Rule Against Perpetuities and the Law Commission's Flawed Philosophy*, 59 CAMBRIDGE L.J. 284 (2000) (urging that the dead hand argument be conceived in terms of the economic consequences of perpetuities), *with* ENGLISH LAW COMMISSION, THE RULES AGAINST PERPETUITIES AND EXCESSIVE ACCUMULATIONS, Report No. 25, 1997-8, H.L. 251, at 5, 8, 20 (1998), *available at* http://www.lawcom.gov.uk/docs/lc251.pdf (putting the dead hand argument in terms of intergenerational fairness), *and* LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 58-59 (1955) (same).

[23] 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. *But see* Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 EMORY L.J. 295, 307 (1988) (arguing that settlors "will take the possibility of unforeseen contingencies into account when creating the trust").

Measured against its purposes, the Rule is both underinclusive and overinclusive. The Rule is underinclusive because it only applies to contingent interests, but vested interests that will not become possessory for a long period of time can also compromise the Rule's underlying policy objectives.[24] It is overinclusive because if the trustee is given the power to sell the trust property and reinvest the proceeds, as is typical,[25] there is no concern with marketability.[26] Nonetheless, the prevailing academic view is that the Rule "does, by and large, effectively prevent tying up property for an inordinate length of time."[27]

B. *Twentieth Century Reform*

Under the what-might-happen possibilities test of the orthodox Rule, even the most implausible assumption about what might happen will render a contingent future interest invalid. Hence the casebooks are replete with improbable and bizarre occurrences such as childbearing octogenarians and toddlers, unborn widows, inexhaustible gravel pits, wars that never end, slothful executors, and explosive birthday presents.[28] Eventually, dissatisfaction with the Rule's exasperating complexities, absurd assumptions, and booby traps led to reform to stay what Barton Leach famously called "the slaughter of the innocents" in the Rule's "reign of terror."[29]

---

[24] *See* T.P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513, 559-60 (2003).

[25] The modern trustee's default powers are broad. *See* UNIF. TRUST CODE § 815 (amended 2003), § 816 (2000), 7C U.L.A. 310, 310, 311-16 (Supp. 2005); RESTATEMENT (THIRD) OF TRUSTS § 85 (Tentative Draft No. 4, 2005); DUKEMINIER ET AL., *supra* note 15, at 777-78; John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 640-43 (1995).

[26] *See* SIMES, *supra* note 22, at 40-42. Today, because almost all life estates and future interests are created in trust rather than as legal interests, the Rule's primary contemporary application is to interests in trusts funded with stocks, bonds, and other liquid financial assets.

[27] DUKEMINIER ET AL., *supra* note 15, at 675.

[28] *See* ELIAS CLARK, LOUIS LUSKY & ARTHUR W. MURPHY, GRATUITOUS TRANSFERS 753-69 (1977); JOEL C. DOBRIS, STEWART E. STERK & MELANIE B. LESLIE, ESTATES AND TRUSTS 839-48 (2d ed. 2003); DUKEMINIER ET AL., *supra* note 15, at 678-86; DUKEMINIER & KRIER, *supra* note 2, at 306-11; WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES 457 (3d ed. 2004); EUGENE F. SCOLES, EDWARD C. HALBACH, JR., RONALD C. LINK & PATRICIA GILCHRIST ROBERTS, DECEDENT'S ESTATES AND TRUSTS 1075-78 (6th ed. 2000); JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES AND PRACTICES 608-09 (3d ed. 2002); VALERIE J. VOLLMAR, AMY MORRIS HESS & ROBERT WHITMAN, AN INTRODUCTION TO TRUSTS AND ESTATES 982-85 (2003); LAWRENCE W. WAGGONER, GREGORY S. ALEXANDER, MARY LOUISE FELLOWS & THOMAS P. GALLANIS, FAMILY PROPERTY LAW 1206-18 (3d ed. 2002).

[29] W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952) [hereinafter Leach, *Terror*]; W. Barton Leach, *Perpetuities: Staying the Slaughter of the Innocents*, 68 L.Q. REV. 35 (1952).

Some states enacted statutory fixes for specific fantasy scenarios, in particular the unborn widow and the fertile octogenarian. Other states authorized the courts to reform instruments that otherwise would have been void ab initio. Still other states adopted the so-called wait-and-see principle whereby courts wait to see if, in light of actual instead of possible events, the interest will in fact vest or fail within a specified period.

The culmination of the twentieth-century perpetuities reform movement was the Uniform Statutory Rule Against Perpetuities (USRAP) of 1986. USRAP, some form of which is now in force in about half the states, provides a wait-and-see period of ninety years and authorizes reformation of instruments that would otherwise violate the Rule.[30] A related response to the Rule's dangers was the development of the perpetuities saving clause. Such a clause ensures that an overlooked violation of the Rule will not render the trust invalid. The use of a saving clause is standard good drafting practice.[31]

The unifying theme of the perpetuities reform movement through 1995—except, of course, in Idaho, South Dakota, and Wisconsin, which for reasons that are not entirely clear abolished their Rules by 1957, 1983, and 1969 respectively[32]—was continuing respect for the long-standing policy against remote vesting. Even in its reformed versions and buffered by saving clauses, the Rule required contingent interests to vest or fail within a specified period. For this reason, for most of the twentieth century the Rule limited the duration of trusts.[33]

---

[30] Both wait-and-see in general and USRAP in particular sparked such heated debate in the law reviews that Susan French aptly dubbed the academic conflicts as the "Perpetuities Wars." Susan F. French, *Perpetuities: Three Essays in Honor of My Father*, 65 WASH. L. REV. 323, 332-34 (1990); *see also* Sitkoff & Schanzenbach, *supra* note 1, at 366-69 (recounting the perpetuities wars and collecting citations); *infra* note 53. In her commentary on this article, Mary Louise Fellows suggests that USRAP was "part of the dry tinder on which the GST tax fell to spark perpetual trusts. Simplification and codification of the RAP made repeal widely and easily imaginable." Fellows, *supra* note 8, at 2511.

[31] *See* DAVID M. BECKER, PERPETUITIES AND ESTATE PLANNING 133-84 (1993); DUKEMINIER ET AL., *supra* note 15, at 695-96; WAGGONER ET AL., *supra* note 28, at 1218-27. Hence, contrary to a pernicious leading case, *see* Lucas v. Hamm, 364 P.2d 685 (Cal. 1961), it is almost certainly malpractice to draft an instrument that violates the Rule and lacks a saving clause. *See* Wright v. Williams, 121 Cal. Rptr. 194, 199 n.2 (Ct. App. 1975); JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY § 7.7.4, at 333 (2d ed. 2005).

[32] Wisconsin may have abolished its Rule even earlier (indeed, Wisconsin may never have had the Rule). *See* Friedman, *supra* note 18, at 550; W. Barton Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 974-75 (1965). We need not resolve the status of the Rule in Wisconsin prior to 1969, however, because our data does not begin until that year.

[33] Because the rule prohibits vesting outside of the applicable perpetuities period, the identity of all persons with a claim to the underlying trust property will be ascertained within that period. Once all the beneficiaries are ascertained, they can terminate the trust when the perpetuities period ends. *See* RESTATEMENT (SECOND) OF PROPERTY, DONATIVE TRANSFERS § 2.1 (1983); 1A AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS § 62.10 (William Franklin Fratcher 4th ed. 1987); *see also* CLARK ET AL., *supra* note 28, at 769. If the beneficiaries do not terminate the

C. *Toward the Twenty-First Century: Repeal*

Unlike prior reform efforts, which preserved the Rule's core prohibition against remote vesting, beginning in the mid-1990s a movement arose to repeal the Rule as applied to interests in trust. This movement appears to have originated in Delaware, which abolished its Rule in 1995.[34] The official synopsis of the Delaware legislation states its purpose plainly:

> Several states, including Idaho, Wisconsin and South Dakota, have abolished altogether their rules against perpetuities, which has given those jurisdictions a competitive advantage over Delaware in attracting assets held in trusts created for estate planning purposes. . . .
>
> The multi-million dollar capital commitments to these irrevocable trusts, and the ensuing compound growth over decades, will result in the formation of a substantial capital base in the innovative jurisdictions that have abolished the rule against perpetuities. Several financial institutions have now organized or acquired trust companies, particularly in South Dakota, at least in part to take advantage of their favorable trust law.
>
> Delaware's repeal of the rule against perpetuities for personal property held in trust will demonstrate Delaware's continued vigilance in maintaining its role as a leading jurisdiction for the formation of capital and the conduct of trust business.[35]

In response, Alaska, Arizona, Illinois, Maine, Maryland, New Jersey, Ohio, and Rhode Island authorized perpetual trusts by year-end 2000.[36] By year-end 2005, Colorado, Florida (360 years), Missouri, Nebraska, Nevada (360 years), New Hampshire, Utah (1,000 years), Virginia, and Wyoming (1,000 years) had followed suit.[37] The legislative history and contemporaneous local media coverage of these repeals indicate that their purpose was to preserve competitiveness in the jurisdictional competition for so-called dynasty trust funds,[38]

trust, the trust corpus will be distributed to the principal beneficiaries when the preceding life estates expire.

34 *See* Act of July 7, 1995, 70 Del. Laws 428 (1995).

35 H.R. 245, 138th Gen. Assemb. (Del. 1995) (bill synopsis).

36 *See* Sitkoff & Schanzenbach, *supra* note 1, at 430-33 tbl.5.

37 *Id.* (listing states, dates of trust law changes, and lengths of perpetuities periods).

38 *See, e.g.*, Assemb. 2804, 208th Leg., 2d Ann. Sess. (N.J. 1999) (stating that the purpose of repeal was "to permit banks and trust companies to offer 'dynasty trusts' to their customers, such

meaning perpetual transfer-tax-exempt trusts.[39] In a related vein, the governor of South Dakota—one of the three states that had abolished the Rule prior to Delaware—created a task force in 1997 to study the South Dakota trust laws and to recommend reforms "to allow South Dakota to continue its position as a highly desirable jurisdiction in which to locate trusts."[40]

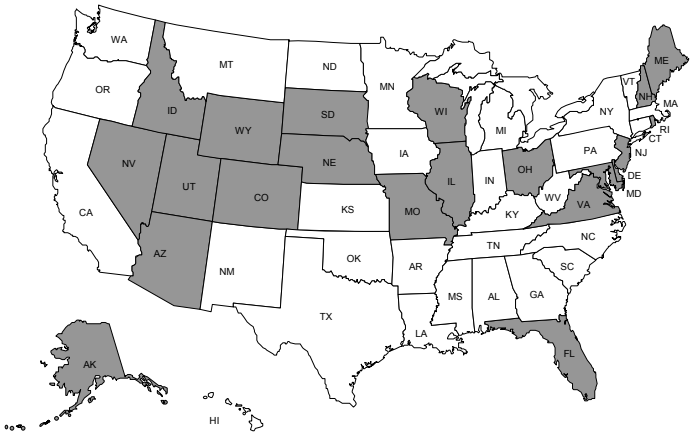
Figure 1 illustrates the extent of the Rule's abolition at year-end 2005.

as those that are being offered by banks and trust companies located in other states"); Fact Sheet for S.B. 1112, 43d Leg., 2d Reg. Sess. (Ariz. 1998), *available at* http://www.azleg.state.az.us/legtext/43leg/2r/summary/s.1112.ced.htm (stating that Arizona's perpetual trust legislation was "an effort to retain people who want to set up [perpetual trusts] in state"); *Trusts and Property Transfers in Trust: Hearings on H.B. 101 Before the Subcomm. on Labor and Commerce*, 20th Leg. (Alaska 1997) (statement of Rep. Vezey), *available at* http://www.legis.state.ak.us/Folhome.htm (search 20th Legislature Committee Minutes); Katharine Fraser, *With New Law, Alaska Aiming to Be Trust Capital*, AM. BANKER, Apr. 21, 1997, at 1; Carrie Lehman, *Legislation Changes Alaska Tax, Trust Laws, Attracts New Investors to State*, ALASKA J. COMM., Aug. 18, 1997, at 1; Deanna Thomas, *Trust Bill Could Mean Boon*, ALASKA STAR, Mar. 20, 1997, at 1, *available at* http://www.hompesch.com/pr04.htm; Rachel Wolcott, *New Jersey Poised to Allow Dynasty Trusts*, PRIVATE ASSET MGMT., May 17, 1999, at 1 (stating that the New Jersey legislation, which was "sponsored by the New Jersey Bankers Association, was drawn up so that New Jersey trust institutions could avoid losing potential dynasty trust business and other types of trust business to Delaware, South Dakota and Alaska").

