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The Future of Future Interests

T. P. Gallanis*

Future interests are essential to the American law of property. They enable ownership to be shared among generations, thus providing unparalleled flexibility in property transactions. Yet the law of future interests revels in unhelpful complexity, elevates form over substance, and frustrates the very transactions it should facilitate. This Article provides a solution. It proposes five fundamental reforms in future interest law, codifies them in a Uniform Future Interests Act, and urges the Act's promulgation by the Uniform Law Commission and its adoption by state legislatures.

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I. Introduction

Future interests are essential to the Anglo-American law of property. Developed in the fourteenth, fifteenth, and sixteenth centuries,¹ they permit ownership to be shared among generations, hence giving property transactions a degree of flexibility historically unavailable to countries rooted in Roman law.² Yet our law of future interests carries much of its late-medieval baggage: it revels in unhelpful complexity, elevates form over substance, and frustrates the very transactions it should facilitate.³

1. On the history of future interests in England, see A.W.B. SIMPSON, *A HISTORY OF THE LAND LAW* 78-102 (2d ed. 1986).

2. On the comparatively limited role of successive interests in Roman law, see David Johnston, *Successive Rights and Successful Remedies: Life Interests in Roman Law*, in *NEW PERSPECTIVES IN THE ROMAN LAW OF PROPERTY* 153 (Peter Birks ed., 1989). This comparative point is not new—see, e.g., FREDERICK POLLOCK & FREDERIC W. MAITLAND, *2 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 10 (1968) (2d ed. 1898) (describing the doctrine of estates and future interests as "the most salient trait" of English land law)—but the contrast is so striking as to bear repeating.

3. For earlier critiques of future interest law, see generally, e.g., Lawrence W. Waggoner, *Reformulating the Structure of Estates: A Proposal for Legislative Action*, 85 *HARV. L. REV.* 729 (1972) (criticizing the prevailing classification of estates and future interests and proposing a reformulated structure); Myres S. McDougal, *Future Interest Restated: Tradition Versus Clarification and Reform*, 55 *HARV. L. REV.* 1077 (1942) (criticizing the future-interest sections of the First Restatement of Property); Olin L. Browder, Jr., *Future Interest Reform*, 35 *N.Y.U. L. REV.* 1255 (1960) (discussing many of the same topics as Professor Waggoner's article but without providing a blueprint for legislative reform). See also the narrower studies cited *infra* note 318 (critiquing classifications for future interests).

To a medieval problem, this Article proposes a medieval solution: simplification. It is one of history's ironies that as Parliament and the common-law courts were laying the foundation for our complicated structure of future interests, an English philosopher was preaching the virtues of conceptual simplicity. His name was William of Ockham,⁴ his lasting contribution the principle *pluritas non est ponenda sine necessitas*: plurality should not be posited without necessity.⁵ The principle is known as Ockham's Razor,⁶ its blade ready to cut away purposeless complexity.

The law of future interests desperately needs Ockham's Razor. The system of future interests is built on unhelpful and unnecessary classifications and burdened with outmoded rules of substantive law. Part II of this Article proposes five fundamental reforms to future interest law. These proposals eliminate the classificatory superstructure and the outdated substantive rules while at the same time retaining the temporal division of ownership that is at the heart of modern property transactions. Part III codifies these reforms in a proposed Uniform Future Interests Act with accompanying commentary. The Article concludes by urging the Act's promulgation by the Uniform Law Commission⁷ and its adoption by state legislatures.

II. Five Reforms

This Article proposes five fundamental reforms to the law of future interests. First, a future interest should be alienable irrespective of its classification. Second, the failure or acceleration of a future interest should occur irrespective of its classification. Third, archaic rules of future interest law should be abolished. Fourth, the limit (if any) on the duration of a future interest should be unrelated to vesting. Fifth, and last, the classification of future interests should be eliminated. This Part of the Article considers each of the five reforms in turn.

A. A Future Interest Should Be Alienable Irrespective of Its Classification

Let us begin with the first reform: a future interest should be alienable irrespective of its classification. At common law, all categories of future

4. For a brief biography, see MARILYN MCCORD ADAMS, 1 WILLIAM OCKHAM, at xv-xvi (1987).

5. *Id.* at 156.

6. *See id.* at 156-61 (discussing the principle known as Ockham's Razor).

7. The organization's full name is the National Conference of Commissioners on Uniform State Laws. For prior use of this shorthand by a prominent Commissioner, see John H. Langbein, *The Uniform Trust Code: Codification of the Law of Trusts in the United States*, 15 TR. L. INT'L 66 (2001) (referring to the Conference as the "Uniform Law Commission").

interests were alienable at death, but only vested interests were alienable *inter vivos*.⁸ Nonvested interests—contingent remainders and executory interests—were viewed as too speculative; they were "mere possibilities of receiving an interest in the future,"⁹ rather than property interests in their own right. Despite this inalienability rule, holders of contingent interests in England still found three ways to make transfers:¹⁰ contracts were enforceable if adequate consideration had been received by the transferor;¹¹ deeds were enforceable if the deed contained a covenant of warranty, thereby estopping the transferor from challenging the transferee's title;¹² and releases were enforceable if the release was in favor of the person whose future interest would be defeated if the released interest were to vest.¹³ With these exceptions, as one future interests text nicely puts it, the common-law rule "boil[ed] down to this: Purported transfers for inadequate consideration by quitclaim deed to someone other than a person in whose favor the interest could have been released [were] ineffective."¹⁴

Today, forty of the fifty common-law jurisdictions in the United States¹⁵ have abolished the inalienability rule, thus making contingent interests fully

8. See LEWIS M. SIMES, *HANDBOOK OF THE LAW OF FUTURE INTERESTS* 67 (2d ed. 1966) (observing that, at English common law, contingent future interests were inalienable *inter vivos*).

9. LAWRENCE W. WAGGONER, GREGORY S. ALEXANDER, MARY LOUISE FELLOWS & THOMAS P. GALLANIS, *FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS AND FUTURE INTERESTS* 1050 (3d ed. 2002) [hereinafter *FAMILY PROPERTY LAW*].

10. See generally LEWIS M. SIMES & ALLAN F. SMITH, *THE LAW OF FUTURE INTERESTS* § 1853 (2d ed. 1956) (discussing the three exceptions to the general rule that contingent remainders and executory interests were inalienable).

11. See, e.g., *Crofts v. Middleton*, 8 De Gex M. & G. 192, 209, 44 Eng. Rep. 364, 371 (Ch. 1856) (stating that a contingent remainder in fee could not legally pass by means of a mere deed of grant unless supported by valuable consideration).

12. See, e.g., *Doe d. Christmas v. Oliver*, 10 B. & C. 181, 187, 109 Eng. Rep. 418, 421 (K.B. 1829) (concluding that "a fine by a contingent remainder-man, though it operates by estoppel, does not operate by estoppel only, but that it has an ulterior operation when the contingency happens; that the estate which then becomes vested feeds the estoppel; and that the fine operates upon that estate, as though that estate had been vested in the cognizers at the time the fine was levied").

13. See, e.g., *Lampet's Case*, 10 Co. Rep. 46b, 48b, 77 Eng. Rep. 994, 998 (K.B. 1612) (asserting that "all rights, titles and actions may by the wisdom and policy of the law be released to the terre-tenant, for the same reason of his repose and quiet, and for avoiding of contentions and suits, and that every one may live in his vocation in peace and plenty").

14. *FAMILY PROPERTY LAW*, *supra* note 9, at 1050.

15. This includes the District of Columbia and excludes Louisiana. On Louisiana's special heritage and distinctive character, see Shael Herman, *The Romanist Tradition in Louisiana: Legislation, Jurisprudence, and Doctrine*, 56 LA. L. REV. 257, 258 (1995) (observing that Louisiana is the only American state with a Romanist civil code).

transferable.¹⁶ However, nine states retain some form of rule against alien-

16. See ALA. CODE § 35-4-1 (1991 & Supp. 2002) (allowing all persons over nineteen years of age and not under a legal incapacity to alienate any interests in land that they possess); ARIZ. REV. STAT. § 33-221 (2000) (stating that "[e]states in expectancy are descendable, devisable and alienable as estates in possession"); CAL. CIV. CODE § 699 (West 1982) (making future interests transferable in the same manner as present interests); *Rogers v. Hartford-Connecticut Trust Co.*, 165 F. Supp. 116, 119 (D. Conn. 1958) (concluding that "[i]n either case [vested or contingent] the future interest would apparently be recognized as transferable today"); DEL. CODE ANN. tit. 25, § 101 (1989) (permitting all legal estates to be transferred by deed); D.C. CODE ANN. § 42-515 (2001) (authorizing expectant estates to be alienable in the same manner as estates in possession); *Richardson v. Holman*, 33 So. 2d 641, 644 (Fla. 1948) (declaring that "in Florida all restraints on alienation have been removed"); GA. CODE ANN. § 44-5-40 (1991 & Supp. 2002) (stating that future interests and estates are descendible in the same manner as estates in possession); *Crescent City Motors, Ltd. v. Nalaielua*, 31 Haw. 418, 424 (1930) (deciding that a contingent remainder is alienable by voluntary conveyance); IDAHO CODE § 55-109 (Michie 2000) (declaring that future interests are transferable in the same manner as present interests); *Kuhn v. Kuhn*, 385 N.E.2d 1196, 1200 (Ind. Ct. App. 1979) (stating that "future interests are valuable property rights which may be freely conveyed"); IOWA CODE ANN. § 557.3 (West 1992) (stating that in every conveyance of real estate all of the interests of the grantor pass, unless a contrary intent can be reasonably inferred); *McDonald v. Bayard Sav. Bank*, 98 N.W. 1025, 1026 (Iowa 1904) (interpreting the predecessor of IOWA CODE ANN. § 557.3, containing the same language, as declaring that every conceivable interest in an estate, whether present or future, may be transferred by deed); KAN. STAT. ANN. § 58-2205 (1994) (providing that conveyances of interests in land may be made by deed and executed by any person having the authority to convey the interests); *Miller v. Miller*, 136 P. 953, 954 (Kan. 1913) (interpreting the words "any other estate or interest therein" as including "estates of freehold and less than freehold, of inheritance and not of inheritance, absolute and limited, present and future, vested and contingent, and any other kind a grantor may choose to invent"); KY. REV. STAT. ANN. § 382.010 (Michie 2002) (stating that the owner of an estate may convey any interest in real property not in the adverse possession of another); MASS. GEN. LAWS ANN. ch. 184, § 2 (West 1991 & Supp. 2002) (allowing a person to sell, assign, or devise any contingent remainder, executory devise, or other estate in expectancy); MICH. COMP. LAWS ANN. § 554.35 (West 1988 & Supp. 2002) (permitting all expectant estates to be devisable in the same manner as estates in possession); MINN. STAT. ANN. § 500.16 (West 2002) (declaring that expectant estates are alienable in the same manner as estates in possession); MISS. CODE ANN. § 89-1-1 (1999 & Supp. 2002) (providing that any interest in or claim to land may be conveyed to vest immediately or in the future); *Hamilton v. City of Jackson*, 127 So. 302, 304 (Miss. 1930) (interpreting MISS. CODE ANN. § 89-1-1 as removing all restraints upon the alienation and transfer of real estate); MO. ANN. STAT. § 442.020 (West 2000) (stating that conveyances of land, or of any interest therein, may be made by deed); *Ott v. Pickard*, 237 S.W.2d 109, 112 (Mo. 1951) (affirming that contingent interests may be conveyed); MONT. CODE ANN. § 70-1-326 (2001) (making future interests transferable in the same manner as present interests); NEB. REV. STAT. § 76-107 (1996) (providing that the conveyance of a future interest is not ineffective on the ground that the interest is future or contingent); NEV. REV. STAT. § 111.105 (2001) (authorizing the conveyance of any interest in land by deed); *Merchants Nat. Bank v. Curtis*, 97 A.2d 207, 213 (N.H. 1953) (concluding that "while it was the common law rule that future contingent interests were not alienable, this is not the majority rule today"); N.M. STAT. ANN. § 47-1-4 (Michie 1995) (declaring that any person holding any right or title

ation for contingent interests. Of these, five states distinguish between two types of contingency: interests contingent on an event (surviving the life tenant, for example) are alienable, but interests contingent as to person (for instance, class gifts, in which some beneficiaries may be unborn or unascertained) are not.¹⁷ The other four states follow the common-law rule

to real estate, whether in possession, remainder, or reversion, may convey such interest); N.Y. EST. POWERS & TRUSTS LAW § 6-5.1 (McKinney 2002) (stating that future interests are alienable in the same manner as estates in possession); N.C. GEN. STAT. § 39-6.3 (2001) (declaring that all future interests in real property may be conveyed); N.D. CENT. CODE § 47-02-18 (1999) (stating that future interests are transferable in the same manner as present interests); OHIO REV. CODE ANN. § 2131.04 (West 1994) (providing that contingent remainders, executory interests, and other expectant estates are descendible in the same manner as estates in possession); OKLA. STAT. ANN. tit. 60, § 30 (West 1994) (declaring that contingent remainders are transferable); OR. REV. STAT. § 93.010 (2001 & Supp. 2002) (permitting the conveyance of any interest in land by deed); 21 PA. CONS. STAT. ANN. § 3 (West 2001) (stating that all instruments for conveying land will be construed as to include all future interests); R.I. GEN. LAWS § 34-4-11 (1995) (providing that all contingent future interests may be disposed of by legal conveyance or will); S.D. CODIFIED LAWS § 43-3-20 (Michie 1997) (making future interests transferable in the same manner as present interests); *Gottwald v. Warlick*, 125 S.W.2d 1060, 1061 (Tex. Civ. App. 1939) (concluding that "[a] mere expectancy of inheritance, or remainder of a defeasible estate, may be assigned, and a regular conveyance thereof is valid and will be upheld, unless fraudulently procured"); UTAH CODE ANN. § 57-1-13 (2000) (allowing the conveyance of any interest in real property by quitclaim deed); VT. STAT. ANN. tit. 27, § 301 (1998) (allowing the conveyance of any interest in land by deed); WASH. REV. CODE ANN. § 64.04.050 (West 1994 & Supp. 2003) (permitting all legal and equitable interests in land to be conveyed); W. VA. CODE § 36-1-9 (1997) (stating that any interest in or claim to real estate may be lawfully conveyed or devised); *Rouss v. Rouss*, 111 S.E. 586, 588 (W. Va. 1922) (adjudging that a contingent remainder is "an interest or claim to real estate" as stated by W. VA. CODE § 36-1-9, and therefore is alienable); WIS. STAT. ANN. § 700.07 (West 2001) (providing that a future interest is transferable in the same manner as a present interest); WYO. STAT. ANN. § 34-1-106 (Michie 2001) (permitting the conveyance of any interest in land).

17. See FAMILY PROPERTY LAW, *supra* note 9, at 1051 (stating that "[b]y statute or case law in a few states, remainders and executory interests that are contingent as to person (interests in favor of unborn or unascertained persons) are still inalienable, but those that are contingent as to event are alienable"); e.g., N.J. STAT. ANN. § 46:3-7 (West 1989 & Supp. 2002) (allowing the transfer of estates in expectancy, except that no person may dispose of any contingent estate or expectancy where the contingency is to the person in whom the same may vest); *In re Clayton's Estate*, 74 A.2d 1, 2 (Md. 1950) (stating that "a remainder, contingent only as to the event and not as to the person to take, is descendible, devisable and assignable"); *Boykin v. Springs*, 44 S.E. 934, 937 (S.C. 1903) (concluding that "[i]f the remaindermen be ascertained, it is a possibility coupled with an interest, and it is devisable, transmissible, and in equity assignable; but, if the remaindermen be not ascertained, such bare possibility is not capable of devise, transmission or assignment"); *Frank v. Frank*, 280 S.W. 1012, 1013-14 (Tenn. 1926) (noting that contingent remaindermen who are definitely ascertained may convey their interests while unascertained remaindermen may not); *Prince v. Barham*, 103 S.E. 626, 627 (Va. 1920) (observing that an executory interest may be conveyed just as a contingent remainder as long as there is an ascertained person to take under the devise).

of inalienability while recognizing the three forms of transfer that were available in England.¹⁸ (The final jurisdiction, Alaska, does not seem to have taken any position, either by statute or judicial decision, with respect to the alienability of future interests.)

The nine states imposing these restraints on alienation should abolish them, for three reasons. First, the rationale for inalienability—that contingent interests are "mere possibilities"—is inconsistent with the settled modern view that future interests, even contingent ones, are existing property rights, not property rights to be acquired in the future.¹⁹ Thus, whether a contingent interest is "too speculative" should affect merely its valuation, not its alienability. Some future interests may be difficult to value, and indeed may be worthless, but that is not a reason to forbid alienation as a matter of law. Second, and this is a related point, Anglo-American law has long had a strong policy in favor of permitting people to alienate what property they own.²⁰

18. See, e.g., *Hurst v. Hilderbrandt*, 10 S.W.2d 491, 492 (Ark. 1928) (observing that "[s]ince his interest in this land was a contingent remainder and not a vested remainder, he had no power to convey, because he had no vested interest to convey"); *Barry v. Newton*, 273 P.2d 735, 740 (Colo. 1954) (declaring that when "it is impossible to determine in whom the ultimate right to the estate may vest, or whether it will ever vest[,] . . . no conveyance can pass an absolute title"); *Goodwine State Bank v. Mullins*, 625 N.E.2d 1056, 1072 (Ill. App. Ct. 1993) (stating that "where the holder of a contingent remainder conveys property to a grantee, representing that he holds fee simple title to realty and warranting title, but in actuality has only a contingent remainder in the property, the grantor will be estopped from claiming the warranty deed did not convey his contingent remainder"); *Gould v. Leadbetter*, 150 A. 375, 377 (Me. 1930) (concluding that "[w]hen the contingent remainderman, prior to the decease of the tenant for life, conveyed the estate by deed of general warranty, the title which vested when the contingency ceased inured to the benefit of the grantee, and the grantor is estopped by his deed").

19. See *SIMES*, *supra* note 8, at 71 (stating that "the policy of the law is generally to permit people to alienate property interests which they have"). Indeed, interests even more speculative than contingent remainders and executory interests have been held sufficient to support the creation of inter vivos revocable trusts. See, e.g., *Farkas v. Williams*, 125 N.E.2d 600, 603 (Ill. 1955) (observing that "[i]t is difficult to name this interest of Williams, nor is there any reason for so doing so long as it passed to him immediately upon the creation of the trust").

20. Many authorities could be cited to make this point. See, e.g., *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (observing that "[i]n one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times"); *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS* 3, introductory cmt. (1999) (declaring that "[t]he organizing principle of the American law of donative transfers is freedom of disposition"); Ronald Chester, *Inheritance in American Legal Thought*, in *INHERITANCE AND WEALTH IN AMERICA* 23, 23–32 (Robert K. Miller, Jr. & Stephen J. MacNamee eds., 1998) (emphasizing alienation as a fundamental attribute of ownership). The common law's support for alienability also helps explain its related preference for vested interests over contingent ones. See, e.g., *Roberts v. Roberts*, 2 Bolstrode 124, 133, 80 Eng.

Making contingent future interests, which do represent a form of owned property,²¹ inalienable is contrary to that policy. Third, the jurisdictions that continue to enforce the inalienability rule in its common-law form still allow the same exceptions to the rule that were recognized in England, thereby permitting alienation by those who know the law and can use it effectively; only the unwary or unlearned are caught. It makes little sense to forbid alienation yet to permit such easily-used exceptions for those sophisticated enough to know and follow the law.

As noted in the leading treatise on trusts, the modern trend is definitely in the direction of free alienation: "The beneficiary can transfer his interest either inter vivos or by will, either in whole or in part, either absolutely or as security or in trust."²² For all the reasons stated above, the nine states still clinging to restrictions on the alienation of contingent future interests should abolish those restrictions, adopting the first reform.

B. The Failure or Acceleration of a Future Interest Should Occur Irrespective of Its Classification

Let us now turn to the second reform: the failure or acceleration of a future interest should occur irrespective of its classification.

1. Failure

We begin with the topic of failure. Future interests can fail for a variety of reasons.²³ For example, the beneficiary might not meet a condition of

Rep. 1002, 1010 (K.B. 1613) (stating that "the law always delights in vesting of estates").

The one exception to the preference for alienability arises in the context of spendthrift trusts, which contain provisions designed to invalidate the transfer of interests by trust beneficiaries. Although void at common law and in the English Court of Chancery (*see, e.g., Brandon v. Robinson*, 18 Ves. Jun. 429, 434, 34 Eng. Rep. 379, 381 (Ch. 1811) (holding that a father may not create a clause giving property to sons while protecting it from creditors)), spendthrift clauses were validated in the United States by the leading case of *Broadway Nat'l Bank v. Adams*, 133 Mass. 170 (1882). Today, most, but not all, American jurisdictions permit the creation of spendthrift trusts. For discussion, *see* FAMILY PROPERTY LAW, *supra* note 9, at 830-45 (reviewing the history and current law of spendthrift trusts).

21. This is in contrast to an expectancy, which is merely a factual hope of inheriting. Yet even expectancies can be released or assigned; although unenforceable at common law, these transfers will be enforced in equity if supported by fair consideration. *See* FAMILY PROPERTY LAW, *supra* note 9, at 75-76 (stating that "[c]ontracts to release or assign expectancy interests are only enforceable in equity and only if the heir (or devisee) receives fair consideration").

22. AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *THE LAW OF TRUSTS* § 132 (4th ed. 1987) [hereinafter SCOTT ON TRUSTS].

23. This discussion follows FAMILY PROPERTY LAW, *supra* note 9, at 1061-64 (describing the situations in which a future interest can fail).

survivorship or might disclaim the interest, or the interest might violate a rule of law, such as the rule against perpetuities (discussed in subpart II.D below). Whatever the cause, the failure of a future interest typically means that the interest is treated as if it had never existed. Consider the following example:

X gives property to *A* for life, then to *B*, but if *B* fails to survive *A*, then to *C*.

At the creation of the gift, *B* has a remainder that is vested subject to divestment, and *C* has an executory interest. However, if *B* fails to survive *A*, then from the moment of *B*'s death, *B*'s remainder is treated as if it had never existed, and *C*'s executory interest becomes an indefeasibly vested remainder.

The one wrinkle in the law concerns the failure of an executory interest when it is preceded by a fee simple determinable and followed by no other valid interest. Consider the following examples:

- (1) *X* gives property to *A* so long as [a condition is satisfied] and upon [the condition no longer being satisfied] the property shall go to *B*.
- (2) *X* gives property to *A*, but if [a condition is not satisfied] the property shall go to *B*.

In each case, *B* has an executory interest. However, if *B*'s interest fails (typically because it violates the rule against perpetuities), the result in the second example is that *A*'s fee simple subject to an executory limitation becomes a fee simple absolute, thus giving *A* the property unconditionally, while in the first example *A*'s interest remains a fee simple determinable, meaning that *A* must continue to satisfy the condition or lose the property to *X* or *X*'s successors. Why? The result stems purely from classification. In the first example, but not the second, *X* is deemed to have retained a possibility of reverter,²⁴ a reversionary future interest immune from the rule against perpetuities.²⁵

24. See RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 1.5 cmt. b (1983 & Supp. 2003) (stating that "[i]f the donative transfer creates an interest in fee simple determinable with an executory interest limited to take effect on the termination of the fee simple determinable which fails under the rule against perpetuities, such failure may leave remaining the interest in fee simple determinable with a possibility of reverter in the transferor"). Note that the possibility of reverter is created at the moment of the initial gift, not when the executory interest fails. See SIMES & SMITH, *supra* note 10, § 281 (describing the possibility of reverter as an "undisposed of interest remaining in the grantor").

25. At common law, possibilities of reverter were of unlimited duration. See SIMES, *supra* note 8, at 280–81 (stating that "the possibility of reverter and the power of termination are not within the rule [against perpetuities]"). However, some American statutes provide that they cease to exist after a specified number of years. *Infra* notes 302–08 and accompanying text.

This approach to the failure of an executory interest dates at least from the nineteenth century²⁶ and has been followed by some twentieth-century courts, including, most recently, the Oregon Court of Appeals in 1978.²⁷ However, the Second Restatement of Property, promulgated in 1983, appropriately rejected the artificial distinction between our two examples and urged courts to treat both cases alike:²⁸ upon the failure of *B*'s executory interest, we should hold that it and the condition upon which it is based never existed, and thus *A* would own the property outright. That is the sensible result, for four reasons. First, Anglo-American law has long had a strong policy in favor of the vesting of estates.²⁹ Allowing *A* to retain the property outright avoids the potential divestiture of *A*'s possessory estate.³⁰ Second, allowing *A* to retain the property outright promotes marketability. Potential buyers will be more likely to purchase the property from *A* because there is no chance of future divestment.³¹ Third, the result gives effect to the grantor's probable intention: namely, that a fee simple limited by an executory interest should continue until the executory interest takes effect.³² Here, the executory interest cannot take effect due to its invalidity, so the fee simple interest

26. See *First Universalist Soc'y v. Boland*, 29 N.E. 524, 524 (Mass. 1892) (concluding that "[w]here there is an invalid limitation over, the general rule is that the preceding estate is to stand, unaffected by the void limitation. The estate becomes vested in the first taker, according to the terms in which it was granted or devised."); *Proprietors of the Church in Brattle Square v. Grant*, 69 Mass. (3 Gray) 142, 156 (1855) (stating that "when a subsequent condition or limitation is void by reason of its being impossible, repugnant or contrary to law, the estate becomes vested in the first taker, discharged of the condition or limitation over, according to the terms in which it was granted or devised").

27. See *State Dept. of Transp. v. Tolke*, 586 P.2d 791, 799 (Or. Ct. App. 1978) (holding that the grantor of land to a railroad company "so long as said property . . . [shall be used] as a railway" retained a possibility of reverter not subject to the rule against perpetuities).

28. See RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 1.5 cmts. b & c (1983 & Supp. 2003) (observing that, in both of our examples, *A* should hold the property in fee simple absolute).

29. See, e.g., *Roberts v. Roberts*, 2 Bolstrode 124, 133, 80 Eng. Rep. 1002, 1010 (K.B. 1613) (stating that "the law always delights in vesting of estates"); *Edwards v. Hammond*, 83 Eng. Rep. 614, 615 (C.P. 1683) (construing a condition as a condition subsequent rather than as a condition precedent).

30. See *SIMES & SMITH*, *supra* note 10, § 824 (observing that "the law does not readily divest a vested interest").

31. See *id.* (stating that "to hold the prior interest absolute is to decrease the number of future interests extant and thus to make property more readily alienable as a practical matter").

32. See RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 1.5 cmt. b (1983 & Supp. 2003) (observing that "it may effectuate more closely the manifested plan of distribution to make the fee simple determinable a fee simple absolute on the failure of the executory interest").

should become absolute.³³ Fourth and last, the result accords with the basic rule on failure: future interests that fail are treated as if they had not been created.

For all of these reasons, those states that have not already, by statute or judicial decision, laid down a rule transforming *A*'s interest in each example into unconditional ownership upon the failure of *B*'s interest should revise their law.

2. Acceleration

We now turn to acceleration. When property is divided into a series of present and future interests, there is always the possibility that one of the prior interests will terminate more quickly than the grantor intended. This typically occurs when the holder of the prior interest executes a disclaimer or a release or conveys the interest to the holder(s) of the succeeding interest.³⁴ Consider the following examples:

- (1) *X* gives property to *A* for life, then to *B*.
- (2) *X* gives property to *A* for life, then to *C* if *C* survives *A*.
- (3) *X* gives property to *A* for life, then to *D* if *D* graduates from law school.

What happens in each case if *A* disclaims or renounces her interest or conveys it to the remainderman?

In the absence of a statute, courts have traditionally held that future interests accelerate unless the original grant contains evidence of the grantor's contrary intention.³⁵ As one commentator rightly noted, "the difficult issue is what constitutes contrary intent."³⁶ To resolve this issue, many courts have

33. See SIMES & SMITH, *supra* note 10, § 824 (arguing that "when a fee simple is limited subject to an executory interest only, this means that there is a fee simple to continue until the executory interest takes effect, and that, since the executory interest can never take effect, the preceding interest should become absolute").

34. The distinction between disclaimers and releases has been well phrased by Professor Roberts:

A disclaimer (or renunciation) is a refusal to accept the benefit of an interest with the result that, by operation of law, the property passes to someone else rather than passing to someone chosen by the disclaimant A release, in contrast, is a beneficiary's refusal to continue accepting the benefits of the interest after having already accepted some benefits. It constitutes a transfer from the releasor to the beneficiary of the release.

Patricia J. Roberts, *The Acceleration of Remainders: Manipulating the Identity of the Remaindermen*, 42 S.C. L. REV. 295, 304 (1991).

35. See *id.* at 297 (observing that "[t]he traditional judicial approach presumes acceleration absent contrary intent").

36. *Id.*

relied on the classification of the future interest as a guide to the grantor's intent.³⁷ vested interests (*B*'s remainder in example 1) typically accelerate; interests contingent on surviving the holder of the prior estate (*C*'s remainder in example 2) may or may not accelerate (the cases are split); interests contingent on an event unrelated to the prior estate (*D*'s remainder in example 3) do not accelerate. If the future interest does not accelerate, the holder of the remainder interest must wait until the termination of the prior estate, with the property reverting to the grantor or the grantor's successors—in our examples, *X* or *X*'s successors—in the meantime.

These distinctions based upon classification are irrelevant under the provisions of the two uniform statutes that regulate disclaimers.³⁸ the Uniform Probate Code (UPC),³⁹ Article II of which was revised substantially in 1990,⁴⁰ and the new Uniform Disclaimer of Property Interests Act (UDPIA), promulgated in 1999.⁴¹ In February 2002, the Joint Editorial Board for the UPC voted to incorporate the UDPIA into the UPC.⁴² The incorporation having happened so recently, however, we discuss both the UDPIA and the pre-existing provisions of the UPC.

Prior to incorporation, UPC Section 2-801(d) provided in pertinent part: "A future interest that takes effect in possession or enjoyment after the termination of the estate or interest disclaimed takes effect as if the disclaimant had predeceased the decedent." Applying this provision to *A*'s disclaimer creates

37. For discussion of the case law, see *id.* at 297–307.

38. The effect of releases and conveyances on future interests, unlike the effect of disclaimers, is not regulated by statute. See *id.* at 299 (noting the differences in treatment).

39. See UNIF. PROBATE CODE § 2-801(d)(1), 8 U.L.A. 449, 453 (1998 & Supp. 2002) (providing that a "future interest that takes effect in possession or enjoyment after the termination of the estate or interest disclaimed takes effect as if the disclaimant had predeceased the decedent").

40. See *id.*, Prefatory Note to Article II Revisions, at 75–76 (describing the 1990 revisions). For an overview of the revisions, see generally John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871 (1992).

41. See UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 6(b)(4), 8A U.L.A. 54 (Supp. 2002) (providing that "[u]pon the disclaimer of a preceding interest, a future interest held by a person other than the disclaimant takes effect as if the disclaimant had died or ceased to exist immediately before the time of distribution"). For a discussion of its provisions by the Act's Reporter, see William P. LaPiana, *Uniform Disclaimer of Property Interests*, PROB. & PROP., Jan/Feb. 2000, at 57.

42. E-mail communication from Adam Hirsch to the author (July 18, 2002) (on file with author); see also UNIF. DISCLAIMER OF PROP. INTERESTS ACT, Prefatory Note to Act, 8A U.L.A. 47 (Supp. 2002) (stating that "[t]he Uniform Disclaimer of Property Interests Act . . . replaces three Uniform Acts promulgated in 1978 . . . and will be incorporated into the Uniform Probate Code to replace current UPC § 2-801").

the legal fiction that *A* predeceased *X*, thus accelerating *C*'s remainder. *D*'s remainder, which would not become possessory simply upon the termination of *A*'s interest, is not accelerated.

The UDPIA takes a similar, although not identical, approach. Section 6(b)(4) of the UDPIA provides:

Upon the disclaimer of a preceding interest, a future interest held by a person other than the disclaimant takes effect as if the disclaimant had died or ceased to exist immediately before the time of distribution, *but a future interest held by the disclaimant is not accelerated in possession or enjoyment.*⁴³

Under the UDPIA, the disclaimer still creates the legal fiction of *A*'s death before *X*, so the future interest held by *C* still accelerates. The future interest held by *D* still does not accelerate. The one difference between the uniform laws is that, under the UDPIA, but not UPC Section 2-801, future interests held by the disclaimant do not accelerate. The commentary to the UDPIA provides an example:

Mother's will creates a testamentary trust to pay the income to her daughter [*E*] until she reaches age 35 at which time the trust is to terminate and the corpus distributed in equal shares to [*E*] and her three siblings. [*E*] disclaims her income interest.⁴⁴

When *E* disclaims her income interest, the vested remainders in her three siblings accelerate. The remainder held by *E* does not accelerate, even though it is vested; she must wait until she is 35 to receive her one-fourth share.

Under both uniform laws, therefore, the acceleration or nonacceleration of future interests occurs irrespective of classification. Put differently: both UPC Section 2-801 and the UDPIA reject any per se distinction between contingent and vested interests. Writing separately, Professors Roberts and Hirsch have criticized the rules on acceleration, arguing that they permit the manipulation of the identity of the remaindermen in a way that is inconsistent with the probable intention of the grantor.⁴⁵

43. UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 6(b)(4), 8A U.L.A. 54 (Supp. 2002) (emphasis added).

44. See *id.* § 6 cmt., ex. 5(b), at 57.

45. See Adam J. Hirsch, *Revisions in Need of Revising: The Uniform Disclaimer of Property Interests Act*, 29 FLA. ST. U. L. REV. 109, 173 (2001) [hereinafter Hirsch, *Revisions*] (concluding that "[i]n respect of disclaimers of preceding interests, however, the Act [UDPIA] incongruously opens the door to manipulation"); Adam J. Hirsch, *The Uniform Disclaimer of Property Interests Act: Opportunities and Pitfalls*, EST. PLAN., Dec. 2001, at 577 [hereinafter Hirsch, *Opportunities*] (observing that "[t]his outcome [acceleration of contingent remainders] may contradict the intent of the benefactor"); Roberts, *supra* note 34, at 297 (stating that "[t]he potential for manipulation exists when the identity of the remainderman can change during the

Professor Hirsch makes three specific arguments against the acceleration provision in UDPIA Section 6(b)(4). First, he argues that the provision is ambiguous about whether it is a mandatory rule or a default rule that yields to the grantor's contrary intention and, if the latter, what evidence of contrary intention is sufficient to avoid acceleration.⁴⁶ Second, he maintains that the provision will produce results that are unlikely to accord with the grantor's probable intention. For example, in a transfer "to *A* for life, remainder to *A*'s descendants," *A*'s disclaimer of the life estate will cause the acceleration of the remainder, thus cutting out any afterborn children or more remote descendants of *A*.⁴⁷ Professor Hirsch contends that it is not probable that the grantor would want this result, which fails to treat the life tenant's children equally.⁴⁸ Third, Professor Hirsch warns of the danger of strategic disclaiming by the beneficiary of the prior estate.⁴⁹ He offers the following illustration: "to *A* for life, and then to *B* if *B* survives *A*, otherwise to *C*."⁵⁰ In this situation, *A* stands in a position to dictate the outcome of the contingencies on the remainders held by *B* and *C*. If *A* disclaims, *B*'s remainder vests in possession immediately as a fee simple absolute, even if *B* eventually fails to survive *A*.⁵¹ Thus, he argues, the UDPIA creates a situation in which *A* can collude with *B* to ensure *B*'s inheritance.⁵² Because the UDPIA provides no time limit for a disclaimer, he notes additionally, *A* can sit back and await events before deciding whether to disclaim.⁵³ If *B* does fail to survive *A*, *A* can again dictate who receives the

course of the prior estate").

46. See Hirsch, *Revisions*, *supra* note 45, at 171 (arguing that "[i]t is unclear whether the benefactor can avoid this outcome [the acceleration of a contingent remainder], even by express provision in the governing instrument"); Hirsch, *Opportunities*, *supra* note 45, at 577 (stating that "it remains unclear whether UDPIA permits the benefactor to override the rule of acceleration by express provision in the governing instrument").

47. See Hirsch, *Opportunities*, *supra* note 45, at 577 (stating that "[u]nder UDPIA, if *A* were to disclaim, the remainder would accelerate, cutting out any afterborn descendants of *A*").

48. See Hirsch, *Revisions*, *supra* note 45, at 172 (questioning whether it is "truly probable that the life tenant [and hence the benefactor] would prefer a result that fails to treat the life tenant's children equally").

49. See Hirsch, *Opportunities*, *supra* note 45, at 578 (arguing that the "UDPIA's rule of acceleration also creates interesting strategic opportunities for the beneficiaries of life estates in those instances where a contingent remainder follows their interests").

50. Hirsch, *Revisions*, *supra* note 45, at 173.

51. See Hirsch, *Opportunities*, *supra* note 45, at 578-79 (observing that "[i]f *A*, *B*, and *C* all survive the benefactor and *A* disclaims, *B* will take the remainder immediately, even if *B* eventually predeceases *A*").

52. See Hirsch, *Revisions*, *supra* note 45, at 173 (observing that "[i]n quiet collusion with *B* (who might be old or ill and unlikely actually to outlive *A*), *A* can ensure *B*'s inheritance by disclaiming, thereby effecting *A*'s immediate constructive death").