[39] *See infra* Part II.A.

[40] *See* Michael J. Myers & Rollyn H. Samp, *South Dakota Trust Amendments and Economic Development: The Tort of "Negligent Trust Situs" at its Incipient Stage?*, 44 S.D. L. REV. 662, 664 (1999) (discussing the South Dakota task force).

Figure 1: Perpetual Trust States (2005)



Not surprisingly, legislation designed to abolish the Rule is under consideration in several more states.[41]

II. CURRENT UNDERSTANDINGS

A. *The Dominant View: The GST Tax*

The dominant view among both scholars and policymakers is that the enactment of the generation skipping transfer tax in 1986[42] sparked the movement to abolish the Rule.[43] Mass media outlets such as the

41 *See* Tate, *supra* note 16, at 604 n.45 (collecting legislation pending as of 2005).

42 The GST tax provisions comprise Chapter 13 of the Internal Revenue Code. I.R.C. §§ 2601-2663 (2000). The Tax Reform Act of 1976 contained a GST tax, but the 1976 scheme was later repealed retroactively. *See* JEFFREY N. PENNELL, FEDERAL WEALTH TRANSFER TAXATION 981-88 (4th ed. 2003); STEPHANIE J. WILLBANKS, FEDERAL ESTATE AND GIFT TAXATION: AN ANALYSIS AND CRITIQUE § 15.01, at 220 (3d ed. 2004).

43 *See, e.g.*, JCT Report, *supra* note 17, at 393; Dennis L. Belcher & Mary Louise Fellows, *Report on Reform of Federal Wealth Transfer Taxes Task Force on Federal Wealth Transfer Taxes*, 58 TAX LAW. 93, 269 (2004); Bloom, *supra* note 13, at 569; 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 n.135 (1998); Dukeminier & Krier, *supra* note 13, at 1312 (Dukeminier & Krier's view) & 1317 n.59 (reporting John Langbein's view); French, *supra* note 14, at 2524-25; Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1180 n.90 (1999); Sterk, *supra* note 4, at 2100; Vallario, *supra* note 13, at 156-58; *see also* BORIS I. BITTKER, ELIAS CLARK & GRAYSON M.P. MCCOUCH, FEDERAL ESTATE AND GIFT

Wall Street Journal, the *New York Times*, and *Forbes* magazine tell a similar story.[44]

Prior to 1986, the estate tax could be avoided via successive life interests, for example, by leaving property to one's child for life, then to one's grandchild.[45] Because a life tenancy terminates at death and the estate tax is levied only on the decedent's transferable interests, in the foregoing example there would be no tax when, on the death of the transferor's child, the transferor's grandchild's interest became possessory. The 1986 GST tax closed the successive-life-estates loophole by levying a tax equal to the highest rate of the estate tax on any generation-skipping transfer.[46] In rough terms, a transfer to a grandchild, great-grandchild, or any other person who is two or more generations below the transferor is a generation-skipping transfer.[47]

However, under the 1986 code (as amended through 2006) a transferor can pass $1 million during life, or $2 million at death, free from federal wealth transfer taxes, including the GST tax.[48] By funding a trust with the amount of the transferor's exemption, successive generations can benefit from the trust fund and any appreciation therein,

---

TAXATION 573 (9th ed. 2005); REGIS W. CAMPFIELD, MARTIN B. DICKINSON & WILLIAM J. TURNIER, TAXATION OF ESTATES, GIFTS AND TRUSTS 730 (22d ed. 2002); DOBRIS ET AL., *supra* note 28, at 900-02; DUKEMINIER ET AL., *supra* note 15, at 558; DUKEMINIER & KRIER, *supra* note 2, at 335-38; WAGGONER ET AL., *supra* note 28, at 1251-53; LAWRENCE W. WAGGONER & THOMAS P. GALLANIS, ESTATES AND FUTURE INTERESTS IN A NUTSHELL § 5.16 (2005); *cf.* Macey, *supra* note 23, at 308.

From time to time scholars have noted that litigated perpetuities cases typically involve not failed dynastic efforts but technical violations of the Rule that, with better drafting, could have been avoided without compromising the transferor's objectives. *See, e.g.*, Leach, *Terror*, *supra* note 29, at 723. However, because the instruments at issue in such cases were drafted in the shadow of the Rule (albeit by a lawyer who did not catch the technical violation), they shed little light on the empirical question whether transferors have a taste for perpetual control. *Cf.* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

44 *See, e.g.*, Carole Gould, *Shifting Rules Add Luster to Trusts*, N.Y. TIMES, Oct. 29, 2000, § 3, at 11; Rachel Emma Silverman, *Building Your Own Dynasty; States Toss Out Restrictions on Creating Perpetual Trusts; Downside—Fees Last Forever, Too*, WALL ST. J., Sept. 15, 2004, at D1; John Turrettini, *Providing for the Year 3000*, FORBES, June 11, 2001, at 220; *see also* Bruce W. Fraser, *The Rush to Dynasty Trusts*, FIN. ADVISOR, June 2005, at 111 (summarizing the findings of our prior study); Rachel Emma Silverman, *Looser Trust Laws Lure $100 Billion*, WALL ST. J., Feb. 16, 2005, at D1 (same).

45 *See* CAMPFIELD ET AL., *supra* note 43, at 722-24; DUKEMINIER ET AL., *supra* note 15, at 919; PENNELL, *supra* note 42, at 981-83.

46 The maximum rates are as follows: 49% in 2003; 48% in 2004; 47% in 2005; 46% in 2006; and 45% in 2007-09. I.R.C. §§ 2641, 2001.

47 *See id.* § 2651 (defining generational assignments); *id.* § 2613 (defining skip and non-skip persons); *id.* § 2611 (defining generation-skipping transfer); *id.* § 2612 (defining taxable events); *see also* PAUL R. MCDANIEL, JAMES R. REPETTI & PAUL L. CARON, FEDERAL WEALTH TRANSFER TAXATION 713-16 (5th ed. 2003).

48 Federal wealth transfer taxes comprise estate, gift, and GST taxes. The exemption schedule is as follows: through 2003, $1,000,000; in 2004 and 2005, $1,500,000; in 2006 through 2008, $2,000,000; and in 2009, $3,500,000. I.R.C. §§ 2631(c), 2010(c).

free from federal wealth transfer taxes, for as long as state perpetuities law will allow the trust to endure. Thus, as the prominent Boston estate planning lawyer, Raymond Young, foresaw in testimony to Congress prior to the enactment of the 1986 GST tax, the transfer-tax exemption would invite increased use of generation-skipping trusts.[49]

Crucially, Congress put no limit on the duration of a transfer-tax-exempt trust, leaving that question to state perpetuities law.[50] Enactment of the GST tax therefore gave state perpetuities law renewed salience among estate planners. The longer a transfer-tax-exempt trust could be extended, the more generations could benefit from the trust fund free from transfer taxes. In a state that has abolished the Rule, successive generations can benefit from the trust fund, free from subsequent federal wealth transfer taxation, forever. On this view, the movement to abolish the Rule is perhaps more precisely described as a race between the states to allow donors to exploit a loophole in the federal transfer taxes.[51]

Considerable evidence supports the view that the GST tax sparked demand for perpetual trusts by giving trust duration greater salience in estate planning. Not long after the enactment of the GST tax, trust companies in South Dakota began advertising for out-of-state trust business in the practitioner journals by touting South Dakota as a place where a "generation skipping trust" was "possible" because "there is no

---

[49] Young testified:

> However, we are obliged to point out to you that if [the 1986 GST tax] is adopted . . . , it will be an inducement to generation-skipping. You will have more generation-skipping than you ever had under pre-1976 law, and there will be a greater erosion of the tax base, because you will have the banks, lawyers, financial planners, and all others saying, here you are, this is a specially created opportunity for you. Congress has said you can take $1 million, put it aside, no generation-skipping tax.

Generation-Skipping Transfer Tax: Hearings Before the H. Comm. on Ways and Means, 98th Cong. 335, 336 (1984) (testimony of Raymond Young). Young then observed that such a trust could "last within the period of the rule against perpetuities." *Id.*

[50] "When Congress originally enacted a tax on generation-skipping transfers, it noted that '[m]ost States have a rule against perpetuities which limits the duration of a trust.'" JCT Report, *supra* note 17, at 394.

[51] For the sake of expositional simplicity, we employ the common metaphor for jurisdictional competition of a race between the states. In our prior study, however, we embraced an interest-group model, extending the Macey and Miller lawyer-focused model to include transactional lawyers in addition to litigators. *See* Jonathan Macey, *Delaware: Home of the World's Most Expensive Raincoat*, 33 HOFSTRA L. REV. 1131, 1136-39 (2005); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987); Sitkoff & Schanzenbach, *supra* note 1, at 416-18; *see also* Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 299 (2004) (arguing 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"). The primary interest groups that agitate for state trust law reform are local bankers and lawyers. *See* Sitkoff & Schanzenbach, *supra* note 1, at 417; Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1060 & n.126 (2000).

rule against perpetuities."[52] By contrast, prior to the 1986 tax change, there was little discussion in the practitioner literature of the theoretical advantages to, or the use in practice of, perpetual trusts.[53] Not until the 1990s (after Delaware's abolition of the RAP) did lawyers begin publishing articles and continuing legal education materials analyzing the tax and other advantages of creating a perpetual trust.[54]

The Delaware legislature did not validate perpetual trusts until 1995. The hegemon of corporate regulatory competition, Delaware has also long been a trust-friendly jurisdiction. In 1986 Delaware had a disproportionate share of the nation's trust funds,[55] and on several occasions prior to 1986 Delaware tweaked—but did not abolish—its

[52] *See* DUKEMINIER ET AL., *supra* note 15, at 714 (reproducing a Wells Fargo ad); *see also* Dukeminier & Krier, *supra* note 13, at 1315 (discussing marketing of perpetual trusts).