53. See Hirsch, *Opportunities*, *supra* note 45, at 579 (concluding that "[g]iven UDPIA's

remainder: absent a disclaimer, the remainder goes to *C*, but if *A* disclaims, the remainder passes through *B*'s estate to *B*'s devisees or heirs.⁵⁴ Professor Hirsch also argues that Section 6(b)(4) permits the beneficiary of the prior estate to disclaim strategically in order to close a class.⁵⁵ He uses the example "to *A* for life, remainder to the children of *A* and *B*" and assumes that at the grantor's death *A* has children but *B* does not.⁵⁶ *A* can disclaim and immediately close the class of remaindermen, ensuring that the property passes only to her children, and not to the children of *B*.⁵⁷

To alleviate these concerns, Professor Hirsch proposes that Section 6(b)(4) be modified in two respects. First, the section should state that its provisions on acceleration constitute default rules that the grantor "remains free to supersede."⁵⁸ Second, the section should differentiate between vested and contingent future interests. The former should accelerate, but the latter should not, at least not in the absence of contrary intention. In Professor Hirsch's words, the section should contain "a default rule rendering disclaimers inoperative to resolve contingencies."⁵⁹ What would happen to a contingent remainder in the event of a disclaimed prior estate? Professor Hirsch suggests three possibilities: the prior estate "could either be returned to the [grantor's] estate, or sequestered for the benefit of the remaindermen awaiting resolution of the contingency, or distributed immediately to remaindermen with vested interests pending potential divestment by occurrence of the contingency."⁶⁰

As to his first proposal, Professor Hirsch's point is well taken. The rules governing acceleration in the absence of a statute have traditionally been applied by courts as defaults, hence permitting override by grantors who express their contrary wishes with a sufficient level of clarity.⁶¹ Having the statutory rules on acceleration also serve as defaults would be consistent with

simultaneous elimination (or, at worst, relaxation) of the time limit on disclaiming, *A* can sit back and await events—a possibility that did not exist under prior statutes").

54. See *id.* (arguing that "[i]f *A* delays the decision to accept or disclaim the life estate and *B* predeceases *A*, *A* can now dictate who receives the remainder").

55. See Hirsch, *Revisions*, *supra* note 45, at 174 (observing that "[b]y disclaiming under the UDPIA, the life tenant can close the class at will").

56. See *id.* (providing the example and postulating that "at the benefactor's death *A* already has children but *B* as yet does not").

57. See *id.* (arguing that "under UDPIA *A* can disclaim the life estate and thereby ensure that the remainder goes only to her own offspring—presumably not what the typical benefactor would have intended had the possibility of a disclaimer been anticipated").

58. *Id.* at 171 n.291.

59. *Id.* at 174.

60. *Id.* at 174 n.303.

61. See *id.* at 171 n.291 (observing that "[c]ourts had often imposed a common law rule of acceleration, but only as a default rule").

this common-law heritage. Moreover, the UDPIA's main provision on the effect of disclaimers is explicitly characterized as a default rule; only the Section 6(b)(4) provision on acceleration is ambiguous.⁶² Thus, redrafting Section 6(b)(4) to remove this ambiguity is a good idea.⁶³

Professor Hirsch's second proposal is more controversial. Professor LaPiana, who served as the UDPIA's Reporter, has responded to Professor Hirsch's arguments by emphasizing the virtues of acceleration, including the ability to terminate trusts early, which can (among other benefits) produce favorable tax results.⁶⁴ He also argues that grantors who are concerned about the possible use of disclaimers should tailor their dispositive plans accordingly.⁶⁵

Thankfully, this debate need not be resolved here. For present purposes, the point to notice is that each side of the acceleration debate can be accommodated without making distinctions based upon the classification of the future interest. We have already seen that such distinctions are irrelevant under UPC Section 2-801 and the UDPIA. They are similarly irrelevant under a regime specifically designed to prevent manipulation. For this purpose, Professor Roberts has built the better mousetrap. In her article, she rightly observes that the true source of manipulability is not acceleration, but indefeasibility: it is the fact that the successive interest, when accelerated, also becomes indefeasible that gives rise to the ability to manipulate the identity of the holders of that successive interest.⁶⁶ She argues that the future interest should accelerate without becoming indefeasible *and* explains how this can be accomplished without the immediate distribution of the property.⁶⁷

62. Compare UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 6(b)(3), 8A U.L.A. 54 (Supp. 2002) (stating expressly that its rules apply only if "the instrument does not contain a provision" to the contrary) with *id.* § 6(b)(4) (containing no such language).

63. There is some indication that the omission was a deliberate drafting choice, designed to avoid the possibility that courts would override Section 6(b)(4) even where little evidence existed that the grantor intended to do so. See Hirsch, *Revisions*, *supra* note 45, at 171 n.291 (citing a memorandum from the UDPIA's Reporter, Professor LaPiana). This argument strikes me as a good one for requiring express evidence of intention, but it does not convince me that Section 6(b)(4) should be silent about whether it applies mandatorily. Professor Hirsch has also made this point. See *id.* (raising the same objection).

64. E-mail communication from William LaPiana to the author (July 24, 2002) (on file with author) (noting that "the ability to end trusts and rearrange interests is one of the most useful aspects of disclaimers").

65. See *id.* (observing that "the UDPIA puts the burden on the transferor by allowing the transferor to make provisions in case of disclaimer").

66. See Roberts, *supra* note 34, at 320 (stating that "[c]ourts that purport to object to acceleration are often, upon closer examination, really objecting to early indefeasibility").

67. Cf. Hirsch, *Revisions*, *supra* note 45, at 174 n.303 (suggesting immediate distribution with potential future divestment).

Specifically, she proposes that legislatures enact a statute providing that when a disclaimer, release, conveyance, or other event would have the effect of accelerating a future interest into a possessory estate in which the identity of the holders of the interest remains to be determined, the interest should be held in trust with the income paid out periodically to those who fit the identity of the holders of the interest at the time of each payment; the property would be distributed outright only when, according to actual events and the terms of the original grant, the conditions for outright ownership have been met.⁶⁸ (Professor Roberts does not explain what would happen if the property generated no income, but there are other rights of a life tenant—the right to occupy or use the property, for example⁶⁹—that could be given to the holders of the interest, with the understanding that the class would similarly be subject to increase or decrease.) Thus, in example 2 above, *A*'s disclaimer would lead to the property being put into trust, with *C* receiving periodic payments of income and/or other rights of a life tenant; when and if *C* survives *A*, the trust would terminate, and the property would be given to *C* outright.

The point to notice here about Professor Roberts's proposal is that it does not rely on the classification of the future interest. There is no *per se* distinction between vested and contingent interests.⁷⁰ The proposal applies to any future interest subject to a condition, without regard to whether the condition is expressed as a condition precedent (thus rendering the interest contingent) or as a condition subsequent (thus rendering the interest vested subject to divestment). The proposal also applies to any future interest in favor of a class that has not yet closed (where the interests of some class members may be vested subject to open while others may be contingent).

Thus, whether one favors the approach of the UPC and UDPIA, on the one hand, or the proposal put forward by Professor Roberts, on the other hand, the rules governing the acceleration of future interests would apply irrespective of classification. This is precisely the nature of the second reform.

C. Archaic Rules of Future Interest Law Should Be Abolished

The third reform calls for the abolition of three outdated rules of future interest law: the rule of the destructibility of contingent remainders, the rule in *Shelley's Case*, and the doctrine of worthier title.

68. See Roberts, *supra* note 34, at 320–22 (discussing the specifics of her proposal).

69. See, e.g., HERBERT T. TIFFANY, *THE LAW OF REAL PROPERTY AND OTHER INTERESTS IN LAND* 53 (R. Berman ed., 3d ed. 1970) (stating that "a tenant for life has the right of possession and all the ordinary uses and profits of the land").

70. For discussion, see Roberts, *supra* note 34, at 322.

1. *The Rule of the Destructibility of Contingent Remainders*

The rule of the destructibility of contingent remainders, known in shorthand as the "destructibility rule," dates from the late sixteenth century.⁷¹ It provides that a contingent remainder in land is destroyed if it does not vest by the time the preceding estate terminates.⁷² The best way to understand the rule is to see it in operation, as in the following example:

X gives land to *A* for life, remainder to *B* if *B* lives to the age of 21. At *A*'s death, *B* is under 21.

At *A*'s death, *B*'s remainder is still contingent because we do not yet know whether *B* will live to the age of 21. Accordingly, at *A*'s death, *X*'s reversion operates. In a jurisdiction without the destructibility rule, *X*'s reversion is vested (because reversions are always vested), but it is subject to defeasance upon *B* surviving to the age of 21. Once *B* reaches 21, her contingent remainder vests, and the land passes to her in outright ownership. However, in a jurisdiction with the destructibility rule in force, at *A*'s death, *X*'s reversion is indefeasibly vested, and *B*'s contingent remainder—which failed to vest by the end of *A*'s life interest—is destroyed.

The destructibility rule has its origins in the English feudal system, in which the transfer of land from one person to another meant the transfer of seisin, or the right to possess the land.⁷³ In the prototypical transfer with a future interest—"X gives land to *A* for life, remainder to *B*"—seisin would pass initially from *X* to *A*. Under a legal fiction, *A* would hold seisin for herself⁷⁴ and for *B*, and at *A*'s death seisin would pass to *B*. But in our example, *B* has not reached 21 and thus would not be capable of accepting seisin at *A*'s death, thereby triggering a reversion to *X*. Yet *X* would hold seisin for herself only because English law did not permit the holder of an interest in fee simple to hold seisin partly on behalf of another. Only the holder of an interest *less* than

71. See SIMPSON, *supra* note 1, at 213–14 (discussing certain rules that developed after the case of *Colthirst v. Bejushin* in 1550, one of which stated that "[t]he remainder must vest before the precedent estate determined, so that there [is] no abeyance of seisin").

72. See SIMES, *supra* note 8, at 33 (observing that, at common law, "[i]f the prior estate of freehold terminates before the happening of the contingency on which a contingent remainder is limited, the remainder can never take effect").

73. See LAWRENCE W. WAGGONER, *ESTATES IN LAND AND FUTURE INTERESTS IN A NUTSHELL* 120 (2d ed. 1993) (stating that seisin "implied possession under a claim to a freehold estate"). For background on seisin, see JOHN H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 229–33 (4th ed. 2002).

74. See BAKER, *supra* note 73, at 466 (observing that "[s]ingle women (including widows) were generally treated the same as men for the purposes of private law, save that the rules for inheriting real property favoured males before females in the same degree of kinship").

fee simple could do so.⁷⁵ Accordingly, *X*'s reversion would give seisin to her and her alone, and *B*'s contingent remainder would be destroyed.

Being a part of the common law, the destructibility rule was received in some American jurisdictions.⁷⁶ Today, however, the rule seems to thrive in its traditional form only in Florida, where one can find post-World War II decisions endorsing it.⁷⁷ (Also recognizing the traditional rule are a New Hampshire Supreme Court decision from 1860,⁷⁸ a Pennsylvania Supreme Court decision from 1912,⁷⁹ and a New Jersey Orphans' Court decision from 1942,⁸⁰ but whether precedents so distant would still be followed is an open question.) The rule may also exist in a modified form in Mississippi, Missouri, and New Mexico, which have statutes preventing the destruction of a contingent remainder in favor of an unborn child, but saying nothing about the destructibility rule in general.⁸¹ In all of the other jurisdictions addressing the

75. See WAGGONER, *supra* note 73, at 121 (noting that "the reversioner did not and could not (since his interest was a fee simple interest) take seisin from the life tenant on behalf of himself and the remainderman").

76. See SIMES, *supra* note 8, at 41-42 (discussing reception). See also, merely by way of example, Friedman v. Friedman, 119 N.E. 321, 323 (Ill. 1918) (stating that "a contingent remainder will be destroyed whenever there is a union of the two estates [a particular estate and a reversion in fee] in the same person"); Archer v. Jacobs, 101 N.W. 195, 198 (Iowa 1904) (stating that "if a remainder be contingent, and the contingent event does not occur until after the expiration of the life tenancy, the remainder is extinguished, because it is an invariable principle that a remainder cannot exist without a particular estate to support it"); Love v. Lindstedt, 147 P. 935, 937 (Or. 1915) (stating that "[r]emote contingent remainders not being favored in law, it has always been in the power of the tenant for life to extinguish his life tenancy and convert it into a fee simple by merging it with the ultimate estate," thus terminating the contingent remainder that was predicated upon the life estate); McCreary v. Coggeshall, 53 S.E. 978, 979 (S.C. 1906) (observing that "[t]he general rule that a life estate is drowned or merged in the fee, when acquired by the owner of the fee to the destruction of an intervening contingent remainder, is too deeply embedded in the common law to be now judicially questioned").

77. See Popp v. Bond, 28 So. 2d 259, 260 (Fla. 1946) (observing that "contingent remainders may be defeated by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they became vested"); *In re Estate of Rentz*, 152 So. 2d 480, 482 (Fla. Dist. Ct. App. 1963) (stating that the doctrine of destructibility of contingent remainders "is in full force and effect in the State of Florida").

78. See Dennett v. Dennett, 40 N.H. 498, 504-05 (1860) (stating that "we regard this as a contingent remainder, and by the destruction of the life estate, on which such a remainder depends, it is clear the remainder is destroyed").

79. See *In re Estate of Gunning*, 83 A. 61, 62-63 (Pa. 1912) (holding that the contingent remainder was destroyed because it was not vested at the time the life estate terminated).

80. See *In re Estate of Koellhoffer*, 25 A.2d 638, 642 (N.J. Orphans' Ct. 1942) (stating that the rule of destructibility of contingent remainders exists in New Jersey, but did not apply on these facts).

81. The Mississippi statute provides in pertinent part:

question⁸²—Alabama,⁸³ Alaska,⁸⁴ Arizona,⁸⁵ Georgia,⁸⁶ Illinois,⁸⁷ Iowa,⁸⁸

When an estate is, by any conveyance, limited in remainder to the son or daughter of any person, to be begotten such son or daughter born after the decease of the father, shall take the estate in the same manner as if he or she had been born in the lifetime of the father, although no estate shall have been conveyed to support the contingent remainder after his death.

MISS. CODE ANN. § 89-1-11 (1999). The relevant part of the Missouri statute provides:

When an estate has been or shall be, by any conveyance, limited in remainder to the son or daughter, or to the use of the son or daughter of any person to be begotten, such son or daughter born after the decease of his or her father shall take the estate in the same manner as if he or she had been born in the lifetime of the father, although no estate shall have been conveyed to support the contingent remainder after his death.

MO. ANN. STAT. § 442.510 (West 2000). The New Mexico statute provides:

When any possession has been or shall be conveyed limiting the remainder of the possession to the son or daughter of any person, born after the death of its parent, possession shall be taken the same as if he or she was born during the life of the parent, although no possession should have been conveyed to sustain the remainder of a contingent possession after his death.

N.M. STAT. ANN. § 47-1-20 (Michie 1995).

82. Some jurisdictions have not addressed the issue at all, and others have done so only obliquely. For oblique statements about the destructibility rule, see *Tucker v. Walker*, 437 S.W.2d 788, 789 (Ark. 1969) (declining to apply the rule on the facts at issue, but not indicating whether the rule is part of Arkansas law) and *In re Estate of Haney*, 344 P.2d 16, 22 (Cal. Ct. App. 1959) (referring to the vested remainder rule as existing in an "early period in English law" and noting that the law "ha[d] changed," but not addressing specifically the rule's status under California law).

83. ALA. CODE § 35-4-212 (1991 & Supp. 2002) (providing that "every estate created by any will or conveyance, which might have taken effect as a contingent remainder, has the same properties and effect as an executory devise").

84. ALASKA STAT. § 34.27.030 (Lexis 2002) (providing that a "contingent remainder is not defeated by the termination of a precedent estate before the occurrence of the contingency that was to cause the remainder to take effect").

85. ARIZ. REV. STAT. § 33-228 (2000) (stating that a "remainder valid in its creation is not defeated by determination of the precedent estate before the contingency occurs upon which the remainder is limited to take effect").

86. GA. CODE ANN. § 44-6-62 (1991) (providing that "[s]ince no particular estate is necessary to sustain a remainder, the defeat of the particular estate for any cause does not destroy the remainder").

87. 765 ILL. COMP. STAT. 340/1 (West 2001) (providing that "[n]o future interest shall fail or be defeated by the determination of any precedent estate or interest prior to the happening of the event or contingency on which the future interest is limited to take effect").

88. IOWA CODE ANN. § 557.7 (West 1992) (providing that a "contingent remainder shall take effect, notwithstanding any determination of the particular estate, in the same manner in which it would have taken effect if it had been an executory devise or a springing or shifting use").

Kansas,⁸⁹ Kentucky,⁹⁰ Maryland,⁹¹ Massachusetts,⁹² Michigan,⁹³ New Mexico,⁹⁴ Nevada,⁹⁵ New York,⁹⁶ North Dakota,⁹⁷ Ohio,⁹⁸ Rhode Island,⁹⁹

89. *Miller v. Miller*, 136 P. 953, 954 (Kan. 1913) (stating that "[t]his court is of the opinion that the common-law rules referred to [the rule requiring contingent remainders to have a precedent particular estate to support them and the rule mandating the destruction of the contingent remainders when the particular estate upon which they depend terminates] have been abrogated by statute").

90. KY. REV. STAT. ANN. § 381.100 (Michie 2002) (providing that a "contingent remainder shall, in no case, fail for the want of a particular estate to support it").

91. MD. CODE ANN., EST. & TRUSTS § 11-101 (2001) (stating that "[a]ny contingent remainder arising under any will or inter vivos transfer shall be capable of taking effect, regardless of the determination of any preceding estate of freehold, in the same manner and in all respects as if the determination had not happened").

92. MASS. GEN. LAWS ANN. ch. 184, § 3 (West 1991 & Supp. 2002) (providing that a "contingent remainder shall take effect, notwithstanding any determination of the particular estate, in the same manner in which it would have taken effect if it had been an executory devise or a springing or shifting use").

93. MICH. COMP. LAWS ANN. § 554.34 (West 1988) (providing that "[n]o remainder, valid in its creation, shall be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder is limited to take effect").

94. *Johnson v. Amstutz*, 678 P.2d 1169, 1170 (N.M. 1984) (stating that "the doctrine [of the destructibility of contingent remainders] is not now and has never been the law in New Mexico").

95. NEV. REV. STAT. § 111.102 (2001) (stating that a "contingent remainder is not destroyed by the termination of the preceding estate before the satisfaction of the condition upon which the remainder is contingent").

96. *Will of Vanderbilt v. Balsan*, 77 N.Y.S.2d 403, 416 (N.Y. Gen. Term 1948) (observing that "[c]ontingent remainders have long since been declared indestructible by statute, irrespective of the premature termination of the preceding estate").