[53] Although there was little discussion of perpetual trusts, the drafting and promulgation of USRAP prompted a large academic literature on perpetuities policy. *See, e.g.*, Ira Mark Bloom, *Perpetuities Refinement: There Is an Alternative*, 62 WASH. L. REV. 23 (1987); Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985) (launching the opening salvo in a four-piece, one hundred-page exchange with Waggoner in a single issue of the Columbia Law Review); Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023 (1987) [hereinafter Dukeminier, *Limbo*]; Jesse Dukeminier, *Wait-and-See: The Causal Relationship Principle*, 102 L.Q. REV. 250 (1986); Mary Louise Fellows, *Testing Perpetuity Reforms: A Study of Perpetuity Cases 1984-89*, 25 REAL PROP. PROB. & TR. J. 597 (1991); Amy Morris Hess, *Freeing Property Owners from the RAP Trap: Tennessee Adopts the Uniform Statutory Rule Against Perpetuities*, 62 TENN. L. REV. 267 (1995); Ronald C. Link & Kimberly A. Licata, *Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts*, 74 N.C. L. REV. 1783 (1996); Lawrence W. Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718 (1983); Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORNELL L. REV. 157 (1988); *see also* Paul G. Haskell, *A Proposal for a Simple and Socially Effective Rule Against Perpetuities*, 66 N.C. L. REV. 545, 562 (1988) (proposing a rule of trust duration of 125 years).

[54] *See, e.g.*, Douglas J. Blattmachr & Jonathan G. Blattmachr, *A New Direction in Estate Planning: North to Alaska*, TR. & EST., Sept. 1997, at 48; Douglas J. Blattmachr & Richard W. Hompesch, II, *Alaska vs. Delaware: Heavyweight Competition in New Trust Laws*, 12 PROB. & PROP. 32 (1998); Thomas H. Foye, *Using South Dakota Law for Perpetual Trusts*, 12 PROB. & PROP. 17 (1998); Al W. King, *A Generation-Skipping Trust: Unlimited Duration? Why Not?*, TR. & EST., June 1999, at 8; Pierce H. McDowell, III, *The Dynasty Trust: Protective Armor for Generations to Come*, TR. & EST., Oct. 1993, at 47; Richard W. Nenno, *Planning with Perpetual Dynasty Trusts* (ALI-ABA Course of Study, Apr. 18-22, 2005), WL SK069 ALI-ABA 121; Daniel G. Worthington, *The Problems and Promise of Perpetual Trust Laws*, TR. & EST., Dec. 2004, at 15; Andrew J. Willms & Dean T. Stange, *Wisconsin: An Estate Planning Paradise*, 72WIS. LAW., Feb. 1999, at 20; *see also* John A. Warnick & Sergio Pareja, *Selecting a Trust Situs in the 21st Century*, 16 PROB. & PROP. 53 (2002) (discussing perpetuities repeal and the GST tax as crucial considerations in choosing a trust situs).

[55] In 1986 Delaware's share of all trust funds held by federally-reporting trustees was eight times larger than its share of the population (2% versus 0.25%). In 1986, when New York institutional trustees held $3,500 in trust assets per state resident, Delaware institutional trustees held $12,600 in trust assets per state resident. For a visual representation of Delaware's dominant position, see Sitkoff & Schanzenbach, *supra* note 1, at 393 fig.4, 398 fig.8. Delaware's success in the jurisdictional competition for trust funds prior to 1986 is confirmed by the regression analysis presented below. *See infra* Part III.D.1.

perpetuities law to create tax and other advantages to settling a trust in Delaware.[56] Hence, that Delaware did not abolish the Rule as applied to interests in trust until 1995,[57] but that in the ten years since 1995 seventeen other states have done so, supports the view that there was little demand for perpetual trusts prior to the GST tax.

Practitioners interviewed by Jesse Dukeminier and James Krier reported that South Dakota "enjoyed a substantial increase in trust business since 1986"; that since Alaska's repeal of the RAP Alaska has gotten at least seven hundred new perpetual trusts; and that "'South Dakota and Delaware institutions probably have more.'"[58] In a similar vein, lawyers and bankers in New York and other states that have retained the Rule only began agitating for its repeal after the 1986 tax reform, once they began to perceive a loss of business to other states.[59]

Finally, in our prior empirical perpetuities study we examined the effect of repealing the RAP on a state's trust business using state-level panel data spanning 1985 through 2003. In 1985 and 1986, the two years prior to the GST tax that were included in our sample, average account sizes in Wisconsin, Idaho, and South Dakota closely matched those of their neighboring states and substantially trailed the national average. After the GST tax, however, average account size in abolishing states increased on average by $200,000. Thus, although we could employ no tests of statistical inference on the effect of abolishing the RAP prior to the GST tax (we had only two years of qualifying

---

[56] In 1986, Delaware reconfigured the Rule as applied to interests in trust into a 110-year limit on trust duration. Act of July 3, 1986, ch. 422, 65 Del. Laws 831 (1986). Prior to 1986 Delaware enacted legislation providing that a new perpetuities period would begin on the exercise of a power of appointment, which remains good law in Delaware today. *See* DEL. CODE ANN. tit. 25, § 501 (1989). Hence Delaware made possible a perpetual trust long before 1995. However, Congress effectively foreclosed this option with I.R.C. § 2041(a)(3), which makes the extension of the perpetuities period under section 501 a taxable event for all trusts created in or after 1942. *See* I.R.C. § 2041(a)(3) (2000); DUKEMINIER ET AL., *supra* note 15, at 694-95; Jonathan G. Blattmachr & Jeffrey N. Pennell, *Adventures in Generation-Skipping, or How We Learned To Love the "Delaware Tax Trap,"* 24 REAL PROP. PROB. & TR. J. 75 (1989).

[57] *See* 70 Del. Laws 164 (1995).

[58] Dukeminier & Krier, *supra* note 13, at 1315-16 (quoting Letter from Jonathan G. Blattmachr to Jesse Dukeminier (July 9, 2002)).

[59] *See, e.g.*, Charles F. Gibbs & Colleen F. Carew, *Trusts Leaving New York, Situs in Cyberspace: Time for Legislation?*, N.Y. L.J., Dec. 20, 2002, at 3 ("Our New York state trust banker friends have been proclaiming for some years now a substantial loss of trust business to Delaware, South Dakota, and other more-hospitable venues . . . ."); Charles F. Gibbs & Marilyn Ordover, *An Open Letter to Assemblywoman Ann Carrozza*, N.Y. L.J., Feb. 5, 2001, at 3 (arguing that "to remain competitive with the other states," New York must repeal the RAP); Thomas Scheffey, *Is Immortality Just Around The Corner? "Dead Hand" Trust Law Relaxes Its Grip*, CONN. L. TRIB., Mar. 4, 2002, at 10 (noting that the Connecticut legislature was considering a revision of the Rule "[i]n an effort to keep legal and banking work for ultra-rich clients from migrating to states with friendlier trust laws").

data), we tentatively concluded that, "without the GST tax incentive to act as a wedge, few individuals would establish perpetual trusts."[60]

B. *The Alternate View: Perpetual Control*

In spite of the intuitive appeal of the foregoing evidence, there are good reasons to suppose that perpetual trusts had (and continue to have) appeal independent of the influence of the GST tax. First, the legislative record of South Dakota's 1983 repeal, although scanty, implies that the purpose of repeal was to attract trust business to the state[61]—and South Dakota's repeal occurred three years prior to the enactment of the GST tax. Hence it appears that, prior to the GST tax, lawyers and bankers in South Dakota concluded that offering perpetual trusts would attract trust business to the state.

Second, in a recent study of donor preferences, Joshua Tate examined the online promotion of perpetual trusts. Tate concluded that "while tax concerns are very important," perpetual trust settlors also "want to make sure that their money is put to good use" and is protected "from beneficiaries' bad judgment or misfortune."[62] Tate explained:

> While most settlors certainly want to pass tax savings down to their descendants, that is not the only apparent goal: settlors also wish to protect their wealth from being wasted and to encourage their descendants to be productive members of society. Moreover, although it may be true that most settlors do not care about their unborn descendants, some of them might, and those who do probably

60 Sitkoff & Schanzenbach, *supra* note 1, at 398-99.

61 South Dakota's Legislative Research Council (LRC) maintains the legislative history for bills introduced prior to 1997. *See* How to Compile Legislative History Using the Legislative Research Council Website, http://legis.state.sd.us/general/leghist.htm (last visited Feb. 25, 2006). In response to a request by the law library of Northwestern University for copies of the records pertaining to South Dakota's repeal of the RAP, the LRC sent the following: (1) a one-page chronology of the steps leading up to the bill's passage copied from the 1983 House Bills Index; (2) the bill's language; and (3) the voting records of the House and Senate Judiciary Committees copied from the House and Senate Journals. None of these materials contains a reference to the reason for repealing the RAP. However, a voting record sheet of the House Judiciary Committee indicates that Tom Shelby, a Vice President at the Sioux Falls branch of the First Bank of South Dakota, and Dick Bogue, an attorney from Canton, testified in favor of repeal on February 23, 1983. *Hearing Before the H. Judiciary Comm.*, 58th Leg. (S.D. Feb. 2, 1983) (statements of Tom Shelby and Dick Bogue) (on file with authors). Further, according to Stewart Sterk, South Dakota's repeal of the RAP was part of a larger set of tax and interest rate policy reforms designed to attract trust and banking business. *See* Sterk, *supra* note 4, at 2101-02; *see also* Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. (forthcoming), *available at* http://ssrn.com/abstract=789704 (follow "Social Science Research Network" link to download).

62 Tate, *supra* note 16, at 613, 617.

> want their spendthrift provisions and restrictions on the use of funds to continue indefinitely.[63]

Accordingly, Tate concluded that "some settlors may have truly dynastic intentions."[64]

Third, history is replete with efforts by one generation to control subsequent generations' disposition of the family patrimony.[65] On this view, the perpetual trust might be reckoned the modern counterpart to the fee tail and strict settlement.[66] Indeed, consistent with this idea and Tate's findings, in our prior study we noted that "trust lawyers have told us anecdotes about settlors who" employ perpetual trusts "because they seek . . . perpetual control," not merely tax advantages.[67]

C. *A Look Abroad: Scotland*

[63] *Id.* at 620.

[64] *Id.* at 619. As Tate candidly acknowledges, however, his findings depend on the reliability of advertisements by practitioners as a proxy for settlor's preferences and are also biased by selecting for practitioners who maintain promotional websites. *See id.* at 612-13 & n.104. Further, Tate's evidence is amenable to an alternative interpretation, namely, that lawyers find it necessary to highlight the non-tax benefits of perpetual trusts to assuage the settlor's natural antipathy to them. *Cf.* Moritz, *supra* note 1, at 2606 n.81 (reporting an interview with a South Dakota trust company officer in which the author was told that "[o]nce clients hear the full explanation, including non-tax reasons, they often become much more interested in" perpetual dynasty trusts).

[65] Perhaps the most notorious is that of Peter Thellusson, who died in 1797. *See* Leach, *Terror*, *supra* note 29, at 726 (stating that the "family-dynasty mentality flourished in the eighteenth century and reached a fine fruition in the will of Peter Thellusson"). 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. *See* PATRICK POLDEN, PETER THELLUSSON'S WILL OF 1797 AND ITS CONSEQUENCES ON CHANCERY LAW (2002); Robert H. Sitkoff, *The Lurking Rule Against Accumulations of Income*, 100 NW. U. L. REV. 501 (2006); *see also* Fellows, *supra* note 8, at 2517 (discussing other examples).

[66] *See supra* note 2 and accompanying text.

[67] Sitkoff & Schanzenbach, *supra* note 1, at 414; *see also* Sitkoff, *supra* note 15, at 661 n.208. Such efforts occasionally wind up in the case reports. For example, in the amusing case of *Marsh v. Frost National Bank*, 129 S.W.3d 174 (Tex. App. 2004), the court held invalid a bequest "to provide a million dollar trust fund for every American [eighteen] years or older" by accumulating income for 346 years on the proceeds from the sale of certain property because this purpose was not charitable and hence violated the Rule Against Perpetuities. *Id.* at 176. The testator had wanted the trust "to be called the James Madison Fund to honor our fourth President, 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.* Another recent example, with a different result on the perpetuities question, is *White v. Fleet Bank of Maine*, 739 A.2d 373 (Me. 1999). In *White*, the testator left a holographic will providing for a 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 [t]rust." *Id.* at 375. The court held that the quoted language was a saving clause such that, under the then-applicable Maine wait-and-see statute, the bequest did not offend the Rule Against Perpetuities. *See id.* at 377. The court nonetheless held the bequest invalid for violating the rule against accumulations of income. *See id.* at 380; *see also* Sitkoff, *supra* note 65, at 511-12 (discussing *White*).

There is no Rule Against Perpetuities in Scotland, and "Scots law has never set its face against perpetuities in the same way as has happened in England and Wales."[68] Hence, trust practice in Scotland may offer another window on whether donors desire perpetual control independent of U.S. federal transfer-tax incentives.[69]

The English Law Commission recently surveyed "the views of a number of Scottish conveyancing lawyers,"[70] publishing its findings in a 1998 report on perpetuities reform in England:

> What we discovered from our enquiries is that although perpetual trusts are created, they tend to be confined to public purposes, some of which are charitable and some of which are not. We were given a tiny handful of examples of perpetual private trusts, including one created in the [eighteenth] century which eventually became impossible to administer because of uncertainty as to the identity of the beneficiaries. In practice, the maximum duration of trusts in Scotland was, we were informed, about [one hundred] years. Most were of much shorter duration, and there was little pressure from clients to create long-term trusts.
>
> The conclusions that we have drawn from our study of Scottish law and practice are as follows. The mere fact that the law allows the creation of perpetual trusts does not lead settlors to create them. In Scotland few do. Other factors, such as taxation, or the risk of the disposition eventually failing for uncertainty, tend to encourage trusts to be set up for a comparatively short duration.[71]

To be sure, the Law Commission's survey of Scotland's experience is limited. Moreover, inferences about domestic perpetual trust practice drawn from experience in the English Commonwealth are inherently suspect because the English law of trust modification and termination is more liberal than the American law.[72] Nonetheless, the Law Commission's findings are consistent with the prevailing (but not exclusive) view among domestic scholars that tax incentives, not desires

---

[68] ENGLISH LAW COMMISSION, *supra* note 22, at 21; *see also* SIMPSON, *supra* note 23, at 160-62 (comparing Scots and English law).

[69] Still another possible source of information on desire for perpetual control independent of domestic transfer-tax advantages comes from the Canadian province of Manitoba, which abolished its Rule Against Perpetuities in 1983. *See* Perpetuities and Accumulations Act, R.S.M., chs. 38, 43 (1983) (Manitoba, Can.); *see also* DUKEMINIER ET AL., *supra* note 15, at 721 (discussing Manitoba); Dukeminier & Krier, *supra* note 13, at 1340-41. We are not aware of any study comparing Manitoba with the rest of Canada.

[70] *See* ENGLISH LAW COMMISSON, *supra* note 22, at 20. Although the Law Commission "considered the possibility of commissioning a full study of the economic implications of abolishing the rule," in the end it did not "because it proved impossible to obtain sufficient data." *Id.*

[71] *Id.* at 22; *see also* DUKEMINIER & KRIER, *supra* note 2, at 338 (stating that "perpetual settlements are rarely, if ever, created" in Scotland, but citing no authority for this proposition).

[72] *See* DUKEMINIER ET AL., supra note 15, at 572-73 (comparing English and American law); Sitkoff, *supra* note 15, at 658-63 (same).

for dynastic control, sparked the recent domestic movement to promote perpetual trusts.

III. EMPIRICAL ANALYSIS

A. *The Data*

As in our prior study, the trust data (state-level panel data) come from annual reports collected by the four federal agencies charged with banking regulation: (1) the Federal Deposit Insurance Corporation (FDIC); (2) the Federal Reserve System; (3) the Office of Thrift Supervision (which superseded the Federal Home Loan Bank Board); and (4) the Office of the Comptroller of the Currency. Federal law requires all banks and other financial institutions that are regulated by these agencies to file an annual report detailing their trust holdings, including total assets and number of accounts.[73] Based on this data, from 1969 until 2001 the Federal Financial Institutions Research Council published annual reports of trust holdings by regulated entities, summarizing the results by state.[74] Since 2001, the FDIC has published these reports (now available online) organized by individual institution and by state.[75] Our previous study includes an exhaustive treatment of the nature of and potential problems with the data.[76]

The trust holdings of regulated entities are reported in categories entitled "Employee Benefit," "Personal Trusts," and "Estates." We examine here only "Personal Trusts," a category that includes both private and charitable trusts (both testamentary and inter vivos), but excludes commercial trusts and employee benefit plans. Prior to 1985, federal authorities only collected information on actively managed personal trusts (meaning trusts for which the regulated entity had discretionary investment authority), and neither savings-and-loan institutions nor savings banks with trust powers were required to report.[77] Because the data are not consistent from 1969 through 2003,

---

[73] 12 U.S.C. § 1817 (2000) (FDIC); *id.* §§ 248(a), 1844(a) (Federal Reserve System); *id.* § 1464 (Office of Thrift Supervision); *id.* §§ 1725, 1730 (Federal Home Loan Bank Board) (repealed 1989); *id.* §§ 161, 1817 (Office of Comptroller of the Currency).

[74] FED. FIN. INSTS. EXAMINATION COUNCIL, TRUST ASSETS OF FINANCIAL INSTITUTIONS (published annually from 1969 through 2000).

[75] An interactive website allows one to obtain new data, state by state at FDIC: Statistics on Depository Institutions, http://www2.fdic.gov/sdi/main.asp (last visited Apr. 3, 2006). Older reports, from 1996 through 2000, may be obtained at FFIEC: Trust Institutions Information, http://www2.fdic.gov/structur/trust/index.asp (last visited Apr. 3, 2006).

[76] *See* Sitkoff & Schanzenbach, *supra* note 1, at 389-90, 434-35.

[77] See FED. FIN. INSTS. EXAMINATION COUNCIL, TRUST ASSETS OF FINANCIAL INSTITUTIONS-1987, at 2, for a discussion.

we split the sample into two time periods: 1969 through 1984, and 1985 through 2003.

Another potential problem with the data arises from the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (Riegle-Neal Act).[78] Effective in 1997, the Riegle-Neal Act made it much easier for banks and bank holding companies to convert independently chartered banks in other states into branch offices of a single interstate bank.[79] Interstate bank mergers or branch consolidations have the potential to bias our results because the data are collected by institution, not by state. For example, if a bank consolidated after 1997 by converting its independently chartered offices in state *A* into a branch of its headquarters bank chartered in state *B*, then trust assets formerly reported as held in state *A* would be reported as held by the headquarters bank in state *B*. Mergers could have the same effect. If a bank chartered in state *A* acquired a bank chartered in state *B* and then converted the acquired bank into a branch, the accounts formerly reported as held in state *B* would from that point forward be reported as held in state *A*.

Although important to consider, bank mergers and consolidations do not pose a serious impediment to the current study for three reasons. First, in the present study we focus primarily on the data from 1969 through 1984, well before the Riegle-Neal Act. Second, to the extent we examine the data from 1985 through 2003, only substantial mergers between banks in RAP and abolition states have the potential to bias our results. But as we noted in our prior perpetuities study, few such mergers have occurred.[80] Instead, almost every substantial merger since the Riegle-Neal Act has involved only banks located in abolition states, which merely shifts funds from one control state to another. Third, when using the data from 1985 through 2003 we examine not only total trust assets but also average trust account size, which should be less susceptible to bias from mergers than total trust assets.[81]

---

[78] Pub. L. No. 103-328, 108 Stat. 2338 (1994) (codified at 12 U.S.C. § 1811 (2000)); *see* Patrick Mulloy & Cynthia Lasker, *The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994: Responding to Global Competition*, 21 J. LEGIS. 255, 270-72 (1995).

[79] Prior to 1997, banks could maintain interstate branches under narrow circumstances, but a study conducted by the Federal Reserve found that few banks did so. *See* Susan McLaughlin, *The Impact of Interstate Banking and Branching Reform: Evidence from the States*, CURRENT ISSUES IN ECON. & FIN., May 1995, at 1.

[80] Sitkoff & Schanzenbach, *supra* note 1, at 389-90.

[81] Average account size is computed by dividing the total reported assets by the number of reported accounts. A swing up or down in reported assets caused by a merger also causes a corresponding swing up or down in the number of accounts reported in that state. Thus, average account size should be less sensitive to distortion from mergers or branching than total assets. *See id.* at 390.

B. *Identification Strategies*

To assess the popularity of perpetual trusts prior to the GST tax, ideally we would examine the change in a state's trust assets after it abolished the Rule relative to states that did not abolish the Rule. However, prior to the 1986 enactment of the GST tax, only three states had abolished the Rule: Wisconsin, Idaho, and South Dakota. Moreover, Wisconsin and Idaho abolished their Rules prior to the start of our data,[82] so we are unable to make before-and-after comparisons for those states. South Dakota abolished the Rule in 1983, only a few years before the enactment of the GST tax in 1986 and the change in data collection methods in 1985. The data are thus insufficient to accommodate a before-and-after identification strategy such as differences-in-differences.

Because we cannot undertake a before-and-after comparison, we instead examine existing differences across states. Although not ideal, such comparisons, especially when made with similar states, are highly suggestive. In the period under study, there was little variation in the basic law of trusts across the states,[83] except that Idaho and Wisconsin previously permitted perpetual trusts and South Dakota did so beginning in 1983. Further, the law of trusts consists largely of default rules that may be varied by the settlor.[84] Accordingly, apart from state perpetuities law, in the typical case there would have been little reason to settle a trust out of state given the increased transaction costs of doing so.

If the movement to abolish the RAP was driven by donors who desired control across generations rather than to exploit the perpetuities loophole in the GST tax, then the states that permitted perpetual trusts prior to the enactment of the GST tax ought to have had more trust

---

82 Indeed, Wisconsin may never have had the Rule. *See supra* note 32.

83 State courts regularly cite the same leading authorities: the 1959 Restatement (Second) of Trusts and the current versions of the Scott and Bogert treatises. *Cf.* John H. Langbein, *The Uniform Trust Code: Codification of the Law of Trusts in the United States*, 15 TR. L. INT'L 66, 67 & n.3 (2001), *available at* http://www.astrea.com.ar/files/prologs/doctrina0157.pdf (noting the pervasive influence of the Restatement (Second) of Trusts, "which has long been the most authoritative source for American trust law"). In recent years the states' trust laws have become increasingly differentiated on the issue of creditor's rights in self-settled asset protection trusts, but these changes occurred after the period under study here. *See* Sitkoff & Schanzenbach, *supra* note 1, at 380-85. Other important differences across states involve their fiduciary income, estate, and inheritance taxes. *See id.* at 378-80 & n.71, 385-87. In our prior study, however, we found that these considerations, by themselves, did not have a significant effect on the state's reported trust funds. *See id.* at 410-12 (income taxes), 385-87 & n.71 (estate and inheritance taxes).

84 *See* RESTATEMENT (THIRD) OF TRUSTS § 4 cmt. a(1) (2003); John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105 (2004); Sitkoff, *supra* note 15, at 642-43.

assets, ceteris paribus, than other states. Further, because Idaho, Wisconsin, and South Dakota are relatively small states that at the time were not major banking centers, there is little other reason for them to have had a disproportionate share of the reported trust assets; if these states' abolition of the RAP attracted significant trust assets, it should be obvious. On the other hand, if the movement to abolish the RAP was sparked by the GST tax, then we would expect to observe differences between RAP states and abolition states only after 1986.