97. N.D. CENT. CODE § 47-02-32 (1999) (providing that "[n]o future interest, valid in its creation, is defeated by the determination of the precedent interest before the happening of the contingency on which the future interest is limited to take effect").

98. OHIO REV. CODE ANN. § 2131.05 (West 1994 & Supp. 2003) (stating that a "remainder valid in its creation shall not be defeated by the determination of the precedent estate before the happening of the contingency on which the remainder was limited to take effect").

99. The Rhode Island statute states in pertinent part:

No expectant estate shall be defeated or barred by an alienation or other act of the owner of the precedent estate, nor by the destruction of the precedent estate by disseisin, forfeiture, surrender, or merger, nor shall a contingent remainder be defeated by the termination of a precedent estate before the occurrence of the contingency on which the remainder was limited to take effect.

R.I. GEN. LAWS § 34-4-4 (1995).

Tennessee,¹⁰⁰ Virginia,¹⁰¹ and West Virginia¹⁰²—the rule has been abolished by statute or abrogated by judicial decision.

The rationale for abolition is well stated by Professor Simes:

Since, in this country, either by statute or by common law, it is possible to create an estate of freehold to begin in the future without any prior estate of freehold to support it, there is no rational basis left for the destructibility rule. If a contingent remainder has not vested at the termination of the prior estate, there is no reason why it should not be given effect as an executory interest which is everywhere recognized as indestructible.¹⁰³

Put simply, the destructibility rule is a feudal relic inconsistent with modern law. The seven states that have not definitively abolished the rule should do so without further delay.

2. *The Rule in Shelley's Case*

The rule in Shelley's Case derives from Edward Coke's report of the case of *Wolfe v. Shelley*,¹⁰⁴ decided in 1581 by the Court of King's Bench. The rule provides that a remainder interest in land in favor of the life tenant's heirs is held by the life tenant.¹⁰⁵ Consider the following example:

X gives land to *A* for life, remainder to *A*'s heirs.

Without the rule in Shelley's Case, *A* has an interest in the property for life, after which the property passes to *A*'s heirs. Applying *Wolfe v. Shelley* yields a very different result: *A* holds both the life interest and the remainder, so the

100. TENN. CODE ANN. § 66-1-105 (1993) (stating that "[i]t shall not be necessary, as at common law, that a contingent remainder be supported by a particular estate of the dignity of a freehold, but it shall be sufficient and lawful for contingent remainders to be supported by a preceding estate for years").

101. VA. CODE ANN. § 55-15 (Michie 1995) (stating that a "contingent remainder shall in no case fail for want of a particular estate to support it").

102. W. VA. CODE § 36-1-15 (1997) (providing that a "contingent remainder shall in no case fail for want of a particular estate to support it, nor because of the termination of a preceding particular estate by merger, forfeiture, or in any other manner, before the contingent remainder shall have been vested").

103. SIMES, *supra* note 8, at 42.

104. *Wolfe v. Shelley*, 1 Co. Rep. 93b, 76 Eng. Rep. 206 (K.B. 1581). For a fascinating discussion of the background and aftermath of the case, see A.W.B. SIMPSON, LEADING CASES IN THE COMMON LAW 13-44 (1995).

105. See SIMES, *supra* note 8, at 43 (stating that if there is a conveyance to *A* for life, remainder to his heirs, the rule in Shelley's Case would mandate that "this transaction would give *A* a fee simple, but would give nothing to his heirs").

two interests merge,¹⁰⁶ thus giving *A* outright ownership of the land. This result occurs without regard to what *X* intended when making the gift: the rule in *Shelley's Case* is an absolute rule of law, not a rule of construction that applies only when the donor's intent is unclear.¹⁰⁷ Moreover, the rule governs transfers of land whether made outright or in trust, meaning that both legal and equitable remainders are subject to it.¹⁰⁸

Various explanations for the rule in *Shelley's Case* have been offered. The traditional explanation points to the English feudal system.¹⁰⁹ In that system, land was not devisable by will; instead, it descended to one's heirs at death.¹¹⁰ Thus, if we imagine the above example within a feudal system, the land would pass to *A*'s heirs no matter whether *A* owned a life estate or the entire property. The crucial distinction comes in the method of transfer. Without the rule, the land would pass by the terms of *X*'s gift; with the rule, the land would pass by operation of the statute of descent. In the latter case, but not in the former, the feudal lord would be able to exact dues from the heirs before allowing them to receive the land.¹¹¹ Accordingly, the explanation goes, the rule in *Shelley's Case* protected lords and their revenue from attempts to evade the payment of feudal obligations.¹¹² Recent scholarship has suggested a very different reason for the rule: a battle between two lines of the *Shelley* family—one Protestant, one Catholic—during the sixteenth century, a time when religious divisions in England were particularly pronounced.¹¹³ The outcome of the litigation, which favored the Protestant side, might well have reflected a desire to support, in Professor Simpson's words, "the politically correct branch of the *Shelley* family against a dangerous papist."¹¹⁴

Whatever its history, the rule was abolished in England in 1925.¹¹⁵ In the United States, the rule has also been abolished, either by statute or judicial

106. On merger, see WAGGONER, *supra* note 73, at 129–31, 151–58.

107. See *Perrin v. Blake*, 1 W. Bl. 672, 96 Eng. Rep. 392, 394 (K.B. 1769) (describing the rule in *Shelley's Case* as a rule of law).

108. See, e.g., *Bagshaw v. Spencer*, 1 Ves. Sen. 142, 2 Atk. 570, 26 Eng. Rep. 741, 747 (Ch. 1743) (stating that "limitations of trusts and legal estates are governed by the same rules").

109. See WAGGONER, *supra* note 73, at 138–39 (discussing the historical development of the rule in *Shelley's Case*).

110. See SIMPSON, *supra* note 1, at 62 (stating that, in early England, "[t]he descent to the heir could not be interfered with by will").

111. See WAGGONER, *supra* note 73, at 139 (observing that "[t]he feudal dues to the lord could be exacted only when land descended on the owner's death").

112. See *id.* at 138–39 (discussing the rule's origins).

113. See SIMPSON, *supra* note 104, at 29–41 (exploring the historical background to the litigation).

114. *Id.* at 40.

115. Law of Property Act, 15 & 16 Geo. 5, c. 20, § 131 (1925) (Eng.).

decision, in 43 of the 50 common-law jurisdictions.¹¹⁶ The most recent of these is North Carolina, which eliminated the rule in 1987.¹¹⁷ The others are Alabama,¹¹⁸ Alaska,¹¹⁹ Arizona,¹²⁰ California,¹²¹ Connecticut,¹²² the District of Columbia,¹²³ Florida,¹²⁴ Georgia,¹²⁵ Idaho,¹²⁶ Illinois,¹²⁷ Iowa,¹²⁸ Kansas,¹²⁹

116. Recall that this excludes Louisiana and includes the District of Columbia. *Supra* note 15.

117. N.C. GEN. STAT. § 41-6.3 (2001) (providing that "[t]he rule of property known as the rule in Shelley's case is abolished"). For commentary, see generally John V. Orth, *Requiem for the Rule in Shelley's Case*, 67 N.C. L. REV. 681 (1989).

118. The Alabama statute provides in pertinent part:

Where a remainder created by a deed or will is limited to the heirs, issue or heirs of the body of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the heirs, issue or heirs of the body of such tenant for life are entitled to take as purchasers by virtue of the remainder so limited to them.

ALA. CODE § 35-4-230 (1991 & Supp. 2002).

119. The Alaska statute provides in pertinent part:

If real property is granted or devised to a person and after the person's death, to the person's heirs or the heirs of the person's body, however the grant or devise is expressed, an estate for life only vests in the person, and a remainder goes to the person's heirs or the heirs of the person's body as purchasers.

ALASKA STAT. § 34.27.020 (Lexis 2002).

120. The Arizona statute provides in pertinent part:

When a remainder is limited to the heirs or heirs of the body of a person to whom a life estate in the same premises is given, the persons who, on the termination of the life estate, are the heirs or heirs of the body of the life tenant shall take as purchasers by virtue of the remainder so limited to them.

ARIZ. REV. STAT. § 33-231 (2000).

121. The California statute provides in relevant part:

When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life.

CAL. CIV. CODE ANN. § 779 (West 1982 & Supp. 2003).

122. CONN. GEN. STAT. ANN. § 47-4 (West 1995) (providing that "[a]ll grants or devises of an estate in lands, to any person for life and then to his heirs, shall be only an estate for life in the grantee or devisee").

123. The D.C. statute provides in pertinent part:

Where a remainder shall be limited to the heirs or heirs of the body of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heirs or the heirs of the body of such tenant for life shall be entitled to take in fee simple as purchasers by virtue of the remainder so limited.

Kentucky,¹³⁰ Maine,¹³¹ Maryland,¹³² Massachusetts,¹³³ Michigan,¹³⁴

D.C. CODE ANN. § 42-703 (1998).

124. FLA. STAT. ANN. § 689.17 (West 1994 & Supp. 2003) (stating simply that "[t]he rule in Shelley's Case is hereby abolished").

125. The Georgia legislature abolished the rule indirectly by providing that "heirs" means "children." See GA. CODE ANN. § 44-6-23 (1991) (providing that "[l]imitations over to 'heirs,' 'heirs of the body,' 'lineal heirs,' 'lawful heirs,' 'issue,' or words of similar meaning shall be held to mean 'children' whether the parents are alive or dead"). The Georgia Supreme Court has stated that this statute effectively abolishes the rule. See *Raines v. Duskin*, 277 S.E.2d 26, 32 n.10 (Ga. 1981) (stating that "[a] conveyance 'to B for life, remainder to his heirs' gave B a fee simple estate by the rule in Shelley's case . . . but the rule is now contrary in Georgia"); *Miller v. Dunham*, 236 S.E.2d 8, 9 (Ga. 1977) (concluding that the rule in Shelley's Case "has been abolished in England by statute, and it is no longer of force in Georgia, as the reverse of its doctrine has been established by our Code").

126. The Idaho statute provides in pertinent part:

When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder, so limited to them, and not as mere successors of the owner for life.

IDAHO CODE § 55-206 (Michie 2001).

127. 765 ILL. COMP. STAT. ANN. 345/1 (West 2001) (stating simply that "[t]he rule of property known as the rule in Shelley's Case is abolished").

128. IOWA CODE ANN. § 557.20 (West 1992) (stating that "[t]he rule or principle of the common law known as the rule in Shelley's case is hereby abolished and is declared not to be a part of the law of this state").

129. KAN. STAT. ANN. § 58-502 (1994) (providing that "[t]he rules of the common law, known as the rule in Shelley's case, and those pertaining to estates tail, however created, shall not be applied in this state to any instrument which becomes effective after the effective date of this act").

130. The Kentucky statute provides in pertinent part:

If any estate is given by deed or will to any person for his life, and after his death to his heirs, or the heirs of his body, or his issue or descendants, such estate shall be construed to be an estate for life only in such person, and a remainder in fee simple in his heirs, or the heirs of his body, or his issue or descendants.

KY. REV. STAT. ANN. § 381.090 (Michie 2002).

131. ME. REV. STAT. ANN. tit. 33, § 158 (West 1999) (stating that a "conveyance or devise of land to a person for life and to his heirs in fee, or by words to that effect, shall be construed to vest an estate for life only in the first taker and a fee simple in his heirs").

132. The Maryland statute provides in pertinent part:

Whenever by any form of words in any will or inter vivos conveyance, a remainder is limited, mediately or immediately, to the heirs or heirs of the body of a person to whom a life estate in the same subject matter is given, the persons who on the termination of the life estate are then the heirs or heirs of the body of the tenant for life, take as purchasers by virtue of the contingent remainder limited to them.

MD. CODE ANN., EST. & TRUSTS § 11-104 (2001).

Minnesota,¹³⁵ Mississippi,¹³⁶ Missouri,¹³⁷ Montana,¹³⁸ Nebraska,¹³⁹ Nevada,¹⁴⁰

133. MASS. GEN. LAWS ANN. ch. 184, § 5 (West 1991 & Supp. 2002) (providing that "[i]f land is granted or devised to a person and after his death to his heirs in fee, however the grant or devise is expressed, an estate for life only shall vest in such first taker, and a remainder in fee simple in his heirs").

134. The Michigan statute provides in relevant part:

When a remainder shall be limited to the heir, or heirs of the body of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heir, or heirs of the body of such tenant for life, shall be entitled to take as purchasers, by virtue of the remainder so limited to them.

MICH. COMP. LAWS ANN. § 554.28 (West 1988).

135. The Minnesota statute provides in pertinent part:

When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises is given, the persons who, on the termination of the life estate, are the heirs or heirs of the body of such tenant for life shall be entitled to take as purchasers, by virtue of the remainder so limited to them.

MINN. STAT. ANN. § 500.14(4) (West 2002).

136. The Mississippi statute states in relevant part:

A conveyance or devise of land or other property to any person for life, with remainder to his heirs or heirs of his body, shall be held to create an estate for life in such person, with remainder to his heirs or heirs of his body, who shall take as purchasers, by virtue of the remainder so limited to them.

MISS. CODE ANN. § 89-1-9 (1991 & Supp. 2002).

137. The Missouri statute provides in relevant part:

Where a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heir or heirs of the body of such tenant for life shall be entitled to take as purchasers in fee simple, by virtue of the remainder so limited in them.

MO. ANN. STAT. § 442.490 (West 2000).

138. The Montana statute states in pertinent part:

When a remainder is limited to the heirs or heirs of the body of a person to whom a life estate in the same property is given, the persons who on the termination of the life estate are the successors or heirs of the body of the owner for life are entitled to take by virtue of the remainder so limited to them and not as mere successors of the owner for life.

MONT. CODE ANN. § 70-15-215 (2001).

139. The Nebraska statute provides in relevant part:

Whenever any person, by conveyance, takes a life interest and in the same conveyance an interest is limited by way of remainder, either immediately or mediately, to his heirs, or heirs of his body, or his issue, or next of kin, or some of such heirs, heirs of the body, issue, or next of kin, the word heirs, heirs of the body, or next of kin, or other words of like import used in the conveyance, in the limitation therein by way of remainder, are not words of limitation carrying to such person an estate

New Jersey,¹⁴¹ New Mexico,¹⁴² New York,¹⁴³ North Dakota,¹⁴⁴ Ohio,¹⁴⁵ Oklahoma,¹⁴⁶ Pennsylvania,¹⁴⁷ Rhode Island,¹⁴⁸ South Carolina,¹⁴⁹ South

of inheritance or absolute estate in the property, but are words of purchase creating a remainder in the designated heirs, heirs of the body, issue, or next of kin.

NEB. REV. STAT. § 76-112 (1996).

140. NEV. REV. STAT. § 111.101 (2001) (stating that "[t]he purpose of this section is to abolish the Rule in Shelley's Case").

141. N.J. STAT. ANN. § 46:3-14 (West 1989 & Supp. 2002) (stating that "the said rule of the common law, known as the Rule in Shelley's Case, shall not be applicable to any interest in property created by an instrument to take effect hereafter").

142. The New Mexico statute provides:

When the remainder of a possession is limited to the heirs or heirs of the body of a person who holds said property as a life estate, in these premises the person who at the termination of said life estate, are to be heirs or heirs of the body of said life estate, shall be authorized to purchase the same [take as purchasers] by virtue of the remainder of the possession so limited in them.

N.M. STAT. ANN. § 47-1-19 (Michie 1995).

143. The New York statute provides in part:

When a remainder is limited to the heirs, heirs of the body or distributees of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the heirs, heirs of the body or distributees of the life tenant take as purchasers.

N.Y. EST. POWERS & TRUSTS LAW § 6-5.8 (McKinney 2002).

144. The North Dakota statute provides:

When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them and not as mere successors of the owner for life.

N.D. CENT. CODE § 47-04-20 (1999).

145. OHIO REV. CODE ANN. § 2107.49 (West 1994 & Supp. 2003) (stating that "[t]he rule in Shelley's case is abolished by this section and shall not be given effect").

146. The Oklahoma statute provides in part:

When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life.

OKLA. STAT. ANN. tit. 60, § 41 (West 1994).

147. 20 PA. CONS. STAT. ANN. §§ 2517, 6117 (West 1975 & Supp. 2002) (stating that "[t]he rule in Shelley's case and its corollaries shall not be applied").

148. The Rhode Island statute provides:

A devise for life to any person and to the children or issue generally of the devisee in fee simple, shall not vest a fee tail estate in the first devisee but an estate for life only, and the remainder shall on his or her death vest in his or her children or issue

Dakota,¹⁵⁰ Tennessee,¹⁵¹ Texas,¹⁵² Vermont,¹⁵³ Virginia,¹⁵⁴ Washington,¹⁵⁵ West Virginia,¹⁵⁶ Wisconsin,¹⁵⁷ and Wyoming.¹⁵⁸ In three of the other states, the rule has been partly, but not wholly, abolished: a statute in Indiana elimi-

generally agreeable to the direction of the will.

R.I. GEN. LAWS § 33-6-10 (1995).

149. S.C. CODE ANN. § 27-5-20 (Law. Co-op. 1991) (stating that "[t]he rule of law known as the rule in Shelley's Case is hereby abolished").

150. The South Dakota statute provides in relevant part:

When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life.

S.D. CODIFIED LAWS § 43-9-11 (Michie 1997).

151. The Tennessee statute reads:

Where a remainder is limited to the heirs or heirs of the body of a person, to whom a life estate in the same premises is given, the persons who, on the termination of the life estate, are heirs or heirs of the body of such tenant, shall take as purchasers, by virtue of the remainder so limited to them.

TENN. CODE ANN. § 66-1-103 (1993 & Supp. 2002).

152. TEX. PROP. CODE ANN. § 5.042 (Vernon 1984 & Supp. 2003) (stating that "[t]he common-law rule[] known as the rule in Shelley's case . . . [does] not apply in this state").

153. *Kennedy v. Rutter*, 6 A.2d 17, 22 (Vt. 1939) (stating that "the result contended for by the plaintiffs could be obtained only by the application of the rule in Shelley's case, and this rule has never been followed in this State").

154. The Virginia statute provides:

Wherever any person by deed, will or other writing takes an estate of freehold in land . . . and in the same deed, will or writing an estate is afterwards limited by way of remainder, either mediately or immediately, to his heirs, or heirs of the body, or his issue, the words 'heirs,' 'heirs of the body,' and 'issue,' or other words of like import used in the deed, will or writing in the limitation therein by way of remainder shall not be construed as words of limitation carrying to such person the inheritance as to the land . . . but they shall be construed as words of purchase, creating a remainder in the heirs, heirs of the body or issue.

VA. CODE ANN. § 55-14 (Michie 1995).

155. WASH. REV. CODE ANN. § 11.12.180 (West 1998) (stating that "[t]he Rule in Shelley's Case is abolished as a rule of law and as a rule of construction").

156. W. VA. CODE § 36-1-14 (1997) (stating that it is "the intent and purpose of this section to completely abolish the rule of law known as the rule in Shelley's Case").