Using the post-1985 data, in our prior study we examined the effect of abolishing the RAP on a state's reported trust business, finding that from the enactment of the 1986 GST tax through 2003 a state's abolition of the Rule increased its reported trust assets by about $6 billion and its average trust account size by roughly $200,000.[85] These findings imply that, from around the time the GST tax took effect through 2003, roughly $100 billion in trust assets poured into the abolishing states.[86] Thus, in our prior study we concluded that transferors who desire a perpetual trust but live in a state that has retained the Rule have had little difficulty in creating an out-of-state perpetual trust.

We also examined the effect of state income taxation of trust funds attracted from out of state,[87] finding that, by itself, whether a state levied an income tax on trust funds attracted from out of state had little observable effect on a state's reported trust business. However, in tests of the interactive effect of such taxes with the abolition of the Rule, we found that states that abolished the RAP but levied such a tax experienced no observable increase in reported trust assets.[88] In other words, abolishing the RAP attracted trust funds, but only if those funds would not be subject to a state fiduciary income tax.

In view of the tax findings in our prior study, it is important to note that South Dakota does not levy an income tax on trust funds attracted from out of state, but Idaho does and Wisconsin did until 1999.[89] Inasmuch as our identification strategies in the present study depend primarily on observations from Idaho and Wisconsin, we must acknowledge the possibility that the income tax in those states

85 *See* Sitkoff & Schanzenbach, *supra* note 1, at 410-11.

86 The $100 billion figure is only a point estimate. For discussion of this estimate and its confidence interval, see *id.* at 404 & n.125.

87 We classify any state that "might levy a fiduciary income tax on the basis of an in-state trustee, in-state trust administration, or an in-state situs, even if the trust was settled by a nonresident for the benefit of nonresident beneficiaries and the trust consists entirely of intangible personal property," as one that taxes trust funds attracted from out of state. *Id*. at 430 n.176; *see also id.* at 385-87.

88 *See id.* at 410-11.

89 Put more precisely, in 1999 Wisconsin excluded trusts settled by nonresidents from its fiduciary income tax. *See* WIS. STAT. § 71.14(3m) (2004).

confounds our perpetuities analysis. Specifically, a finding that those states did not have a disproportionate share of trust business after abolishing the RAP could owe not to a lack of demand for perpetual trusts but alternatively to donors' aversion to the income tax. On the other hand, we may rely in part on our finding that South Dakota did not experience an increase in trust business between its 1983 abolition of the RAP and the 1986 enactment of the GST tax. Indeed, South Dakota did not attract significant business until the 1990s, when the tax benefits of perpetual trusts became widely known and Delaware repealed its Rule.

To assess whether abolishing the RAP had an effect on a state's trust business prior to 1985, we undertake both graphical and regression analysis. We begin by making simple graphical comparisons between Idaho, Wisconsin, South Dakota and similar neighboring states.[90] To adjust for inflation, all of the graphs report values in constant dollars as of 2000. We also normalize trust assets to account for differences in population and local economies across states by examining trust assets per person and average account size. In the regression analysis, which allows us more formally to control for population, income, and year effects, we examine three variables: (1) trust assets per person, (2) average account size, and (3) total trust assets.

C. *Graphical Analysis*

Figures 2 and 3 compare Idaho and Wisconsin respectively to some of their neighbors between 1969 and 1984, the same years included in the regression analysis. We examine these years because they are prior to the GST tax (1986) and the changes in data collection (1985).

[90] All states, not just those that are geographically proximate to abolishing states, are included in the regression analysis.

Figure 2: Trust Assets per Person in Idaho and Comparison States (1969-1984)

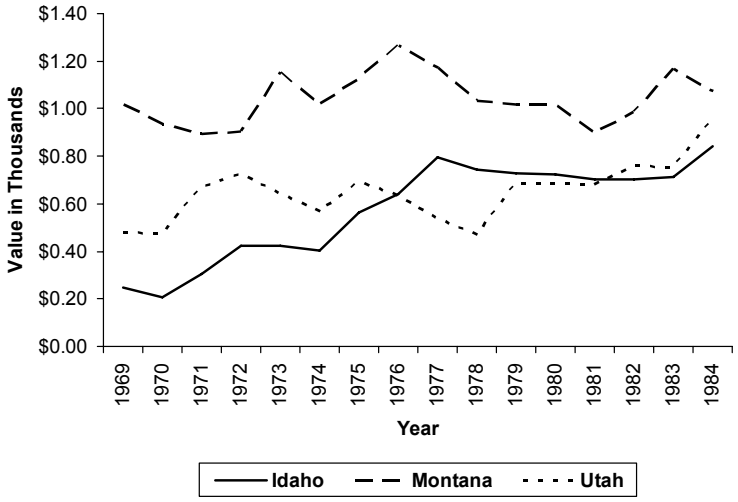
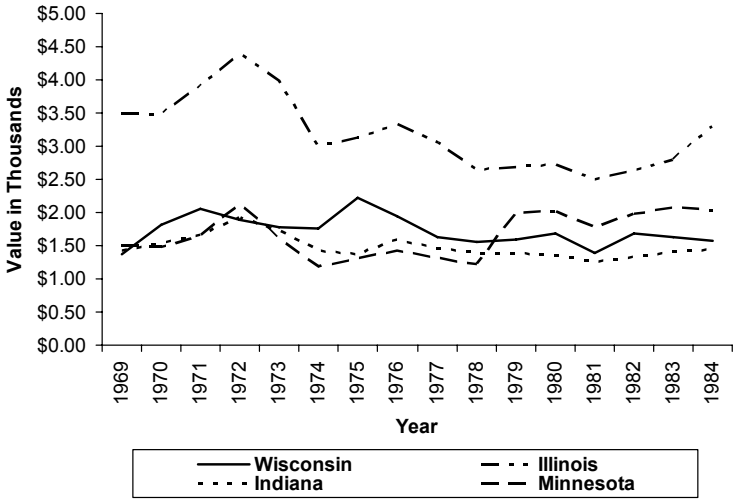


Figure 3: Trust Assets per Person in Wisconsin and Comparison States (1969-1984)

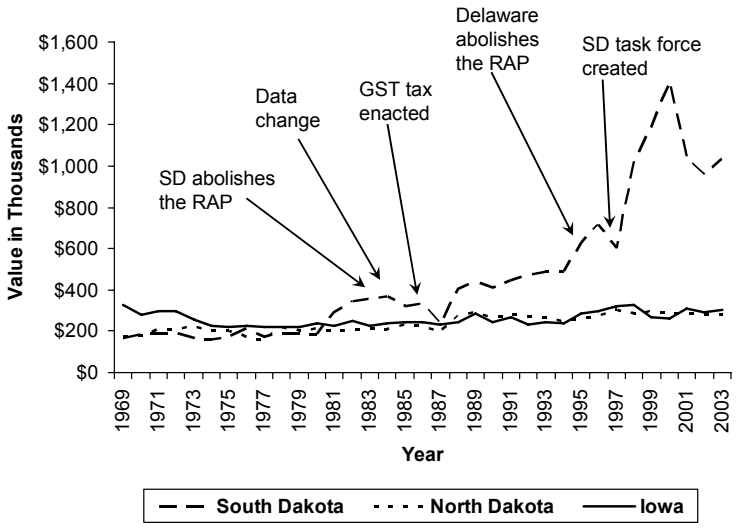


It does not appear that either Wisconsin or Idaho outperformed its neighbors over the sample period, which implies that Wisconsin's and

Idaho's prior abolition of the Rule did not give them an advantage in the jurisdictional competition for trust funds.

We now turn to South Dakota, which abolished the RAP in 1983. Here we include all years between 1969 and 2003, noting the 1985 change in data collection methods and smoothing the data by examining average account size, which in our prior study we found to be quite responsive to the RAP's abolition.[91] Figure 4 compares South Dakota to North Dakota and Iowa.

Figure 4: Average Account Size in South Dakota and Comparison States (1969-2003)



Prior to the early 1980s, average account sizes in South Dakota, Iowa, and North Dakota were quite similar, with Iowa faring a bit better over the 1970s. South Dakota overtook both Iowa and North Dakota beginning in 1980, three years before South Dakota abolished the RAP in 1983. There was no obvious increase in South Dakota's average account size immediately after 1983. There was also no immediate rise in assets after the 1986 enactment of the GST, but rather a gradual trend upward that accelerated in the mid-1990s, around the same time that Delaware entered the fray by abolishing its RAP (1995) and that the Governor of South Dakota formed a task force to assess South Dakota's competitiveness in the market for trust business (1997).[92] By contrast, average account size in Iowa and North Dakota remained virtually

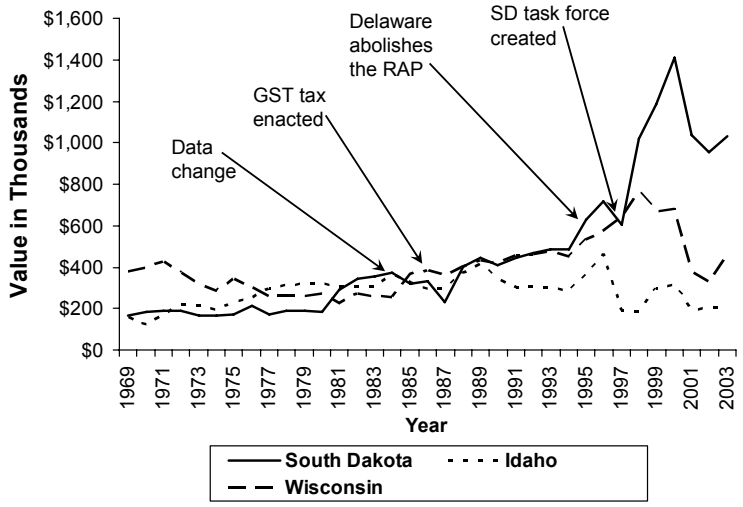
[91] *See* Sitkoff & Schanzenbach, *supra* note 1, at 407-09.

[92] *See supra* note 40 and accompanying text.

unchanged throughout the sample period. (The changes in data collection methods introduced in 1985 apparently did not have much of an effect for these states.)

Figure 5 compares South Dakota to Wisconsin and Idaho for the entire timeframe of the data so as to allow for a pre- and post-GST tax comparison. Wisconsin and South Dakota clearly overtook Idaho by the early 1990s. Further, South Dakota outpaced Wisconsin in the late 1990s, after Delaware's repeal of its RAP and the formation of the governor's task force. (Average trust account size in all three states appears to be sensitive to the stock market decline beginning in 2001.)[93]

Figure 5: Average Account Size in South Dakota, Wisconsin, and Idaho (1969-2003)



We posit that South Dakota broke away from Idaho and Wisconsin in the mid-1990s because South Dakota does not levy an income tax on trust funds attracted from out of state but Idaho does and Wisconsin did until it repealed the tax in 1999. This hypothesis is strongly supported by the results of our prior study's tests of the interactive effect of state

[93] Sensitivity to stock prices is consistent with our findings in a separate empirical study of the effect of changes in trust investment law on trust portfolio allocation. In that study we found that, starting in the late 1980s, the percentage of trust funds invested in stock steadily increased and the percentage invested in bonds and mortgages steadily decreased. *See* Max M. Schanzenbach & Robert H. Sitkoff, *Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?* (New York Univ. Law and Econ. Research Paper Series, Paper No. 05-30, 2005; Northwestern Univ. Law and Econ. Research Paper Series, Paper No. 05-27, 2005), *available at* http://ssrn.com/abstract=868761 (follow "Social Science Research Network" link to download).

tax and perpetuities laws. Those results indicate that only the abolishing states that also did not tax trust funds attracted from out of state experienced an observable increase in reported trust assets.[94] Although it is too soon to assess whether Wisconsin's 1999 repeal of its tax on trust funds attracted from out of state made it competitive with the other abolishing states, Figure 5 suggests visually that Wisconsin stopped losing ground to South Dakota after 1999.