157. WIS. STAT. ANN. § 700.10 (West 2001) (providing that "[i]f an instrument purports to transfer an interest for life to one person and a remainder to that person's heirs or the heirs of that person's body, a remainder is created in that person's heirs or heirs of that person's body").

158. *Crawford v. Barber*, 385 P.2d 655, 657 (Wyo. 1963) (stating that it is "doubtful that the rule in Shelley's Case could be applicable in Wyoming").

nated the rule with respect to trusts, but not wills,¹⁵⁹ whereas statutes in New Hampshire and Oregon abolished the rule with respect to wills, but not nontestamentary trusts.¹⁶⁰ (These odd results seem to have occurred less by legislative intent than by the accident of codification—for example, the Indiana statute forms a part of the state's trust code, which simply does not govern wills.¹⁶¹ Yet if the limited repeals are mistakes, it is also true that none of the three legislatures has acted to remedy the situation.¹⁶²) That leaves merely four states: Utah, Colorado, Arkansas, and Delaware. In Utah, the rule appears never to have arisen, neither in a statute nor in a judicial decision.¹⁶³ In Colorado, the rule exists, but is dormant; the only reported case involving the rule dates from 1922, when the state supreme court announced, "We shall assume, without deciding, that the rule in Shelley's Case is in force in Colo-

159. IND. CODE ANN. § 30-4-2-7 (Michie 2002) (providing that the "extent of the beneficiary's estate shall be determined from the terms of the trust" and that "[t]he Rule in Shelley's Case and the Doctrine of Worthier Title shall not be applied to determine the meaning or application of the terms").

160. N.H. REV. STAT. ANN. § 551:8 (1997) (providing that "[n]o express devise of an estate for life or other limited estate shall be enlarged or construed to pass any greater estate, by reason of any devise to the heirs or issue of such person"); OR. REV. STAT. § 112.345 (2001) (providing that a "devise of property to any person for the term of the life of the person, and after the death of the person to the children or heirs of the person, vests an estate or interest for life only in the devisee and remainder in the children or heirs"). By their terms, both statutes apply only to "devise[s]," not to nontestamentary trusts.

161. The statute abolishing the rule provides in pertinent part that "[t]he extent of the beneficiary's estate shall be determined from the terms of the trust. The Rule in Shelley's Case . . . shall not be applied to determine the meaning or application of the terms." IND. CODE ANN. § 30-4-2-7 (Michie 2002) (emphasis added). The word "trust" is defined elsewhere in the state's trust code so as to exclude a will: "a fiduciary relationship between a person who, as trustee, holds title to property and another person for whom, as beneficiary, the title is held." *Id.* § 30-4-1-1(a).

162. One branch of the New Hampshire legislature apparently considered a more comprehensive approach, see *Opinion of the Justices*, 338 A.2d 109, 109–10 (N.H. 1975), but in the end the statute was not amended. However, inferring much from legislative silence is problematic. A limited legislative agenda makes it far more likely, on any given topic, that there will be inaction rather than action. In order for a proposal to gain a place on the agenda, it must have substantial support and be considered urgent by key legislators. For thoughtful discussions of this issue, see James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 21–26 (1994) (discussing the crowded congressional calendar and the opportunity costs involved in considering one bill rather than another); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 98–99 (1988) (discussing the problems inherent in inferring intention from legislative inactivity).

163. Westlaw searches for "shelley +2 case" or "heirs /s remainder" in the UT-CS and UT-ST-ANN databases yielded no relevant results.

rado.¹⁶⁴ In the final two states, Arkansas and Delaware, the rule is thriving, having been invoked in judicial decisions as recently as the 1980s.¹⁶⁵

Like the destructibility rule, the rule in Shelley's Case is a relic of an earlier era. Moreover, it contravenes the well-established modern policy of giving effect to the intention of the grantor, absent a strong contrary reason.¹⁶⁶ Because the rule is one of law rather than of construction, it applies inexorably, even when the grantor has clearly stated his intention that the life tenant's heirs take as purchasers.¹⁶⁷ Indeed, the rule even applies when the grantor has specifically demanded that it not apply.¹⁶⁸ Because the rule in Shelley's Case serves no modern purpose yet still defeats the grantor's intention, it deserves to be eliminated. The seven states that have not yet done so, wholly and unambiguously, should act.

164. *Barnard v. Moore*, 207 P. 332, 334 (Colo. 1922).

165. *See Smith v. Wright*, 779 S.W.2d 177, 179 (Ark. 1989) (stating that "Arkansas is one of the few states that continues to recognize the Rule in Shelley's case"); *Estate of Donovan*, 1983 WL 103280, at *1 (Del. Ch. Apr. 14, 1983) (concluding that "[a]lthough it has been abrogated by statute in many jurisdictions, the Rule in Shelley's Case is in force in Delaware").

166. *See William A. Reppy, Jr., Judicial Overkill in Applying the Rule in Shelley's Case*, 73 NOTRE DAME L. REV. 83, 86-87 (1997) (stating that Shelley's rule applies "inexorably" despite the clear intent that the life tenant's heirs shall take as purchasers). For one of many examples of the modern emphasis on effectuating the intention of the grantor, see UNIF. PROBATE CODE, Prefatory Note to Article II Revisions, 8 U.L.A. 75 (1998) (describing one of the broad themes of the revisions as "the decline of formalism in favor of intent-serving policies"). On the role of default rules as intent-effectuating, see T. P. Gallanis, *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 OHIO ST. L.J. 1513, 1522-24 (1999) (demonstrating how default rules in three uniform acts claim to reflect intent but fail to do so for members of sexual minorities). Note that the modern approach of donative transfer law is *not* that the grantor's intention should trump all other considerations; rather, the modern view is that the grantor's intention should prevail unless there is a strong reason to the contrary. For examples of rules that deliberately restrict the implementation of the grantor's intention in order to implement a contrary policy, see UNIF. STAT. RULE AGAINST PERPETUITIES § 1(a), 8B U.L.A. 236 (2001 & Supp. 2002) (limiting the duration of contingent future interests); UNIF. PROBATE CODE § 2-202(a), 8 U.L.A. 102 (1998 & Supp. 2002) (giving the surviving spouse an elective share of the decedent's augmented estate); RESTATEMENT (THIRD) OF TRUSTS § 65(2) (Tentative Draft No. 3, 2001) (substantially relaxing the traditional rules of trust termination by permitting a court to terminate a trust early "if it determines that the reason for termination outweighs the [grantor's] material purpose").

167. *See Reppy, supra* note 166, at 86 (stating that "[a]s a rule of law, rather than of construction, the Rule applies 'inexorably' in the face of the strongest statement of intent that the life tenant's heirs shall take as purchasers").

168. *See id.* at 86-87 (concluding that the rule "applies even though the instrument refers to the Rule by name, demanding that it not be applied"); *see also Fowler v. Black*, 26 N.E. 596, 597 (Ill. 1891) (stating in dicta that the rule in Shelley's Case is "a rule of property which overrides even the expressed intention of the testator or grantor that it shall not operate").

3. The Doctrine of Worthier Title

The doctrine of worthier title derives from England, where it emerged no later than the sixteenth century, and probably earlier.¹⁶⁹ The doctrine provides that a remainder in the grantor's heirs is to be treated as a reversion in the grantor.¹⁷⁰ Consider the following example:

X gives property to *A* for life, remainder to *X*'s heirs.

By the terms of the transfer, *A* receives an interest for life, after which the property passes to *X*'s heirs. If we apply the doctrine, the transfer is rewritten as "to *A* for life, reversion in *X*." The explanation for the worthier title doctrine is the same as the one traditionally offered for the rule in Shelley's Case: both rules require heirs to take property by descent rather than by the terms of a transfer—title by descent being "worthier" than title by devise or conveyance—because only on descent could feudal lords exact the customary dues.¹⁷¹

The doctrine was abolished in England in 1833,¹⁷² but continues to exist in a modified form in some parts of the United States. In order to understand the doctrine's current contours, it is necessary to recognize that the doctrine has split into two branches.¹⁷³ The "testamentary branch" of the doctrine concerns transfers made by will; the "inter vivos branch" applies to transfers made during the transferor's lifetime.¹⁷⁴

The doctrine's testamentary branch is virtually extinct in the United States. Of the 31 jurisdictions that have addressed the issue by statute or

169. See *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559, 562 (D.C. Cir. 1966) (discussing the doctrine's origins); *Doctor v. Hughes*, 122 N.E. 221, 221 (N.Y. 1919) (citing *Read v. Erington*, Cro. Eliz. 322 (1594)).

170. See *Doctor*, 122 N.E. at 222 (stating that "a reservation to the heirs of the grantor is equivalent to the reservation of a reversion to the grantor himself").

171. See *Hatch*, 361 F.2d at 562 (stating that because "the feudal overlord was entitled to certain valuable incidents when property held by one of his feoffees passed by 'descent' to an heir rather than by 'purchase' to a transferee [sic] . . . [t]he doctrine of worthier title—whereby descent is deemed 'worthier' than purchase—remained enconced in English law . . . until abrogated by statute in 1833."); SIMES, *supra* note 8, at 56–57 (stating that "[i]n early English law the worthier title doctrine, to the effect that title by descent, as compared with title by purchase, is the worthier title, invalidated limitations to the heirs of a grantor or testator").

172. See Inheritance Act, 3 & 4 Wm. IV, c. 106, § 3 (1833) (Eng.) (providing that "when any land shall have been devised, by any testator who shall die after the Thirty-first day of December One thousand eight hundred and thirty-three, to the Heir or to the Person who shall be the Heir of such Testator, such Heir shall be considered to have acquired the land as a Devisee, and not by Descent").

173. THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 121–22 (2d ed. 1984).

174. *Id.*

judicial decision, 30 have rejected it.¹⁷⁵ Alabama,¹⁷⁶ Alaska,¹⁷⁷ Arizona,¹⁷⁸ Arkansas,¹⁷⁹ California,¹⁸⁰ Colorado,¹⁸¹ Connecticut,¹⁸² the District of Columbia,¹⁸³ Hawaii,¹⁸⁴ Illinois,¹⁸⁵ Iowa,¹⁸⁶ Kansas,¹⁸⁷ Kentucky,¹⁸⁸ Massachusetts,¹⁸⁹

175. Not on this list is Indiana, which has abolished the worthier title doctrine with respect to trusts, but not with respect to wills. See IND. CODE ANN. § 30-4-2-7 (Michie 2002) (stating that the "extent of the beneficiary's estate shall be determined from the terms of the trust," and that "[t]he Rule in Shelley's Case and the Doctrine of Worthier Title shall not be applied to determine the meaning or application of the terms"). As noted in the earlier discussion of the rule in Shelley's Case, see *supra* note 161 and accompanying text, the limited scope of the Indiana legislation seems more a function of its inclusion in the state's trust code than a deliberate decision by the legislature to keep the old rules in place for wills.

176. City Nat'l Bank of Birmingham v. Andrews, 355 So. 2d 341, 344 (Ala. 1978) (stating that "[w]e are persuaded that the wills branch of the worthier title doctrine is an anachronism in the law and should not be applied").

177. ALASKA STAT. § 13.12.710 (Lexis 2002) (providing that "[t]he doctrine of worthier title is abolished as a rule of law and as a rule of construction").

178. ARIZ. REV. STAT. § 14-2710 (1995 & Supp. 2002) (stating that "[t]he common law doctrine of worthier title is not recognized in this state").

179. ARK. CODE ANN. § 28-9-220 (Michie 1987) (abolishing the doctrine of worthier title for both testamentary and inter vivos conveyances).

180. CAL. PROBATE CODE § 21,108 (West Supp. 2003) (providing that "[t]he law of this state does not include (a) the common-law rule of worthier title that a transferor cannot devise an interest to his or her own heirs"). The statute abolishing the inter vivos branch is CAL. CIV. CODE § 1073 (West 1982 & Supp. 2003) (providing that "[t]he law of this State does not include . . . the common law rule of worthier title that a grantor cannot convey an interest to his own heirs").

181. COLO. REV. STAT. § 15-11-710 (2001) (stating that "[t]he doctrine of worthier title is abolished as a rule of law and as a rule of construction").

182. Phoenix State Bank & Trust Co. v. Buckalew, 15 Conn. Supp. 149, 152 (Super. Ct. 1947) (stating that "[i]t is the opinion of this court that it should not undertake to introduce the principle [of the doctrine of worthier title] . . . 104 years after it was abolished in the land where it originated").

183. Hatch v. Riggs Nat'l Bank, 361 F.2d 559, 564 (D.C. Cir. 1966) (holding that "the doctrine of worthier title is no part of the law of trusts in the District of Columbia, either as a rule of law or as a rule of construction").

184. HAW. REV. STAT. § 560:2-710 (Supp. 1999) (providing that "[t]he doctrine of worthier title is abolished as a rule of law and as a rule of construction").

185. 765 ILL. COMP. STAT. ANN. 350/1 (West 2001) (providing that "[t]he doctrine of worthier title and the rule of the common law that a grantor cannot create a limitation in favor of his own heirs are abolished").

186. Matter of Campbell, 319 N.W.2d 275, 278 (Iowa 1982) (stating that "we deem this case an appropriate one in which to end in Iowa what is left of the wills branch of the doctrine of worthier title").

187. KAN. STAT. ANN. § 58-506 (1994) (providing that "[i]n the case of a will to heirs, or to next of kin of the testator, or to a person an heir or next of kin, the common-law doctrine of worthier title is abolished and the devisees or devisee shall take under the will and not by

Michigan,¹⁹⁰ Minnesota,¹⁹¹ Montana,¹⁹² Nebraska,¹⁹³ New Mexico,¹⁹⁴ New York,¹⁹⁵ North Carolina,¹⁹⁶ North Dakota,¹⁹⁷ Pennsylvania,¹⁹⁸ South Dakota,¹⁹⁹

descent").

188. *Mitchell v. Dauphin Deposit Trust Co.*, 142 S.W.2d 181, 184 (Ky. Ct. App. 1940) (concluding that "the doctrine of worthier title serves to hinder, rather than aid, in the ascertainment of the intention of the testator, which is the cardinal purpose in the construction of wills, and that it has no place in our jurisprudence").

189. MASS. GEN. LAWS ANN. ch. 184, § 33A (West 1991 & Supp. 2002) (providing that "[w]hen any interest in real or personal property is limited, mediately or immediately, in an otherwise effective testamentary conveyance or devise . . . to the heirs or next of kin of the conveyor . . . such conveyees or devisees acquire the interest . . . by purchase, and not by descent"). The statute abolishing the inter vivos branch is MASS. GEN. LAWS ANN. ch. 184, § 33B (West 1991 & Supp. 2002) (stating that "[w]hen any interest in real or personal property is limited, in an otherwise effective inter vivos conveyance . . . to the heirs or next of kin of the conveyor . . . such interest . . . operates in favor of such heirs or next of kin by purchase and not by descent").

190. MICH. COMP. LAWS § 700.2719 (2002) (providing that "[t]he doctrine of worthier title is abolished as a rule of law and as a rule of construction").

191. MINN. STAT. ANN. § 500.14(4) (West 2002) (stating that "[n]o conveyance, transfer, devise, or bequest of an interest, legal or equitable, in real or personal property, shall fail to take effect by purchase because limited to a person or persons, howsoever described, who would take the same interest by descent or distribution").

192. MONT. CODE ANN. § 72-2-720 (2001) (stating that "[t]he doctrine of worthier title is abolished as a rule of law and as a rule of construction").

193. NEB. REV. STAT. § 76-114 (1996) (providing in pertinent part that "[w]hen any property is limited, mediately or immediately, in an otherwise effective testamentary conveyance . . . to the heirs or next of kin of the conveyor . . . such conveyees acquire the property by purchase and not by descent").

194. N.M. STAT. ANN. § 45-2-710 (Michie 1995) (stating that "[t]he doctrine of worthier title is abolished as a rule of law and as a rule of construction").

195. N.Y. EST. POWERS & TRUSTS LAW § 6-5.9 (McKinney 2002) (providing that "[w]here a remainder is limited to the heirs or distributees of the creator of an estate in property, such heirs or distributees take as purchasers").

196. N.C. GEN. STAT. § 41-6.2 (2001) (providing that "[t]he law of this State does not include . . . the common-law rule of worthier title that a grantor or testator cannot convey or devise an interest to his own heirs").

197. N.D. CENT. CODE § 30.1-09.1-10 (1996) (providing that "[t]he doctrine of worthier title is abolished as a rule of law and as a rule of construction").

198. 20 PA. CONS. STAT. ANN. §§ 2517(b), 6117(b) (West 1975 & Supp. 2002) (stating that "[t]he doctrine of worthier title shall not be applied as a rule of law or as a rule of construction").

199. S.D. CODIFIED LAWS § 29A-2-710 (Michie 1997) (providing that "[t]he doctrine of worthier title does not exist in this state either as a rule of law or as a rule of construction").

Tennessee,²⁰⁰ Texas,²⁰¹ Utah,²⁰² Washington,²⁰³ West Virginia,²⁰⁴ and Wisconsin.²⁰⁵ The one remaining state is Maryland, where the state supreme court noted the testamentary branch of the doctrine in 1883,²⁰⁶ however, no Maryland court has considered the question since then, so the existence of the testamentary branch there is doubtful. Moreover, the Restatement and Second Restatement of Property have squarely rejected the testamentary branch,²⁰⁷ as has the Uniform Probate Code.²⁰⁸ All in all, it is fair to say that the worthier title doctrine's testamentary branch is dead in the United States.

In contrast, the inter vivos branch still exists in some American jurisdictions, although very few. Most of the state statutes abolishing the testamentary branch also abolished the inter vivos branch,²⁰⁹ the exceptions being the statutes in Kansas and Nebraska, which are silent on the issue,²¹⁰ and the statute in Washington, which preserves the inter vivos branch as a rule of

200. TENN. CODE ANN. § 66-1-111 (1993) (providing that "[t]he doctrine of worthier title in both its inter vivos and testamentary branches . . . is abolished for all effects and purposes").

201. TEX. PROP. CODE ANN. § 5.042(a) (Vernon 1984 & Supp. 2003) (stating that "the doctrine of worthier title . . . do[es] not apply in this state").

202. UTAH CODE ANN. § 75-2-710 (Supp. 2002) (providing that "[t]he doctrine of worthier title is abolished as a rule of law and as a rule of construction").

203. WASH. REV. CODE ANN. § 11.12.185 (West 1998) (stating that "[t]he Doctrine of Worthier Title is abolished as a rule of law and as a rule of construction").

204. W. VA. CODE § 36-1-14a (1997) (stating that it is "the intent and purpose of this section to completely abolish the rule of law known as the doctrine of worthier title and the rule of law that a grantor cannot create a limitation in favor of his own heirs or next of kin").