In our view, the foregoing graphs support the hypothesis that abolishing the RAP prior to the enactment of the GST tax had little effect on a state's trust business. The regression analysis reported below supports this interpretation of the graphs.

Before turning to the regression analysis, however, we wish to make three further observations about Figures 4 and 5, which show that South Dakota experienced an increase in trust business after the GST tax, but not (visually) a substantial increase until the mid to late 1990s, after Delaware abolished its Rule. First, we suspect that the delay may reflect the time necessary for the bar to digest the change in the tax law and to sell clients on the advantages of perpetual transfer-tax-exempt trusts. The GST tax and the Rule Against Perpetuities are complex, and the interaction of the two was not immediately obvious.[95]

Second, we suspect that Delaware's repeal of its RAP may have validated the use of transfer-tax-exempt perpetual trusts. Delaware is the leading state in corporate law and law firms elsewhere pay attention to developments in Delaware law. Further, at around the same time, an increasing number of states began recognizing estate planner's malpractice liability to intended beneficiaries.[96] Inasmuch as many clients simply instruct that their estate plan should be designed to minimize all possible taxes, together these factors may have helped overcome lawyers' resistance to settling trusts out of state. In a related vein, the increased salience of the Rule after the GST tax may have

94 *See* Sitkoff & Schanzenbach, *supra* note 1, at 410-11.

95 To put the learning difficulties into perspective, consider that USRAP was amended in 1990—four years after its promulgation and the enactment of the GST tax, both in 1986—because of a potential tax problem (irrelevant for this study) arising from the interaction of the two. *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(e) (1990), 8B U.L.A. 236, 236-37 (2001); Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities and the GST Tax: New Perils for Practitioners and New Opportunities*, 30 REAL PROP. PROB. & TR. J. 185, 206-09 (1995).

96 *See* Martin D. Begleiter, *The Gambler Breaks Even: Legal Malpractice in Complicated Estate Planning Cases*, 20 GA. ST. U. L. REV. 277, 281-82 (2003); Sterk, *supra* note 4, at 2100-01. In a related vein, two South Dakota lawyers suggested in 1999 the possibility of a tort of "negligent trust situs." *See* Myers & Samp, *supra* note 40. In 1979 Jesse Dukeminier presciently predicted that expanding malpractice liability would prompt lawyers to lobby for reform of technical rules. *See* Jesse Dukeminier, *Cleansing the Stables of Property: A River Found at Last*, 65 IOWA L. REV. 151 (1979).

overcome lawyers' lack of awareness that perpetual trusts were even possible.[97]

Third, because existing trusts in non-abolition states are drafted to comply with the Rule, and because moving a trust often requires judicial approval, the perpetual trust phenomenon may well be driven by new trusts rather than the movement of existing trusts.[98] If so, the effect of abolition will be gradual as new trusts are created and accumulate.

The foregoing observations about Figures 4 and 5 are consistent with the results of our prior study's regression analysis, which strongly suggest an increasing effect of abolition over time, not an immediate result.[99]

D. *Regression Analysis*

While the graphical analysis is suggestive, a proper comparison must also account for state- and time-specific factors that have the potential to affect trust asset levels. To undertake such a comparison, we employ a more formal analysis using standard Ordinary Least Squares regressions. In these regressions, we control for a variety of other factors that may explain differences between the states such as population, income, and variation over time stemming from the vagaries of financial markets and interest rates. Further, we control for aggregate state income in the total trust assets regressions and, analogously, a state's per capita income in regressions using trust assets per person or average account size. We also include dummy variables for each state, excluding either Idaho or Wisconsin. To avoid problems with data inconsistencies and the introduction of the GST tax, we examine only the years 1969 through 1984 (we examined 1985 through 2003 in our prior study). Examining 1969 through 1984 gives us 797 state-year observations (data for Hawaii are missing for 1969-1971).

Tables 1A and 1B report state differences in per capita assets; Tables 2A and 2B report state differences in average account size; and Tables 3A and 3B report state differences in aggregate assets. The reported coefficients measure each state's difference relative to the excluded state (either Idaho or Wisconsin) controlling for year, population, and income. In other words, each coefficient measures how

---

97 *See infra* note 104 and accompanying text.

98 *Cf.* Sterk, *supra* note 4, at 2117 n.81.

99 The quadratic specifications, which we believe to be the proper functional form, indicate that trust funds grew at an increasing rate after a state abolished the RAP, peaking at about ten years after abolition. *See* Sitkoff & Schanzenbach, *supra* note 1, at 405.

much worse (or better) the state performed in the jurisdictional competition for trust funds relative to the excluded state, controlling for population and income.

If we observe that many states underperformed Idaho or Wisconsin, then we may infer that Idaho's and Wisconsin's repeal of the RAP gave those states an advantage in the jurisdictional competition for trust funds prior to the 1986 enactment of the GST tax. Coefficients indicating that a state significantly underperformed Idaho or Wisconsin are reported in **bold**. Coefficients indicating that a state significantly outperformed Idaho or Wisconsin are reported in *italics*. Significance is indicated by the p-value. Following convention, we use the standard 5% level (p-value of .05 or less) as the threshold for significance.[100]

Before discussing the results, we pause to explain the mechanics of interpreting the regression coefficients. In Table 1A, for example, Alaska has a coefficient of -0.97 and a standard error of 0.42.[101] This implies a p-value of 0.02, which means that, controlling for per capita income and year effects, there is only a 2% chance that Alaska is different from Idaho purely by chance. The coefficient itself is interpreted as follows: Controlling for year effects and per capita income, Alaska had $970 less in trust assets per person than Idaho. Therefore, Alaska "underperformed" Idaho, meaning that Alaska did worse relative to Idaho than Alaska's population and income would predict. Because we cannot undertake a before-and-after approach, all states must be measured relative to an excluded state. Hence, when we wish to compare states to Wisconsin, we run the same regression again, only we now exclude Wisconsin and include Idaho.

1. Trust Assets Per Capita (Tables 1A and 1B)

In our regressions using trust assets per capita as the dependent variable, which are reported in Tables 1A and 1B, we find that Idaho outperformed only three states and underperformed sixteen. In other words, Idaho was solidly in the lower-middle tier. Wisconsin did slightly better, having outperformed twenty-three states and underperforming only six. However, the states Wisconsin outperformed are concentrated in the South and Great Plains. Wisconsin underperformed many states in the Northeast and outperformed none. Further, Wisconsin was little different from its neighbors, Illinois and Minnesota, though it did fare slightly better ($800 more per capita) than

[100] Other common significance thresholds are 10% (indicated by a p-value of .1 or less) and 1% (indicated by a p-value of .01 or less).

[101] We report Huber-White standard errors, which are robust to arbitrary heteroskedasticity.

Michigan. Neither Idaho nor Wisconsin outperformed larger states such as Ohio, Pennsylvania, Massachusetts, and New York. On the contrary, Idaho and Wisconsin underperformed all four.

Two other results in these Tables are noteworthy: (1) Delaware vastly outperformed its prediction based on its income and population, and (2) California underperformed its prediction based on its income and population. The Delaware result confirms that Delaware was a strong player in the jurisdictional competition for trust funds prior to 1985. Indeed, we conjecture that the combination of Delaware's longstanding friendliness toward trust funds attracted from out of state and its proximity to New York may explain the relatively weaker showing by New York.

The California result is probably an artifact of California's income being significantly higher than that in other states. On average, California's trust assets per person were comparable to Wisconsin's, but controlling for income and population levels puts California's numbers in a poor light. These results are repeated in the regressions for average account size, reported in Tables 2A and 2B.

2. Average Account Size (Tables 2A and 2B)

The results for trust assets per capita are largely replicated in our regressions taking average account size as the dependent variable, which are reported in Tables 2A and 2B. Idaho is in the lower-middle tier, having outperformed seven states and underperforming fourteen. Wisconsin outperformed only three states and underperformed thirty.

3. Aggregate Trust Assets (Tables 3A and 3B)

The results for aggregate trust assets, which are reported in Tables 3A and 3B, tell a similar story. On this metric Idaho was in the middle tier, having outperformed only four states and underperforming nine. In addition, Idaho was not statistically different from its neighbors Utah and Montana. Wisconsin outperformed seventeen states and underperformed eight states. However, as in trust assets per capita, the states Wisconsin outperformed are concentrated in the South. Further, Wisconsin substantially underperformed relative to its neighbor Illinois and is not statistically different than nearby Minnesota or Michigan.

E. *Summary of Empirical Findings*

We find no evidence that, in the years prior to the GST tax, states that abolished the Rule Against Perpetuities garnered more trust business relative to states that retained the Rule. On the contrary, prior to the GST tax, the abolishing states had the same or lower trust assets than similar neighboring states, and were no match for leading trust jurisdictions that retained the Rule such as Delaware.

CONCLUSIONS AND IMPLICATIONS

Twenty-one states have validated perpetual trusts by abolishing the Rule Against Perpetuities as applied to interests in trust.[102] The prevailing view is that by conferring a salient tax advantage on long-term trusts, the 1986 generation-skipping transfer (GST) tax sparked the movement to abolish the Rule. However, an alternate view holds that demand for perpetual trusts stems from donors' preference for control independent of tax considerations. Proponents of both views have adduced supporting anecdotal evidence.

This Article assessed the foregoing competing explanations for the rise of the perpetual trust by testing whether a state's abolition of the Rule gave the state an advantage in the jurisdictional competition for trust funds. As such, our approach has the virtue of looking at revealed preferences; we use direct evidence of what donors actually did as a proxy for what donors wanted. Using state-level panel data on trust assets prior to the adoption of the GST tax, we find that, prior to the GST tax, a state's abolition of the Rule did not increase the state's trust business. By contrast, in a prior study we found that between the time the GST tax took effect and 2003, roughly $100 billion in trust assets moved as a result of the Rule's abolition.[103] Accordingly, we conclude that the immediate stimulus for the modern perpetual trust phenomenon was the GST tax.

To be sure, evidence of what donors did is an imperfect proxy for what donors wanted. It is possible that donors desired perpetual trusts prior to the GST tax but few lawyers were aware that such trusts were possible.[104] It is also possible that donors desired perpetual trusts but

---

102 *See supra* note 1.

103 Again, we caution that the $100 billion figure is only a point estimate. For discussion of this estimate and its confidence interval, see Sitkoff & Schanzenbach, *supra* note 1, at 404 & n.125.

104 *Cf.* Friedman, *supra* note 18, at 550 & n.7. In a related vein, several recent empirical studies have found that choice of lawyer has a significant effect on corporate transactional

could not overcome the transaction costs of settling a trust out of state in an era before cheap long distance calls, fax machines, and electronic mail.[105] (Our results demonstrate, however, that Delaware was clearly attracting trust funds from out of state in the early 1970s, which undermines the transaction costs story.) But at most these weaknesses in our proxy merely allow for alternative explanations for the empirical reality that, prior to the GST tax, states that abolished the Rule did not garner more trust business than those that retained the Rule. Taken together, our findings in this and our prior study show that use of the perpetual trust traces to the 1986 GST tax and grew at an increasingly rapid pace thereafter.

Our findings throw light on unresolved issues in federal tax and state property law.[106] For example, without getting embroiled in the debate over the merits of taxing wealth transfers, on which there is already a thick academic literature,[107] our findings lend support to recent proposals to decouple the duration of the GST tax exemption from state perpetuities law.[108] Our findings suggest that the transfer

structure. *See* John C. Coates, IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 CAL. L. REV. 1301 (2001); Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559 (2002); Guhan Subramanian, *Post*-Siliconix *Freeze-Outs: Theory, Evidence and Policy* (Program on Negotiation at Harvard Law Sch. (PON), Research Paper Series, Working Paper No. 472, 2004), *available at* http://ssrn.com/abstract=530284 (follow "Social Science Research Network" link to download).

105 This possibility is consistent with our prior study's finding that not all trust assets that have moved into abolishing states since 1986 are exempt from federal transfer taxes. *See* Sitkoff & Schanzenbach, *supra* note 1, at 396. On the other hand, because there are efficiencies to locating all of one's trust assets in a single trust account, *see id.* at 397, we cannot discern whether these non-exempt assets were moved because the donor sought to exploit those efficiencies versus a desire to exert perpetual control beyond the amount of the transfer tax exemption.

106 This discussion augments the fuller policy discussion of our prior study. *See id.* at 412-20.

107 *See, e.g.*, Wojciech Kopczuk & Joel Slemrod, *Tax Consequences on Wealth Accumulation and Transfers of the Rich*, *in* DEATH AND DOLLARS: THE ROLE OF GIFTS AND BEQUESTS IN AMERICA 213 (Alicia H. Munnell & Annika Sundén eds., 2003); 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); Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283 (1994); James R. Repetti, *Democracy, Taxes and Wealth*, 76 N.Y.U. L. REV. 825 (2001); Colloquium, *Foreword: Wealth Transfer Taxation*, 51 TAX L. REV. 357 (1996) (discussing McCaffery's proposal to abolish the federal estate and gift tax); *see also* RETHINKING ESTATE AND GIFT TAXATION (William G. Gale et al. eds., 2001) (collecting eleven essays on the debate over estate taxation).

108 For example, in 2005 the staff of the Joint Committee on Taxation (JCT) proposed doing so by prohibiting the allocation of the transfer-tax exemption to a trust for the benefit of a generation more remote than the transferor's grandchildren. *See* JCT Report, *supra* note 17, at 392-95. The Task Force on Federal Wealth Transfer Taxes proposed several alternative means including imposition of a periodic tax on trusts and resetting the inclusion ratio after a period of years. *See* Belcher & Fellows, *supra* note 43, at 268-74; *see also* John G. Shively, Note, *The Death of the Life in Being—The Required Federal Response to State Abolition of the Rule Against*

taxes are being avoided in a manner that Congress did not intend.[109] Our findings also suggest that the rise of the perpetual trust reflects avoidance behavior that would not occur without the tax stimulus, implying deadweight loss in the form of the attendant transaction costs.

Moreover, our findings tend to support recent proposals to liberalize the law of trust modification and termination to allow a court to adapt a long-term trust to reflect what the settlor would have wanted had the settlor anticipated subsequent changes in circumstances.[110] Because the movement to abolish the Rule and the corresponding rise of the perpetual trust reflect strategies to minimize taxes, not a burgeoning desire among donors for perpetual control, such proposals are likely to facilitate rather than frustrate the settlor's intent.[111]

Finally, although the rise of the perpetual trust might appear to supply evidence of a dynastic impulse,[112] our findings cast doubt on the validity of that inference. Instead, our findings underscore the importance of tax considerations in driving the structure of donative transfers by tax-sensitive wealth holders.

Perpetuities, 78 WASH. U. L.Q. 371, 394 (2000) (contending that the "best solution to the problems created by abolition of the Rule is to eliminate the generation-skipping exemption"). As detailed in our prior study, however, some of the JCT Report's empirical assumptions are erroneous. *See* Sitkoff & Schanzenbach, *supra* note 1, at 419-20.

109 As Jeffrey Pennell has explained, Congress sought to prevent the "enjoyment of property followed by its movement down the generations without being subjected to estate or gift tax." JEFFREY N. PENNELL, WEALTH TRANSFER PLANNING AND DRAFTING ch. 18, at 27 (2005); *see also* JCT Report, *supra* note 15, at 394; H.R. REP. NO. 99-426, at 824-25 (1985); WILLBANKS, *supra* note 42, § 15.07.

110 *See supra* notes 14-15 and accompanying text. Another idea, which has been discussed in the context of cy pres of perpetual charitable trusts but could be extended to perpetual private trusts, is to allow more liberal modification and termination after the perpetuities period expires—that is, to allow freer modification and termination after the death of everyone known to the settlor and the minority of the next generation. *See* Alex M. Johnson, Jr., *Limiting Dead Hand Control of Charitable Trusts: Expanding the Use of the Cy Pres Doctrine*, 21 U. HAW. L. REV. 353, 355-56 (1999); *cf.* French, *supra* note 14, at 2534-35.

111 Allowing courts to adapt perpetual trusts to account for changed circumstances would also align the default rule with the flexibility provided for in professionally-drafted perpetual transfer-tax-exempt trust forms. Such forms typically give each generation a special power to appoint the property to the next generation either outright or in further trust. *See, e.g.*, Nenno, *supra* note 54, at 164 (supplying a model clause); *see also* Pierce H. McDowell, III, *The Dynasty Trust: Protective Armor for Generations to Come*, TR. & EST., Oct. 1993, at 47, 53 (noting that it "is often desirable to give at least some of the beneficiaries special testamentary powers of appointment that will enable them to change the dispositive terms of the trust" in light of unanticipated changes in circumstances). With such a power each generation can decide whether to continue the trust (and its tax exemption) or to bring the trust to an end. For further discussion, see Sitkoff & Schanzenbach, *supra* note 1, at 413-14. *See also* PENNELL, *supra* note 109, at ch. 4, pp. 2-6 (discussing flexibility and dead hand control).

112 *See supra* note 64 and accompanying text.

TABLE 1A:
TRUST ASSETS PER CAPITA 1969-1984
ALL STATES RELATIVE TO IDAHO

	Coefficient (in Thousands)	Robust Standard Error	p-value
Alabama	0.08	0.18	0.67
Alaska	**-0.97**	**0.42**	**0.02**
Arizona	*0.39*	*0.16*	*0.01*
Arkansas	-0.19	0.15	0.19
California	**-2.49**	**1.22**	**0.04**
Colorado	*0.45*	*0.22*	*0.04*
Connecticut	*2.38*	*0.36*	*0.00*
Delaware	*16.44*	*1.38*	*0.00*
Florida	-0.32	0.47	0.50
Georgia	0.02	0.25	0.93
Hawaii	0.45	0.44	0.31
Illinois	0.97	0.66	0.14
Indiana	0.24	0.29	0.41
Iowa	0.06	0.21	0.79
Kansas	0.03	0.20	0.90
Kentucky	*0.43*	*0.17*	*0.01*
Louisiana	**-0.66**	**0.19**	**0.00**
Maine	*0.73*	*0.11*	*0.00*
Maryland	0.16	0.33	0.63
Massachusetts	*1.58*	*0.37*	*0.00*
Michigan	-0.28	0.50	0.58
Minnesota	*0.52*	*0.27*	*0.05*
Mississippi	-0.23	0.16	0.16
Missouri	*1.09*	*0.30*	*0.00*
Montana	0.05	0.13	0.72
Nebraska	*0.62*	*0.16*	*0.00*
Nevada	*0.73*	*0.23*	*0.00*
New Hampshire	0.22	0.14	0.12
New Jersey	-0.37	0.49	0.45
New Mexico	0.11	0.12	0.35
New York	0.55	1.00	0.59
North Carolina	-0.11	0.26	0.68
North Dakota	0.07	0.15	0.66
Ohio	0.55	0.57	0.34
Oklahoma	0.22	0.17	0.20
Oregon	0.00	0.18	0.98
Pennsylvania	*1.28*	*0.63*	*0.04*

	Coefficient (in Thousands)	Robust Standard Error	p-value
Rhode Island	*2.79*	*0.16*	*0.00*
South Carolina	-0.19	0.15	0.21
South Dakota	0.15	0.18	0.41
Tennessee	0.15	0.20	0.44
Texas	-0.99	0.68	0.15
Utah	*0.43*	*0.13*	*0.00*
Vermont	*0.52*	*0.14*	*0.00*
Virginia	-0.29	0.29	0.33
Washington	0.13	0.26	0.63
West Virginia	*0.58*	*0.15*	*0.00*
Wisconsin	0.52	0.27	0.06
Wyoming	0.06	0.18	0.74

N=797. Three states have statistically significant lower trust assets per person; sixteen have significantly greater trust assets per capita. Dollar values adjusted for inflation (Year 2000=100). Year dummies and controls for state population and per capita income are not reported.

TABLE 1B:
TRUST ASSETS PER CAPITA 1969-1984
ALL STATES RELATIVE TO WISCONSIN

	Coefficient (in Thousands)	Robust Standard Error	p-value
Alabama	**-0.45**	**0.20**	**0.02**
Alaska	**-1.49**	**0.30**	**0.00**
Arizona	-0.13	0.16	0.41
Arkansas	**-0.71**	**0.26**	**0.01**
California	**-3.01**	**0.97**	**0.00**
Colorado	-0.07	0.12	0.56
Connecticut	*1.86*	*0.20*	*0.00*
Delaware	*15.92*	*1.47*	*0.00*
Florida	**-0.84**	**0.23**	**0.00**
Georgia	**-0.50**	**0.11**	**0.00**
Hawaii	-0.07	0.42	0.87
Idaho	-0.52	0.27	0.06
Illinois	0.45	0.41	0.28
Indiana	**-0.29**	**0.08**	**0.00**
Iowa	**-0.47**	**0.15**	**0.00**
Kansas	**-0.50**	**0.16**	**0.00**
Kentucky	-0.09	0.18	0.60
Louisiana	**-1.19**	**0.15**	**0.00**
Maine	0.21	0.26	0.42
Maryland	**-0.36**	**0.14**	**0.01**
Massachusetts	*1.06*	*0.14*	*0.00*
Michigan	**-0.80**	**0.26**	**0.00**
Minnesota	0.00	0.11	0.98
Mississippi	**-0.75**	**0.29**	**0.01**
Missouri	*0.57*	*0.16*	*0.00*
Montana	-0.48	0.25	0.06
Nebraska	0.10	0.20	0.62
Nevada	0.20	0.20	0.31
New Hampshire	-0.30	0.22	0.16
New Jersey	**-0.90**	**0.24**	**0.00**
New Mexico	-0.41	0.26	0.12
New York	0.02	0.76	0.98
North Carolina	**-0.63**	**0.12**	**0.00**
North Dakota	-0.45	0.26	0.08
Ohio	0.03	0.33	0.94
Oklahoma	**-0.30**	**0.15**	**0.05**
Oregon	**-0.52**	**0.13**	**0.00**

	Coefficient (in Thousands)	Robust Standard Error	p-value
Pennsylvania	*0.76*	*0.39*	*0.05*
Rhode Island	*2.27*	*0.22*	*0.00*
South Carolina	**-0.71**	**0.22**	**0.00**
South Dakota	-0.38	0.30	0.20
Tennessee	**-0.37**	**0.14**	**0.01**
Texas	**-1.51**	**0.44**	**0.00**
Utah	-0.09	0.25	0.73
Vermont	-0.01	0.29	0.98
Virginia	**-0.81**	**0.08**	**0.00**
Washington	**-0.40**	**0.08**	**0.00**
West Virginia	0.06	0.26	0.83
Wyoming	**-0.46**	**0.21**	**0.03**

N=797. Twenty-three states have statistically significant lower trust assets per person; six have significantly greater trust assets per capita. Dollar values adjusted for inflation (Year 2000=100). Year dummies and controls for state population and per capita income are not reported.