205. WIS. STAT. ANN. § 854.22(3) (West 2002) (providing that "[t]he doctrine of worthier title is abolished as a rule of law and as a rule of construction").

206. *Donnelly v. Turner*, 60 Md. 81, 84 (1883) (recognizing the existence of the doctrine's testamentary branch, but holding that it applied only "where the devisees take by will, the same estate in *quantity and quality*, which they would take by operation of law") (emphasis in original).

207. RESTATEMENT OF PROP. § 314(2) (1940) (stating that the doctrine's testamentary branch applies neither as a "rule of construction" nor as a "rule of law"); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 30.2(2) (1988 & Supp. 2003) (same).

208. UNIF. PROBATE CODE § 2-710, 8 U.L.A. 204 (1998) (stating that "[t]he doctrine of worthier title is abolished as a rule of law and as a rule of construction").

209. *Supra* notes 177-205.

210. KAN. STAT. ANN. § 58-506 (1994) (providing that "[i]n the case of a will to heirs, or to next of kin of the testator, or to a person an heir or next of kin, the common-law doctrine of worthier title is abolished and the devisees or devisee shall take *under the will* and not by descent") (emphasis added); NEB. REV. STAT. § 76-114 (1996) (providing that "[w]hen any property is limited, mediately or immediately, in an otherwise effective *testamentary conveyance* . . . to the heirs or next of kin of the conveyor . . . such conveyees acquire the property by purchase and not by descent") (emphasis added).

construction under certain circumstances.²¹¹ This jurisprudential transformation—changing the worthier title doctrine from an inflexible rule of law into a rule of construction that applies only when the donor's intention is unclear—is strikingly unusual and merits a brief discussion. The transformation was the brainchild of Benjamin Cardozo, who announced it in 1919 in the New York case of *Doctor v. Hughes*,²¹² which became an important precedent.²¹³ In Cardozo's words:

We do not say that the ancient rule survives as an absolute prohibition limiting the power of a grantor But at least the ancient rule survives to this extent: That, to transform into a remainder what would ordinarily be a reversion, the intention [of the grantor] . . . must be clearly expressed.²¹⁴

However, academic commentators have roundly criticized the case.²¹⁵ Professor Waggoner has explained why, pointing out that the doctrine of worthier title was designed not to implement donors' intent, but to frustrate it:

[S]hifting a rule of law to a rule of construction is not a natural evolutionary step in legal development. Rules of law and rules of construction are based on entirely different premises. Rules of law are intent-defeating; rules of construction are intent-effectuating. Defeating intention is only

211. The Washington statute preserves the inter vivos branch as a rule of construction in situations in which the grantor expressly retains a reversion. See WASH. REV. CODE ANN. § 11.12.185 (West 1998) (stating that "[t]he Doctrine of Worthier Title is abolished as a rule of law and as a rule of construction. However, the Doctrine of Worthier Title is preserved as a rule of construction if . . . [t]he grantor has expressly reserved a reversion to himself or herself . . .").

212. *Doctor v. Hughes*, 122 N.E. 221, 222 (N.Y. 1919) (stating that "in the absence of modifying statute, the rule persists to-day, at least as a rule of construction").

213. See, e.g., *In re Burchell's Estate*, 87 N.E.2d 293, 296 (N.Y. 1949) (stating that "[t]he intent of a grantor is said to be the controlling element and the common-law rule is not applied where the grantor clearly indicated his intention to grant a remainder to his heirs").

214. *Doctor*, 122 N.E. at 222.

215. See, e.g., Lewis M. Simes, *Fifty Years of Future Interests*, 50 HARV. L. REV. 749, 756 (1937) (concluding that "[i]t would seem that this rule is almost as objectionable as the Rule in Shelley's Case, and that legislative action should abolish it"); Harold E. Verrall, *The Doctrine of Worthier Title: A Questionable Rule of Construction*, 6 UCLA L. REV. 371, 385 (1959) (stating that "[t]he doctrine of worthier title in inter vivos cases in New York has followed a course which might well be characterized as one from bad to worse"). But see RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 30.2(1) cmt. a (1988 & Supp. 2003) (approving of the inter vivos branch as a rule of construction). In response, the National Conference of Commissioners on Uniform State Laws revised the Uniform Probate Code to abolish the worthier title doctrine not only as a rule of law, but also as a rule of construction. See UNIF. PROBATE CODE § 2-710, 8 U.L.A. 204 (1998) (providing that "[t]he doctrine of worthier title is abolished as a rule of law and as a rule of construction").

justified to vindicate goals of sound public policy When the policy reasons that underlie a rule of law disappear, as they have with respect to the worthier title doctrine, the normal course is for the legislature to repeal the rule (as the English legislature did in 1833) or for the courts to abrogate it or at least to nibble away at its scope until it eventually ceases to operate.²¹⁶

In 1966, the New York legislature overturned the *Doctor* decision by abolishing the doctrine of worthier title even as a rule of construction.²¹⁷ Nevertheless, there are three states, in addition to the previously-mentioned Washington,²¹⁸ in which the inter vivos branch remains alive as a rule of construction: Mississippi,²¹⁹ New Jersey,²²⁰ and Virginia.²²¹ One can also find dicta from the state supreme court in Iowa suggesting that the inter vivos branch has vitality there.²²²

These remaining jurisdictions should join the majority of states in which the doctrine of worthier title exists neither as a rule of law nor as a rule of construction. Then this obsolete doctrine would disappear from the law, remaining only the province of the historian.²²³

216. WAGGONER, *supra* note 73, at 166–67.

217. See N.Y. EST. POWERS & TRUSTS LAW § 6-5.9 (McKinney 2002) (providing that "[w]here a remainder is limited to the heirs or distributees of the creator of an estate in property, such heirs or distributees take as purchasers").

218. *Supra* note 211 and accompanying text.

219. See *All Persons v. Buie*, 386 So. 2d 1109, 1112 (Miss. 1980) (concluding that "it is the intent of the legislature for the doctrine of worthier title to remain active as a rule of construction").

220. See *Clark v. Judge*, 200 A.2d 801, 807 (N.J. Super. Ct. Ch. Div. 1964) (stating that "[t]oday most states consider the rule as one of construction, with a presumption that a reversion is intended in the absence of facts evidencing a contrary intention"), *aff'd*, 210 A.2d 415 (N.J. 1965).

221. See *Braswell v. Braswell*, 81 S.E.2d 560, 564 (Va. 1954) (observing that "[t]he common-law rule [as a rule of construction], not having been abrogated in Virginia, is controlling").

222. See *In re Estate of Kern*, 274 N.W.2d 325, 326 (Iowa 1979) (examining the doctrine as applied in cases involving the Iowa antilapse statute, but stating that "[w]e leave other types of cases involving the doctrine to future consideration"). One might also mention a decision from Maine applying the inter vivos branch as a rule of law, see *Randall v. Marble*, 69 Me. 310, 313 (1879) (stating that "[a] limitation over to one's heirs is of no effect, for the reason that the estate would descend to the heirs in the case of forfeiture whether there was a limitation or not"), but given the date of the decision and the lack of any subsequent decisions on point, the doctrine probably no longer survives in Maine.

223. Or the law student. Notwithstanding Parliament's abolition of the rule in *Shelley's Case* in 1925, Professor Simpson was still required to learn the rule as an Oxford undergraduate in 1952, "since otherwise, it was argued with perverse yet compelling logic, we could not understand what precisely had been abolished." SIMPSON, *supra* note 104, at 41.

*D. The Limit, If Any, on the Duration of a Future Interest
Should Be Unrelated to Vesting*

Let us now turn to the fourth reform: any limits on the duration of future interests should be unrelated to vesting. This proposal stands in sharp contrast to the common law, which has used the rule against perpetuities, also known as the rule against the remoteness of vesting, to control future-interest duration.

The rule against perpetuities dates from 1682, when Lord Nottingham announced his decision in *The Duke of Norfolk's Case*.²²⁴ This was the first English decision to suggest that a contingent future interest might be invalid if there was a possibility that it would vest too remotely.²²⁵ Over time, the rule evolved. In 1906, an American law professor, John Chipman Gray, stated the rule in what would become its classic formulation: "no [contingent future] interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest."²²⁶ This is not the easiest rule to understand in the abstract,²²⁷ so let us turn to the following illustrations in order to make the rule more concrete:

- (1) *X* gives land to *A* for life, then to such of *A*'s children who are then living.
- (2) *X* gives land to *B*, but if liquor is sold on the premises, then the land is to go to *C*.

In the first example, *A*'s children have contingent remainders that are valid under the rule. The remainders will vest or fail no later than the moment of *A*'s death, an event which is certain to occur within the lifetime of someone alive when *X* made the gift—*A* herself—plus 21 years. In the second example, however, the rule is violated. It is impossible to tell when *C*'s executory interest might vest or fail. We can imagine *B* and *B*'s successors obeying the no-liquor condition for ten generations, then deciding to breach it. (One might call this the case of the afterborn bartender.) By the terms of the gift, *C*'s executory interest—transmitted, let us say, to *C*'s descendants—would then

224. *The Duke of Norfolk Case*, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682).

225. On Nottingham's rule as an innovation, see SIMPSON, *supra* note 1, at 227–28.

226. JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* § 201 (2d ed. 1906). A similar version of the rule, but not precisely the same, appears in the first edition of the book, which was published in 1886.

227. One (in)famous case held that the rule was so complex that a lawyer's failure to understand it did not constitute malpractice. See *Lucas v. Hamm*, 364 P.2d 685, 690 (Cal. 1961). *But see* *Wright v. Williams*, 121 Cal. Rptr. 194, 199 n.2 (Cal. Ct. App. 1975) (stating that "[t]here is reason to doubt that the ultimate conclusion of *Lucas v. Hamm* is valid in today's state of the art. Draftsmanship to avoid the rule against perpetuities seems no longer esoteric.").

vest. But vesting at that point is too remote from the time of the initial gift. Because we cannot say with certainty that *C*'s interest will either vest or fail within the lifetime of someone alive when *X* made the gift, plus 21 years, *C*'s executory interest is invalid *ab initio*, giving *B* ownership of the land unconditionally.²²⁸

This is not the place for a lengthy treatise on the rule,²²⁹ but two essential points about its operation should be mentioned. First, the rule applies only to contingent future interests. Vested future interests automatically satisfy the rule and are thus exempt from it.²³⁰ Second, the rule applies only to nonreversionary interests. Reversions, being vested, are exempt, and although possibilities of reverter and rights of entry are classified as contingent in other contexts, they are treated as vested for purpose of the rule.²³¹ Thus, the rule applies only to contingent remainders and executory interests.

During the twentieth century, various statutory reforms of the rule were enacted. These reforms fall into three broad categories. The first category has been labeled "specific statutory repair."²³² In this category are statutes validating specific types of gifts that violate the rule on technical grounds, but that many commentators believe should be permitted.²³³ The second category has

228. Recall the earlier discussion of the failure of an executory interest, *supra* notes 23–25 and accompanying text.

229. For useful guides to the rule's operation at common law, see generally W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938) [hereinafter Leach, *Perpetuities I*]; W. Barton Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973 (1965).

230. See Leach, *Perpetuities I*, *supra* note 229, at 639–40 (observing that "a gift to *A* for life, remainder to *B* in fee is entirely valid . . . [because] *B*'s remainder is vested").

231. John Chipman Gray noted this anomaly in his classic treatise. Gray agreed that possibilities of reverter were, and should be, exempt from the rule, and so he maintained that there was "no practical object" in labeling them as contingent. JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* 107 (Roland Gray ed., 4th ed. 1942). Conversely, Gray argued that rights of entry, as truly contingent interests, should be subject to the rule. *Id.* at 345.

232. FAMILY PROPERTY LAW, *supra* note 9, at 1228.

233. E.g., 765 ILL. COMP. STAT. ANN. 305/4(c) (West 2001); N.Y. EST. POWERS & TRUSTS LAW §§ 9-1.2 to -1.3 (McKinney 2001). Florida also had a statute that was similar to the ones in Illinois and New York until 1988, when it adopted the Uniform Rule. See Florida Uniform Statutory Rule Against Perpetuities, 1988 Fla. Sess. Law Serv. 88-40 (West) (enacting the Uniform Rule in place of former Section 689.22 of the Florida statutes). California had a statute aimed at the afterborn spouse category, but not the other categories, which was repealed in 1991, when California adopted the Uniform Rule. See Uniform Statutory Rule Against Perpetuities—Conforming Changes—Repealers, 1991 Cal. Legis. Serv. 156, § 9 (West) (repealing Section 715.7 of the California Civil Code, which had provided in pertinent part that "an individual described as the spouse of a person in being at the commencement of a perpetuities period shall be deemed a 'life in being' at such time whether or not the individual so described was then in being").

been called "immediately available reformation."²³⁴ This category consists of statutes that permit courts to alter the terms of a donative transfer as soon as it is discovered that the transfer in its original form violates the rule against perpetuities.²³⁵ The third category is known as "deferred reformation" or "wait-and-see."²³⁶ Statutes in this category bypass the rule's requirement of initial certainty and allow events that occur after the creation of the future interest to be taken into account in determining whether the interest will vest or fail too remotely. If, after these events are considered, the interest is still invalid, a court is permitted to alter the terms of the original gift to prevent the future interest from violating the rule.

Of the three categories of reforming statutes, the only one that has achieved widespread acceptance is the third: deferred reformation. Not all deferred reformation statutes are the same, of course, and commentators have sometimes argued vehemently about which statutes are the best.²³⁷ However, these debates are beyond the scope of this Article. For present purposes, I wish merely to provide an example of deferred reformation, and the example I am using is that of the Uniform Statutory Rule Against Perpetuities, which was promulgated by the Uniform Law Commission in 1986,²³⁸ and is now in force in Arizona,²³⁹ California,²⁴⁰ Colorado,²⁴¹ Connecticut,²⁴² the District of

234. FAMILY PROPERTY LAW, *supra* note 9, at 1230.

235. *E.g.*, *Berry v. Union Nat'l Bank*, 262 S.E.2d 766 (W. Va. 1980). In 1992, West Virginia adopted the Uniform Statutory Rule on Perpetuities, thus replacing the statute in *Berry* for transfers made after the effective date of the Uniform Rule's adoption. W. VA. CODE § 36-1A-1 (1997). For additional examples of immediately available reformation, see MO. REV. STAT. § 442.555 (2001); OKLA. STAT. ANN. tit. 60, § 75 (West 1994); TEX. PROP. CODE ANN. § 5.043 (Vernon 1984 & Supp. 2003).

236. FAMILY PROPERTY LAW, *supra* note 9, at 1234.

237. *See generally* Lawrence W. Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718 (1983); Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985) [hereinafter Dukeminier, *Perpetuities*]; Lawrence W. Waggoner, *Perpetuities: A Perspective on Wait-and-See*, 85 COLUM. L. REV. 1714 (1985); Jesse Dukeminier, *A Response by Professor Dukeminier*, 85 COLUM. L. REV. 1730 (1985); Lawrence W. Waggoner, *A Rejoinder by Professor Waggoner*, 85 COLUM. L. REV. 1739 (1985); Jesse Dukeminier, *A Final Comment by Professor Dukeminier*, 85 COLUM. L. REV. 1742 (1985); Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023 (1987); Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORNELL L. REV. 157 (1988) [hereinafter Waggoner, *Rationale*].

238. UNIF. STATUTORY RULE AGAINST PERPETUITIES, HISTORICAL NOTES, 8B U.L.A. 223 (2001). For an explanation of the 1986 Uniform Statutory Rule Against Perpetuities, see *infra* notes 263-65 and accompanying text.

239. ARIZ. REV. STAT. § 14-2901(a)(1)-(2) (1995 & Supp. 2002). Arizona has also made the rule against perpetuities optional. It does not apply as long as "the trustee has the expressed or implied power to sell the trust assets and at one or more times after the creation of the interest

Columbia,²⁴³ Georgia,²⁴⁴ Hawaii,²⁴⁵ Indiana,²⁴⁶ Kansas,²⁴⁷ Massachusetts,²⁴⁸ Michigan,²⁴⁹ Minnesota,²⁵⁰ Montana,²⁵¹ Nebraska,²⁵² Nevada,²⁵³ New Mexico,²⁵⁴ North Carolina,²⁵⁵ North Dakota,²⁵⁶ Oregon,²⁵⁷ South Carolina,²⁵⁸ Tennessee,²⁵⁹ Utah,²⁶⁰ Virginia,²⁶¹ and West Virginia.²⁶² The Uniform Rule

one or more persons who are living when the trust is created have an unlimited power to terminate the interest." *Id.* § 14-2901(a)(3).

240. CAL. PROBATE CODE § 21205 (West Supp. 2003).

241. COLO. REV. STAT. § 15-11-1102(1)(a)-(b) (2001). Colorado has also made the rule optional. It does not apply as long as "the interest is in a trust and all or part of the income or principal of the trust may be distributed, in the discretion of the trustee, to a person who is living when the trust is created." *Id.* § 15-11-1102(1)(c).

242. CONN. GEN. STAT. ANN. § 45a-491(a) (West 1993 & Supp. 2002).

243. D.C. CODE ANN. § 19-901 (2001).

244. GA. CODE ANN. § 44-6-201 (1991).

245. HAW. REV. STAT. § 525-1 (1993).

246. IND. CODE ANN. § 32-17-8-3 (West 2002).

247. KAN. STAT. ANN. § 59-3401 (1994).

248. MASS. GEN. LAWS ANN. ch. 184A, § 1 (West 1991 & Supp. 2002).

249. MICH. COMP. LAWS ANN. § 554.72 (West 1988 & Supp. 2002).

250. MINN. STAT. ANN. § 501A.01 (West 2002 & Supp. 2002).

251. MONT. CODE ANN. § 72-2-1002 (2001).

252. NEB. REV. STAT. § 76-2002 (1996). Nebraska has also made the rule against perpetuities optional. It does not apply to a trust

in which the governing instrument states that the rule against perpetuities does not apply to the trust and under which the trustee or other person to whom the power is properly granted or delegated has power under the governing instrument, any applicable statute, or the common law to sell, lease, or mortgage property for any period of time beyond the period which would otherwise be required for an interest created under the governing instrument to vest.

Id. § 76-2005 (1996 & Supp. 2002).

253. NEV. REV. STAT. § 111.1031 (2001).

254. N.M. STAT. ANN. § 45-2-901 (Michie 1995).

255. N.C. GEN. STAT. § 41-15 (2001).

256. N.D. CENT. CODE § 47-02-27.1 (1999).

257. OR. REV. STAT. § 105.950 (2001).

258. S.C. CODE ANN. § 27-6-20 (Law. Co-op. 1991).

259. TENN. CODE ANN. § 66-1-202 (Supp. 2002).

260. UTAH CODE ANN. § 75-2-1203 (Supp. 2002).

261. VA. CODE ANN. § 55-12.1 (Michie Supp. 2002). Virginia has also made the rule against perpetuities optional. *See id.* § 55-13.3(c) (providing that the rule "shall not apply to any trust . . . when the trust instrument, by its terms, provides that the rule against perpetuities shall not apply to such trust").