TABLE 2A:
AVERAGE ACCOUNT SIZE 1965-1984
ALL STATES RELATIVE TO IDAHO

	Coefficient (in Thousands)	Robust Standard Error	p-value
Alabama	157	24	0.16
Alaska	-34	76	0.65
Arizona	*90*	*38*	*0.02*
Arkansas	-32	37	0.40
California	**-446**	**151**	**0.00**
Colorado	27	41	0.51
Connecticut	*118*	*56*	*0.03*
Delaware	*1,190*	*107*	*0.00*
Florida	-98	66	0.14
Georgia	*107*	*48*	*0.03*
Hawaii	*373*	*135*	*0.01*
Illinois	-72	85	0.40
Indiana	**-111**	**47**	**0.02**
Iowa	**-96**	**40**	**0.02**
Kansas	-1	40	0.99
Kentucky	40	39	0.31
Louisiana	**-154**	**42**	**0.00**
Maine	-5	35	0.88
Maryland	*122*	*54*	*0.03*
Massachusetts	88	55	0.11
Michigan	-57	72	0.43
Minnesota	*169*	*45*	*0.00*
Mississippi	-50	42	0.23
Missouri	*198*	*45*	*0.00*
Montana	-49	42	0.25
Nebraska	37	40	0.35
Nevada	*282*	*47*	*0.00*
New Hampshire	10	36	0.78
New Jersey	-14	68	0.84
New Mexico	7	37	0.85
New York	34	128	0.79
North Carolina	-7	47	0.88
North Dakota	-59	39	0.13
Ohio	-48	80	0.55
Oklahoma	*311*	*39*	*0.00*
Oregon	*82*	*38*	*0.03*
Pennsylvania	**-283**	**84**	**0.00**

	Coefficient (in Thousands)	Robust Standard Error	p-value
Rhode Island	*249*	*36*	*0.00*
South Carolina	5	41	0.91
South Dakota	-28	45	0.54
Tennessee	*83*	*43*	*0.05*
Texas	-165	90	0.07
Utah	-15	42	0.73
Vermont	-70	39	0.07
Virginia	**-91**	**47**	**0.05**
Washington	69	45	0.13
West Virginia	*108*	*38*	*0.00*
Wisconsin	**-101**	**45**	**0.03**
Wyoming	16	41	0.70

N=797. Seven states have statistically significant lower average account size; fourteen have significantly greater average account size. Dollar values adjusted for inflation (Year 2000=100). Year dummies and controls for state population and per capita income are not reported.

TABLE 2B:
AVERAGE ACCOUNT SIZE 1965-1984
ALL STATES RELATIVE TO WISCONSIN

	Coefficient (in Thousands)	Robust Standard Error	p-value
Alabama	57	40	0.16
Alaska	66	63	0.30
Arizona	*190*	*21*	*0.00*
Arkansas	*69*	*31*	*0.03*
California	**-346**	**119**	**0.00**
Colorado	*128*	*18*	*0.00*
Connecticut	*219*	*34*	*0.00*
Delaware	*1,290*	*110*	*0.00*
Florida	3	31	0.93
Georgia	*207*	*23*	*0.00*
Hawaii	*474*	*128*	*0.00*
Idaho	*101*	*45*	*0.03*
Illinois	29	51	0.57
Indiana	-10	14	0.44
Iowa	5	18	0.80
Kansas	*100*	*22*	*0.00*
Kentucky	*141*	*22*	*0.00*
Louisiana	**-54**	**22**	**0.02**
Maine	*95*	*32*	*0.00*
Maryland	*223*	*30*	*0.00*
Massachusetts	*189*	*23*	*0.00*
Michigan	44	40	0.28
Minnesota	*269*	*17*	*0.00*
Mississippi	50	38	0.19
Missouri	*298*	*13*	*0.00*
Montana	52	39	0.18
Nebraska	*138*	*29*	*0.00*
Nevada	*383*	*35*	*0.00*
New Hampshire	*111*	*27*	*0.00*
New Jersey	*87*	*36*	*0.02*
New Mexico	*108*	*34*	*0.00*
New York	135	98	0.17
North Carolina	*94*	*20*	*0.00*
North Dakota	42	35	0.24
Ohio	52	49	0.28
Oklahoma	*412*	*22*	*0.00*
Oregon	*182*	*18*	*0.00*

	Coefficient (in Thousands)	Robust Standard Error	p-value
Pennsylvania	**-182**	**52**	**0.00**
Rhode Island	*350*	*27*	*0.00*
South Carolina	*105*	*30*	*0.00*
South Dakota	73	43	0.09
Tennessee	*184*	*23*	*0.00*
Texas	-64	57	0.27
Utah	*86*	*38*	*0.02*
Vermont	31	38	0.42
Virginia	10	11	0.39
Washington	*169*	*15*	*0.00*
West Virginia	*209*	*32*	*0.00*
Wyoming	*116*	*33*	*0.00*

N=797. Three states have statistically significant lower average account size; thirty have significantly greater average account size. Dollar values adjusted for inflation (Year 2000=100). Year dummies and controls for state population and per capita income are not reported.

TABLE 3A:
TOTAL ASSETS 1965-1984
ALL STATES RELATIVE TO IDAHO

	Coefficient (in billions)	Robust Standard Error	p-value
Alabama	-1.56	1.31	0.24
Alaska	-0.36	1.11	0.75
Arizona	-0.06	0.76	0.94
Arkansas	**-1.53**	**0.71**	**0.03**
California	-7.93	9.22	0.39
Colorado	0.21	0.88	0.81
Connecticut	*6.74*	*1.17*	*0.00*
Delaware	*9.68*	*0.71*	*0.00*
Florida	-0.82	3.47	0.81
Georgia	-1.52	1.89	0.42
Hawaii	0.52	0.74	0.49
Illinois	*18.57*	*4.69*	*0.00*
Indiana	0.15	1.97	0.94
Iowa	-0.95	0.99	0.34
Kansas	-0.82	0.78	0.30
Kentucky	-0.18	1.22	0.88
Louisiana	**-4.39**	**1.41**	**0.00**
Maine	0.57	0.37	0.12
Maryland	-0.05	1.53	0.98
Massachusetts	*8.85*	*2.18*	*0.00*
Michigan	0.31	3.57	0.93
Minnesota	0.98	1.45	0.50
Mississippi	**-1.97**	**0.84**	**0.02**
Missouri	*4.06*	*1.90*	*0.03*
Montana	0.10	0.40	0.80
Nebraska	0.44	0.52	0.40
Nevada	0.51	0.60	0.39
New Hampshire	0.16	0.42	0.70
New Jersey	-1.04	2.85	0.72
New Mexico	-0.20	0.40	0.62
New York	*37.43*	*8.00*	*0.00*
North Carolina	-2.25	2.08	0.28
North Dakota	0.21	0.42	0.63
Ohio	*11.04*	*4.33*	*0.01*
Oklahoma	-0.57	0.96	0.55
Oregon	-0.94	0.76	0.22
Pennsylvania	*22.53*	*4.88*	*0.00*

	Coefficient (in billions)	Robust Standard Error	p-value
Rhode Island	*2.56*	*0.37*	*0.00*
South Carolina	**-2.12**	**0.99**	**0.03**
South Dakota	0.25	0.42	0.55
Tennessee	-1.15	1.54	0.45
Texas	-3.07	5.35	0.57
Utah	0.16	0.43	0.71
Vermont	0.60	0.42	0.16
Virginia	-2.48	1.88	0.19
Washington	-0.57	1.33	0.67
West Virginia	0.21	0.62	0.73
Wisconsin	1.27	1.66	0.44
Wyoming	0.31	0.55	0.57

N=797. Four states have statistically significant lower trust assets; nine have significantly greater trust assets. Dollar values adjusted for inflation (Year 2000=100). Year dummies and controls for state population and total state income are not reported.

TABLE 3B:
TOTAL ASSETS 1965-1984
ALL STATES RELATIVE TO WISCONSIN

	Coefficient (in billions)	Robust Standard Error	p-value
Alabama	**-2.83**	**0.62**	**0.00**
Alaska	-1.63	2.07	0.43
Arizona	-1.33	1.00	0.19
Arkansas	**-2.80**	**1.16**	**0.02**
California	-9.20	7.63	0.23
Colorado	-1.06	0.89	0.23
Connecticut	*5.47*	*0.87*	*0.00*
Delaware	*8.40*	*1.85*	*0.00*
Florida	-2.09	1.88	0.27
Georgia	**-2.79**	**0.46**	**0.00**
Hawaii	-0.76	1.75	0.67
Idaho	-1.27	1.66	0.44
Illinois	*17.29*	*3.17*	*0.00*
Indiana	**-1.13**	**0.45**	**0.01**
Iowa	**-2.22**	**0.86**	**0.01**
Kansas	**-2.09**	**1.07**	**0.05**
Kentucky	**-1.46**	**0.66**	**0.03**
Louisiana	**-5.66**	**0.49**	**0.00**
Maine	-0.70	1.56	0.66
Maryland	**-1.32**	**0.54**	**0.02**
Massachusetts	*7.57*	*0.76*	*0.00*
Michigan	-0.96	1.97	0.63
Minnesota	-0.29	0.57	0.61
Mississippi	**-3.24**	**1.09**	**0.00**
Missouri	*2.79*	*0.81*	*0.00*
Montana	-1.17	1.70	0.49
Nebraska	-0.83	1.38	0.54
Nevada	-0.76	1.76	0.67
New Hampshire	-1.11	1.65	0.50
New Jersey	-2.31	1.28	0.07
New Mexico	-1.47	1.51	0.33
New York	*36.16*	*6.55*	*0.00*
North Carolina	**-3.52**	**0.60**	**0.00**
North Dakota	-1.07	1.75	0.54
Ohio	*9.77*	*2.77*	*0.00*
Oklahoma	**-1.84**	**0.84**	**0.03**
Oregon	**-2.21**	**1.00**	**0.03**

	Coefficient (in billions)	Robust Standard Error	p-value
Pennsylvania	*21.26*	*3.40*	*0.00*
Rhode Island	1.29	1.60	0.42
South Carolina	**-3.39**	**0.84**	**0.00**
South Dakota	-1.02	1.74	0.56
Tennessee	**-2.43**	**0.41**	**0.00**
Texas	-4.34	3.76	0.25
Utah	-1.11	1.47	0.45
Vermont	-0.67	1.81	0.71
Virginia	**-3.75**	**0.39**	**0.00**
Washington	**-1.84**	**0.46**	**0.00**
West Virginia	-1.06	1.27	0.40
Wyoming	-0.96	1.85	0.60

N=797. Seventeen states have statistically significant lower trust assets; eight have significantly greater trust assets. Dollar values adjusted for inflation (Year 2000=100). Year dummies and controls for state population and total state income are not reported.