262. W. VA. CODE § 36-1A-1 (1997).

takes a three-pronged approach to the validation of contingent future interests. Section 1(a)(1) preserves the common-law rule against perpetuities in the sense that interests that are valid at common law are valid under the Uniform Rule.²⁶³ For interests that violate the common-law rule, Section 1(a)(2) provides a 90-year period of wait-and-see: the interest will still be valid if it "either vests or terminates within 90 years after its creation."²⁶⁴ Finally, if it appears that the 90-year period is insufficient, Section 3 authorizes the court to "reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by [Section 1]."²⁶⁵

The Uniform Rule's most striking innovation is its 90-year waiting period. As explained by Professor Waggoner, the Reporter for the Uniform Rule, the use of a fixed waiting period is preferable to the conventional reference to measuring lives plus 21 years, for three reasons. First, a fixed period of years offers administrative simplicity. It avoids the effort and expense of having to identify and then trace actual measuring lives to see which one is the survivor.²⁶⁶ Second, and this is a related point, a flat period of years reduces the risk of litigation. The identification of actual measuring lives requires the exercise of judgment about whose lives count; this raises the specter of "front-end litigation to determine the identity of the measuring lives in a given case."²⁶⁷ Third, and last, a fixed number of years is just as good as, and perhaps better than, the measuring-lives approach at approximating how long contingent future interests would take to vest in the typical family if the common-law rule were combined with a perpetuity-saving clause.²⁶⁸ Summarizing its advantages, Professor Waggoner described the fixed period thus: "[It] unclutters the wait-and-see strategy of perpetuity reform. It makes wait-and-see simple to administer, fair, and workable. It achieves this objective without the necessity or cost of front-end or mid-period litigation and without supplying a waiting period that exceeds traditional boundaries."²⁶⁹ Beyond the use of a fixed waiting period, the Uniform Rule's approach to deferred reformation

263. See UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(a)(1), 8B U.L.A. 236 (2001 & Supp. 2002) (stating that "[a] nonvested property interest is invalid unless: (1) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive").

264. *Id.* § 1(a)(2), at 236.

265. *Id.* § 3, at 273-74.

266. See Waggoner, *Rationale*, *supra* note 237, at 162-63 (discussing the tracing and identification problems inherent in a waiting period measured by actual lives).

267. *Id.* at 163.

268. See *id.* at 164-68 (comparing the measuring-lives and fixed-period approaches).

269. *Id.* at 168. For a contrary view, see Dukeminier, *Perpetuities*, *supra* note 237, at 1708-13 (arguing for the use of measuring lives that are causally connected to the transaction).

is standard: validation under the common-law rule for interests that comply with it, the invocation of a waiting period for interests that would be invalid at common law, and the availability of reformation when the waiting period is insufficient.²⁷⁰

Going beyond the reforms of the Uniform Rule, a movement to abolish the rule against perpetuities began in earnest in the late 1980s. Three states had eliminated the rule earlier—Wisconsin,²⁷¹ South Dakota,²⁷² and Idaho²⁷³—but the number of states abolishing or restricting the rule increased dramatically in the years after 1986. To a large degree, this movement has been spurred by federal tax law.

In 1986, Congress implemented the current generation-skipping transfer tax (GSTT).²⁷⁴ The GSTT imposes a high rate of taxation (50 percent in 2002)²⁷⁵ on donative transfers that span more than one generation—for example, long-lasting trusts.²⁷⁶ The GSTT also contains a sizeable exemption to ensure that only very wealthy donors are subject to the tax.²⁷⁷ This exemption in 2002 was \$1,100,000 per donor, or \$2,200,000 for married donors acting together,²⁷⁸ the amounts for 2003 may be higher, depending on inflation.²⁷⁹

270. By way of comparison, see RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS §§ 1.3, 1.5 (1983 & Supp. 2003) (adopting a wait-and-see period measured by actual lives and authorizing reformation if a future interest cannot vest within the measuring period).

271. WIS. STAT. ANN. § 700.16(5) (West 2001) (providing that "[t]he common-law rule against perpetuities is not in force in this state").

272. S.D. CODIFIED LAWS § 43-5-8 (Michie 1997) (providing that "[t]he common-law rule against perpetuities is not in force in this state").

273. IDAHO CODE § 55-111 (Michie 2000) (providing that "there shall be no rule against perpetuities applicable to real or personal property"); *Locklear v. Tucker*, 203 P.2d 380, 386 (Idaho 1949) (holding that "the common law rule against perpetuities is not in force in this jurisdiction").

274. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended in scattered sections of 26 U.S.C.).

275. See 26 U.S.C.A. § 2001(c)(1) (West Supp. 2002) (containing the estate tax rate schedule, the highest rate in 2002 being 50 percent); 26 U.S.C. § 2641 (2000) (providing that the tax rate for the GSTT is "the maximum Federal estate tax rate"). For the gradual reduction of the rate between 2003 and 2010, see 26 U.S.C.A. § 2001(c)(2) (West Supp. 2002).

276. See 26 U.S.C. § 2601 (2000) (imposing a tax on each "generation-skipping transfer"); *id.* § 2611(a) (defining the term "generation-skipping transfer").

277. See 26 U.S.C.A. § 2631(a), (c) (West Supp. 2002) (providing in pertinent part that "every individual shall be allowed a GST exemption of \$1,000,000," inflation adjusted after 1998).

278. See INTERNAL REVENUE SERVICE, YEAR 2002 INSTRUCTIONS FOR FORM 709, at 5 (2002) (describing how spouses may combine their exemptions by acting together).

279. See 26 U.S.C.A. § 2631(c) (West Supp. 2002) (providing for an inflation adjustment). For the amount of the exemption, see INTERNAL REVENUE SERVICE, PUB. NO. 553, HIGHLIGHTS

Donative transfers that fall within the exemption can persist tax-free for as many generations as the donor wishes, subject only to state perpetuity law. In other words, transfers that are exempt from GSTT have no *federal* durational limit. States that similarly impose no limit, because they have abolished the rule against perpetuities, are in an excellent position to compete for trust business. Indeed, we are beginning to see trusts specifically designed to exploit the absence of a state rule against perpetuities, and these trusts now have a special name: dynasty trusts.²⁸⁰

States jumping on the dynasty-trust bandwagon fall into two broad groups. States in the first group have abolished the rule against perpetuities entirely. Other than Wisconsin, South Dakota, and Idaho, already mentioned, this group also includes New Jersey²⁸¹ and Rhode Island.²⁸² States in the second group have made the rule against perpetuities optional, meaning that the settlor may provide in the trust instrument that the rule does not apply. These states are Arizona,²⁸³ Colorado,²⁸⁴ Illinois,²⁸⁵ Maine,²⁸⁶ Maryland,²⁸⁷

OF 2001 TAX CHANGES 21 (2001). For a prediction of the amount of the exemption between 2004 and 2010, see Charles F. Newlin & Andrea C. Chomakos, *The 2001 Tax Act: Uncharted Waters for Estate Planners*, PROB. & PROP., Sept.-Oct. 2001, at 32, 34.

280. The literature on dynasty trusts is extensive. Recent law review articles include Verner F. Chaffin, *Georgia's Proposed Dynasty Trust: Giving the Dead Too Much Control*, 35 GA. L. REV. 1 (2000) (emphasizing the disadvantages of perpetual trusts); Joel C. Dobris, *Changes in the Role and Form of the Trust at the New Millennium, or, We Don't Have to Think of England Anymore*, 62 ALB. L. REV. 543 (1998) (surveying new developments in the law of trusts); Joel C. Dobris, *The Death of the Rule Against Perpetuities, or, The RAP Has No Friends Anymore: An Essay*, 35 REAL PROP. PROB. & TR. J. 601 (2000) (analyzing the erosion of the rule against perpetuities); Stephen E. Greer, *The Alaska Dynasty Trust*, 18 ALASKA L. REV. 253 (2001) (illustrating the benefits of dynasty trusts under Alaska law); Keith L. Butler, Comment, *Long Live the Dead Hand: The Case for Repeal of the Rule Against Perpetuities in Washington*, 75 WASH. L. REV. 1237 (2000) (urging the abolition of the rule against perpetuities); Brian Layman, Comment, *Perpetual Dynasty Trusts: One of the Most Powerful Tools in the Estate Planner's Arsenal*, 32 AKRON L. REV. 747 (1999) (evaluating dynasty trusts from the practitioner's perspective); John C. Shively, Note, *The Death of the Life in Being—The Required Federal Response to State Abolition of the Rule Against Perpetuities*, 78 WASH. U. L.Q. 371 (2000) (urging Congress to eliminate the GSTT exemption); Karen J. Sneddon, Comment, *The Sleeper Has Awakened: The Rule Against Accumulations and Perpetual Trusts*, 76 TUL. L. REV. 189 (2001) (discussing recent trust developments including the rise of dynasty trusts).

281. N.J. STAT. ANN. § 46:2F-9 (West Supp. 2002).

282. R.I. GEN. LAWS § 34-11-38 (1995 & Supp. 2002).

283. ARIZ. REV. STAT. ANN. § 14-2901(a)(3) (1995 & West Supp. 2002).

284. COLO. REV. STAT. § 15-11-1102(1)(c) (2001).

285. 765 ILL. COMP. STAT. ANN. 305/3, 305/4 (West 2001).

286. ME. REV. STAT. ANN. tit. 33, § 101-A (West 1999 & Supp. 2002).

287. MD. CODE ANN., EST. & TRUSTS § 11-102(e) (2001).

Nebraska,²⁸⁸ Ohio,²⁸⁹ and Virginia.²⁹⁰ In all of these states except Virginia, the trust must provide some mechanism for the sale or early distribution of trust assets.

In addition, three states have taken idiosyncratic approaches to dynasty trusts. Delaware abolished the rule with respect to trusts of personal property only.²⁹¹ (The Virginia statute likewise seems designed to be limited to personal property in trust, but it is poorly drafted and, as written, applies to "any trust."²⁹²) Florida, which had previously enacted the Uniform Rule, adopted legislation extending the wait-and-see period from 90 years to 360 years.²⁹³ Last but not least, Alaska abolished the rule except with respect to the creation or exercise of certain powers of appointment.²⁹⁴

288. NEB. REV. STAT. § 76-2005 (1996 & Supp. 2002).

289. OHIO REV. CODE ANN. § 2131.09(B) (West 1994 & Supp. 2003).

290. VA. CODE ANN. § 55-13.3(c) (Michie 1995 & Supp. 2002).

291. DEL. CODE ANN. tit. 25, § 503 (1989 & Supp. 2002). With respect to trusts of real property, the statute provides:

At the expiration of 110 years from the later of the date on which a parcel of real property or an interest in real property is added to or purchased by a trust or the date the trust became irrevocable, such parcel or interest, if still held in such trust, shall be distributed in accordance with the trust instrument regarding distribution of such property upon termination of the trust as though termination occurred at that time, or if no such provisions exist, to the persons then entitled to receive the income of the trust in proportion to the amount of the income so receivable by such beneficiaries, or in equal shares if specific proportions are not specified in the trust instrument. In the event that the trust instrument does not provide for distribution upon termination and there are no income beneficiaries of the trust, such parcel or interest shall be distributed to such then living persons who are then determined to be the trustor's or testator's distributees by the application of the intestacy laws of this State then in effect governing the distribution of intestate real property as though the trustor or testator had died at that particular time, intestate, a resident of this State, and owning the property so distributable.

Id. § 503(b).

292. VA. CODE ANN. § 55-13.3(c) (Michie 1995 & Supp. 2002).

293. FLA. STAT. ANN. § 689.225(2)(f) (West Supp. 2003).

294. ALASKA STAT. §§ 34.27.051, 34.27.075 (Lexis 2002). The principal purpose of retaining some perpetuity rule for powers of appointment was to avoid the so-called "Delaware Tax Trap." For background, see 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).

The movement to permit dynasty trusts has sparked a lively debate,²⁹⁵ but for present purposes this debate is beside the point.²⁹⁶ Some states have chosen to give the dead hand free rein; other states might join them, or not.²⁹⁷

295. The arguments on each side fall into two broad categories: philosophical and economic. See T. P. Gallanis, *The Rule Against Perpetuities and the Law Commission's Flawed Philosophy*, 59 CAMBRIDGE L.J. 284, 284–85 (2000) (utilizing these categories). The philosophical arguments center on whether the rule is fair. Supporters of the rule emphasize equality among generations, arguing that the rule is necessary in order for each generation to have the same freedom to use property as it sees fit. See, e.g., LEWIS M. SIMES, *THE THOMAS M. COOLEY LECTURES: PUBLIC POLICY AND THE DEAD HAND* 59 (1955) (maintaining that the rule "come[s] most nearly to satisfying the desires of peoples of all generations"). On the other hand, proponents of abolition emphasize the liberty of the present generation, maintaining that current owners have the right to do as they wish with their property, including the right to restrict the property's use in the future. See Butler, *supra* note 280, at 1246 (discussing "the right of testators to do with their property what they wish").

In contrast to the abstractness of the philosophical arguments, the economic arguments focus on the empirical consequences of abolishing or maintaining the rule. Supporters of the rule typically make three arguments. First, they maintain that the rule is necessary in order to prevent excessive concentrations of wealth in the hands of a limited number of families. See *id.* at 1244 (noting the argument that "[t]he accumulation of wealth by family dynasties deprives those outside the settlers' circle of beneficiaries from gaining access to the property controlled by the families, which limits outsiders' opportunities for economic prosperity"). Second, they argue that trusts grow increasingly difficult to administer over time: by one calculation, a trust lasting 500 years might have 3.4 million beneficiaries. See Press Release, National Conference of Commissioners on Uniform State Laws, *Uniform Statutory Rule Against Perpetuities Is Law in 26 States: Move of a Few States to Abolish the Rule in Order to Facilitate Perpetual (Dynasty) Trusts is Ill-Advised*, (Jan. 2000), at <http://nccusl.org/nccusl/DesktopModules/NewsDisplay.aspx?ItemID=13> (last visited Jan. 22, 2002). Third, they offer reasons why long-term trusts are economically inefficient: trusts protect wealthy beneficiaries from bankruptcies and creditors; they decrease the amount of risk capital available for investment; they impose restrictions on the use of property that make it difficult to respond to changing economic conditions; and trustees tend to be conservative investors who achieve lower rates of return than outright owners. See, e.g., Chaffin, *supra* note 280, at 22–25 (emphasizing "the negative consequences of sanctioning GST-exempt trusts"). Proponents of abolishing the rule argue that the rule is not needed for these purposes. They point to the role of the federal transfer tax system—the estate, gift, and generation-skipping transfer taxes—in reducing concentrations of wealth; they argue that trusts too complicated to administer can be terminated by the trustee or, if necessary, by court order, and they emphasize that trustees have the duty to invest property in an economically efficient way in order to maximize return for the beneficiaries. See, e.g., Butler, *supra* note 280, at 1250–65 (making these arguments as part of the case for repeal of the rule in the State of Washington).

296. For the record, I retain my previously-stated agnosticism. See Gallanis, *supra* note 295, at 292–93 (observing that there may be sound economic reasons to retain the rule against perpetuities, but that we currently have insufficient data to make an informed judgment).

297. As of March 1, 2003, the following states have pending legislation: Connecticut (S.B. 938, Gen. Assem., Jan. 2003 Sess. (Conn. pending legislation 2003) (allowing grantors to elect 1,000-year perpetuity period); H.B. 5090, Gen. Assem., 2002 Reg. Sess. (Conn. proposed legislation 2002) (same)); Indiana (H.B. 1116, 113th Gen. Assem., 1st Reg. Sess. (Ind. pending

The point to be made here is that the states wishing to restrain the dead hand need not use a tool as clumsy as a rule against the remoteness of vesting.

The problem with dynasty trusts and other dynastic gifts is that they last too long; they contain a succession of future interests designed to delay outright ownership of the property. Thus, the proper solution is to establish a direct limit on the duration of future interests. This idea is not wholly novel. Other commentators have suggested that a fundamental problem with the rule against perpetuities is that it uses vesting as a proxy for duration.²⁹⁸ In the words of John Chipman Gray, "in the ideal system of law . . . no interests which did not vest *in possession* within the allotted period would be allowed."²⁹⁹ Subsequent to Professor Gray, Professor Schuyler proposed that the common-law rule against perpetuities be replaced by legislation requiring all remainders and executory interests to become possessory within the longer of (i) thirty years after some life in being at the date of the interest's creation or (ii) eighty years after the interest's creation.³⁰⁰ He proposed a separate rule for possibilities of reverter and rights of entry, which were to endure for no more than a flat 50-year period.³⁰¹ No legislature has yet embraced Professor Schuyler's proposal that the rule against perpetuities should "discard its vest," as he nicely phrased it, but three states have adopted his suggestion for a direct durational limit on possibilities of reverter and rights of entry.³⁰² Illinois,³⁰³

legislation 2003) (permitting perpetual trusts)); Iowa (H.B. 450, 80th Gen. Assem., 1st Sess. (Ia. pending legislation 2003) (same)); S.F. 354, 80th Gen. Assem., 1st Sess. (Ia. pending legislation 2003) (same); Kentucky (H.B. 31, 2003 Reg. Sess. (Ky. pending legislation 2003) (same)); New Hampshire (H.B. 431, 1st Year, 158th Sess., Gen. Ct. (N.H. pending legislation 2003) (same)); New York (A.B. 7317, 224th Leg. Sess. (N.Y. proposed legislation 2001) (same)); Texas (H.B. 2239, 78th Leg. (Tex. pending legislation 2003) (establishing a perpetuity period of 1,000 years for interests in trust)); S.B. 534, 78th Leg. (Tex. pending legislation 2003) (same)). Thus, the dynasty-trust bandwagon does not seem to be slowing despite the recent federal legislation that phases out the GSTT between 2002 and 2010. For background on the federal legislation, see Newlin & Chomakos, *supra* note 279, at 34.

298. HOMER F. CAREY & DANIEL M. SCHUYLER, *ILLINOIS LAW OF FUTURE INTERESTS* § 474 (1941); GRAY, *supra* note 231, at 821; SIMES, *supra* note 295, at 67-68, 80-82; Daniel M. Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?*, 56 MICH. L. REV. 683 (1958) (Part I), 56 MICH. L. REV. 887 (1958) (Part II).

299. GRAY, *supra* note 231, at 821 (emphasis added).

300. Schuyler, *supra* note 298, at 949.

301. *Id.* at 951.

302. The drafting committee that wrote the Uniform Statutory Rule Against Perpetuities also prepared sample provisions that would restrict future interests not covered by the Uniform Rule, such as possibilities of reverter and rights of entry. These provisions were made known informally to the states, but were not published with the Uniform Rule. E-mail communication between Lawrence Waggoner and the author (May 7, 2002 and June 13, 2002) (on file with author).

303. 765 ILL. COMP. STAT. ANN. 330/4 (West 2001).

Nebraska,³⁰⁴ and North Carolina.³⁰⁵ Consider, by way of example, the Illinois statute. Rather than limiting these reversionary interests by making them subject to the rule against perpetuities, Illinois law straightforwardly provides that the interests are terminated if they have not become possessory after forty years.³⁰⁶ The statute provides:

Neither possibilities of reverter nor rights of entry or re-entry for breach of condition subsequent, whether heretofore or hereafter created, where the condition has not been broken, shall be valid for a longer period than 40 years from the date of the creation of the condition or possibility of reverter. If such a possibility of reverter or right of entry or re-entry is created to endure for a longer period than 40 years, it shall be valid for 40 years.³⁰⁷

The Nebraska and North Carolina statutes function similarly, but with periods of 30 and 60 years, respectively.³⁰⁸

The use of a direct durational limit on future interests is far preferable to a rule against the remoteness of vesting, for three main reasons. First, a direct limit is easier to administer and invites less litigation because it is not necessary to determine whether a given future interest is vested or contingent.³⁰⁹ As Professor Simes has commented, "I doubt whether any other question in the law of estates has caused so much litigation as the question of the vested or contingent character of the interest."³¹⁰ Even a casual search on Westlaw reveals hundreds of such cases, the most recent being *Rutherford County v. Wilson*, decided by the Tennessee Court of Appeals in February 2002.³¹¹ As Professor Schuyler rightly concluded, "To the extent that the concept of vesting introduces an extraordinary degree of indefiniteness into the rule it tends to rob the formula of its workability."³¹² Second, a durational limit would more directly achieve the main purposes of the rule against perpetuities: "to make property more fluid, to free capital from testamentary restrictions, and to stay the influence of the dead hand."³¹³ Vested future interests

304. NEB. REV. STAT. § 76-107 (1996).

305. N.C. GEN. STAT. § 41-32 (2001).

306. 765 ILL. COMP. STAT. ANN. 330/4 (West 2001).

307. *Id.*

308. See NEB. REV. STAT. § 76-107(2) (1996) (imposing a 30-year limit); N.C. GEN. STAT. § 41-32 (2001) (imposing a 60-year limit).

309. See Schuyler, *supra* note 298, at 887 (observing that "this aspect of the rule has caused as much if not more litigation than those which have been so harshly condemned").

310. SIMES, *supra* note 295, at 68.

311. See *Rutherford County v. Wilson*, 2002 WL 312506, at *7-8 (Tenn. Ct. App. Feb. 28, 2002) (discussing whether the remainder at issue was contingent or vested).

312. Schuyler, *supra* note 298, at 922.

313. *Id.* at 923.

that take ages to become possessory can frustrate these purposes just as contingent interests do. As Professor Schuyler has explained, "vested interests may unduly fetter alienability and extend the reach of the dead hand. Indeed, in this respect many contingent interests are little more troublesome than those which are vested [The vested] character of outstanding future interests is no assurance that the rule's aims will be met."³¹⁴ Third, and last, a rule against the remoteness of vesting makes sense only if there is a good reason to distinguish all categories of vested future interests from future interests that are contingent. Yet the distinction between a contingent interest and an interest that is vested subject to defeasance is often purely formal,³¹⁵ except in the jurisdictions that treat them differently for purposes of alienability, acceleration, or destructibility. As we have seen in earlier sections of this Article,³¹⁶ those differences in treatment are outmoded. Thus, there is little point in a rule separating defeasibly vested interests from contingent ones.

Precisely how many years a future interest should be permitted to endure is a subject we shall take up in Part III. For present purposes, the essential point to observe is that we can restrict the dead hand by providing a direct limit on the duration of future interests. Controlling the dead hand does not require us to use the blunt instrument of a rule against the remoteness of vesting.

E. The Classification of Future Interests Should Be Eliminated

Classification is at the heart of future interest law. Future interests are classified as reversionary if they are retained by or created in the transferor, or as nonreversionary if they are created in a transferee.³¹⁷ Reversionary interests are then subdivided into reversions, possibilities of reverter, or rights of entry, while nonreversionary interests are subdivided into remainders and executory interests—all of these subdivisions depending upon the nature of the preceding interest. Future interests are then further classified in terms of vesting: they can be indefeasibly vested, vested subject to defeasance, vested subject to open, or contingent.

314. *Id.* at 923–24.

315. See Waggoner, *supra* note 3, at 743–47 (critiquing the distinction).

316. *Supra* subparts II.A, II.B.2, and II.C.1.

317. This paragraph follows FAMILY PROPERTY LAW, *supra* note 9, at 1030–40 (describing the classification of future interests under current law).

Writing in the 1972 *Harvard Law Review*, Professor Waggoner rightly criticized this system of classification on four grounds.³¹⁸ First, the system is extraordinarily complex, making it difficult to understand even for the well-trained attorney.³¹⁹ Second, the system is artificial; the form of a disposition frequently prevails over its substance.³²⁰ Third, the system's complexity and artificiality create the related problem of easy circumvention; individuals who understand the system can use it to their advantage.³²¹ Fourth, and last, the complexity of the system gives rise to what Professor Waggoner labeled the "classificatory mystique"³²²—the notion that questions of construction can be resolved by answering questions of classification. As he correctly observed, courts too often base their decisions on the distinctions between various types of interests, rather than focusing on the real issue, which is how to construe the dispositive language.³²³

Each of these problems results from having too many categories in the classificatory scheme. But what are the sources of this artificial complexity?

318. See Waggoner, *supra* note 3, at 729–33 (pointing out inadequacies in the structure of estates). For some earlier critiques and proposals, although not as comprehensive as Professor Waggoner's, see Browder, *supra* note 3, at 1255–78 (discussing many of the same topics as Professor Waggoner's article, but without providing a blueprint for legislative reform); J. Dukeminier, Jr., *Contingent Remainders and Executory Interests: A Requiem for the Distinction*, 43 MINN. L. REV. 13, 52–55 (1958) (urging the abolition of the distinction between executory interests and contingent remainders); Allison Dunham, *Possibility of Reverter and Powers of Termination—Fraternal or Identical Twins?*, 20 U. CHI. L. REV. 215, 234 (1953) (arguing that "there really is no difference" between rights of entry and possibilities of reverter); Edward C. Halbach, Jr., *Vested and Contingent Remainders: A Premature Requiem for Distinctions Between Conditions Precedent and Subsequent*, in *PERSPECTIVES OF LAW: ESSAYS FOR AUSTIN WAKEMAN SCOTT* 152, 172 (Roscoe Pound et al. eds., 1964) (referring to the distinction between vested and contingent interests as "meaningless and troublesome"); McDougal, *supra* note 3, at 1077–1115 (criticizing the future-interest sections of the First Restatement of Property).

319. See Waggoner, *supra* note 3, at 729–31 (observing that "[s]ome lawyers and judges who took the course covering future interests in law school do not fully understand the subject matter, and few who did not take the course have mastered it in practice"); see also *supra* note 227 (explaining the difficulty attorneys have with the rule against perpetuities).

320. See Waggoner, *supra* note 3, at 731–32 (describing a system "riddled" with artificiality).

321. See *id.* at 732 (observing that "[w]henver legal consequences turn on differences of form, certain results can be achieved by skillful wording of a disposition or by other maneuvers without otherwise affecting the substance of the transaction").

322. *Id.*

323. *Id.* at 732–33. By way of example, see the classic case of *Guilliams v. Koonsman*, 279 S.W.2d 579 (Tex. 1955) (classifying interests as contingent remainders, a task not necessary in order to resolve the constructional question of whether the testator's son took as a life tenant or in fee simple).

Professor Waggoner focused on three: first, the distinction between conditions precedent ("to A if") and conditions subsequent ("to A, but if"); second, the distinction between conditions ("if") and limitations ("so long as"); and third, the distinction between reversionary and nonreversionary interests.³²⁴ In each case, the distinction matters in fact, but does not require separate classifications.³²⁵ Professor Waggoner also advocated eliminating the right of entry, an oddity among future interests because it does not operate automatically; he sensibly suggested treating it like other optional powers, such as powers of appointment or powers of revocation, rather than as a separate interest.³²⁶

Putting all this together, Professor Waggoner drafted a proposed statute consolidating the five types of future interests, reducing them to a single category called "future interest."³²⁷ The statute also combined the vesting categories of "contingent" and "vested subject to defeasance" under the single heading "contingent" because both of the older categories contain functionally the same thing: future interests uncertain to become possessory.³²⁸ Thus, Professor Waggoner's proposal reduced future interests to a one-by-three structure: one type of future interest and three categories of vesting.

When Professor Waggoner drafted his proposal, vesting was an important part of future-interest law. The rule against perpetuities, the rule of the destructibility of contingent remainders, and the rules governing acceleration and alienation all relied on the distinction between vested and contingent interests. But, as we have seen,³²⁹ the distinction is no longer necessary. Neither alienation nor acceleration should depend on the classification of an interest as vested or contingent; the destructibility rule should be abolished; and the rule against perpetuities—if states choose to retain it—should provide a direct limit on the number of years a future interest may exist rather than restrict how remotely an interest may vest. This is not to say that the essence of vesting—conditions being fulfilled so that the interest will become possessory—is irrelevant. To the holder of the future interest, a tremendous difference exists between an interest that is certain to become possessory and one that is speculative. But this is a distinction in fact, akin to the distinction in fact between reversionary and nonreversionary interests. The rules of

324. Waggoner, *supra* note 3, at 735–52.

325. *Id.* at 735.

326. *See id.* at 753 (arguing that "it would be futile to insist on prolonging the separate identity of rights of entry").

327. *Id.*

328. *See id.* at 754 (noting that "the only future interests which the reformulated structure would call vested would be those certain to become possessory").

329. *Supra* subparts II.A, II.B.2, II.C.1, and II.D.

future interest law do not need to use categories of vesting to achieve the appropriate substantive results.

By way of illustration, consider the following two examples:³³⁰

- (1) *X* gives property to *A* for life, then to *B* if he attains age 21, otherwise to *C*.
- (2) *X* gives property to *A* for life, then to *B*, but if he dies without attaining age 21, then to *C*.

Suppose that *B* is 18 at *A*'s death. In the first example, *B* must wait until age 21 to possess the property.³³¹ In the second example, *B* may take possession of the property immediately, subject to losing it if he dies before age 21. Thus, it matters to *B* how the gift is phrased. But the results in our two examples flow from construction, not classification. The delay of *B*'s possession in example 1 but not example 2 flows from the dispositive language used by *X* to express his donative intentions. It is in construing that language, rather than in classifying the interests, that different factual outcomes arise.³³²

In a nutshell, the entire system of classification can and should be eliminated.

III. Implementing the Five Reforms

This Part of the Article puts the five reforms together in a proposed Uniform Future Interests Act. The Act modernizes and simplifies future interest law by eliminating all unnecessary classifications and outmoded rules of substantive law while retaining the system's core insight: the temporal division of ownership.

The Act is built upon Professor Waggoner's 1972 proposal. However, it goes beyond that proposal in three important respects. First, the Act eliminates all classifications, including those based upon vesting. Second, the Act abolishes the rule against perpetuities and, instead, subjects noncommercial future interests and powers of appointment, other than those held by charities, to a fixed durational limit. (The reasons for excluding commercial and

330. The examples are drawn from Waggoner, *supra* note 3, at 746 (using these examples to illustrate the operational consequences of how a gift is construed).

331. For caveats, see *id.* at 746 n.59 (explaining that this result depends on the abolition of the destructibility rule and noting that if the property were in trust, some states would give *B* a right to the intermediate income).

332. Professor Waggoner also makes this argument. See *id.* at 746-47 (stating that the results in the two examples "seem justified, but not because the interest is in one case technically vested and in the other contingent. Rather, the choice between precedent and subsequent language is helpful, though not decisive, in determining the transferor's intent as to the time of taking").

charitable interests are discussed in the commentary below.) Interests that would violate the limit qualify for deferred reformation. Third, the Act abolishes or reforms all of the other rules of future interest law discussed in Part I: the rule of the destructibility of contingent remainders, the rule in Shelley's Case, the doctrine of worthier title, the rule against the alienation of contingent interests, and the rules governing the failure or acceleration of interests. In some cases, the rule is simply abolished. In other cases, it is replaced by a rule that operates irrespective of classification.

Let us begin with the text of the proposed Act and then turn to the related commentary.

A. A Proposed Uniform Future Interests Act

The following is a proposed Uniform Future Interests Act. The drafting of the Act took Professor Waggoner's 1972 proposal as a template and then modified it. For ease of reference, additions to Professor Waggoner's proposal are indicated with double underlining; deletions are struck through.

Uniform Future Interests Act [skeleton draft]

Section 1. Classification of Interests in Property as to Time of Enjoyment.

Legal and equitable interests in real and personal property are classified as to time of enjoyment as:

- (a) possessory interests, which entitle the owner to the present possession or enjoyment of the benefits of the property; or
- (b) future interests, which do not entitle the owner to possession or enjoyment of the benefits of the property until a future time.

Section 2. Classification of Possessory Interests.

Possessory interests are classified as:

- (a) interests in fee simple absolute;
 - (b) defeasible interests, which are interests which terminate upon the happening of an uncertain event, regardless of the language used to describe the uncertain event;
 - (c) life interests;
 - (d) interests for years, which are interests the duration of which is described in units of a year or in multiples or divisions thereof;
 - (e) periodic interests, which continue for successive periods of a year, or successive periods of a fraction of a year, unless terminated;
- or

(f) interests at will, which are terminable at the will of either the transferor or the transferee and have no designated period of duration.

Section 3. Classification of Future Interests.

(a) All future interests, whether left in or created in the transferor or created in a transferee, including those interests known at common law as "reversions," "resulting trusts," "possibilities of reverter," "rights of entry" ("powers of termination"), "executory interests," and "remainders," are assimilated under the title "future interest." Similarly, all future interests, whether described at common law as "indefeasibly vested," "vested subject to defeasance," "vested subject to divestment," "vested subject to open," or "contingent" are assimilated under the title "future interest"; classifications based on vesting are abolished.

(a) "Future interests" are classified as:

(1) "Contingent," if the interest is in favor of one or more unascertained or unborn persons, or is for any reason uncertain to become possessory at some future time; or

(2) "Vested subject to open," if the interest is in favor of a class of persons, one or more of whom are ascertained and in being, and if the interest is certain to become a possessory interest at some future time, and the share of the ascertained persons is subject to diminution by reason of other persons' becoming entitled to share as members of the class; or

(3) "Indefeasibly vested," if the interest is not vested subject to open or contingent.

(b) The Classification known at common law as "vested subject to complete defeasance" is abolished. Future interests which would at common law have been so classified are either "indefeasibly vested" or "contingent."

(c)(b) language which expressly confers on the transferor the right to re-enter and take possession of the premises or words of similar import may be construed as a power of revocation or a power of appointment rather than a future interest.

Section 4. Application of the Rule Against Perpetuities: Limit on the Duration of Future Interests and Powers of Appointment; Deferred Reformation.

(a) The rule against perpetuities is abolished.

(b)(1) A future interest is invalid unless the interest terminates within 90 years after its creation.

(2) A power of appointment is invalid unless the power is irrevocably exercised or otherwise terminates within 90 years after its creation.

(c)(1) Except as provided in subsections (c)(2) and (c)(3) and in Section 11, the time of creation of a future interest or a power of appointment shall be determined under general principles of property law.

(2) If there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of a future interest or a property interest subject to a power of appointment other than a presently exercisable general power of appointment, the future interest or power of appointment is created when the power to become the unqualified beneficial owner terminates. [For purposes of this Act, a joint power with respect to community property or to marital property under the Uniform Marital Property Act held by individuals married to each other is a power exercisable by one person alone.]

(3) For purposes of this Section 4, a future interest or power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the future interest or power of appointment in the original contribution was created.

(d)(1) Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by section (b) if:

(i) a future interest or power of appointment becomes invalid under section (b);

(ii) a future interest can become possessory but not within the 90 years allowed by section (b);

(iii) a future interest that is in the form of a class gift might not become possessory within the 90 years allowed by section (b) and the time has arrived when the share of any class member is to take effect in possession or enjoyment.

(2) The common law rule known as the doctrine of infectious invalidity is abolished.

(e) This Section 4 does not apply to:

(1) a future interest or a power of appointment arising out of a nondonative transfer, except a future interest or a power of appointment arising out of (i) a premarital or postmarital agreement, (ii) a separation or divorce settlement, (iii) a spouse's election, (iv) a similar arrangement arising out of a prospective,

existing, or previous marital relationship between the parties, (v) a contract to make or not to revoke a will or trust, (vi) a contract to exercise or not to exercise a power of appointment, (vii) a transfer in satisfaction of a duty to support, or (viii) a reciprocal transfer;

(2) a fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income;

(3) a power to appoint a fiduciary;

(4) a discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an interest in the income and principal that is not invalid under this Section;

(5) a future interest held by a charity, government, or governmental agency or subdivision, if the future interest is preceded by an interest held by another charity, government, or governmental agency or subdivision; or

(6) a future interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a future interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse; or

(7) a property interest or arrangement subjected to a time limit under any statute governing honorary trusts or trusts for animals.

[(f) Subsections (b) through (e) of this Section 4 shall not apply to a trust if the trust instrument provides that:

(1) no rule against perpetuities or law restricting the duration of trusts shall apply to the trust; and

(2) either (i) the trustee has unlimited power to sell all trust assets or (ii) one or more persons, one of whom may be the trustee, has the unlimited power to terminate the trust.]

Section 5. Destructibility Rule Abolished.

The rule of the destructibility of contingent remainders is abolished. It is neither a rule of law nor a rule of construction.

Section 6. Rule in Shelley's Case Abolished.

The rule in Shelley's Case is abolished. It is neither a rule of law nor a rule of construction.

Section 7. Worthier Title Doctrine Abolished.

The doctrine of worthier title is abolished. It is neither a rule of law nor a rule of construction.

Section 8. Alienation of Future Interest.

(a) [Except as provided in subsection (b),] [f]uture interests are freely alienable. This means that the beneficiary of a future interest may transfer the interest inter vivos or at death, in whole or in part, absolutely or as security or in trust.

[(b) Notwithstanding the provisions of subsection (a), a beneficiary may not transfer a future interest in a trust in violation of a valid spendthrift provision.]

Section 9. Failure of Future Interest.

(a) If a future interest fails for any reason, the interest shall be treated as if it had never existed.

(b) A defeasible possessory interest shall, upon the failure of all expressed subsequent interests, be held in fee simple absolute.

Section 10. Acceleration of Future Interest.

If the governing instrument does not contain a provision expressly indicating a contrary intention, the following rules apply:

(a) [Except as provided in subsection (c),] [u]pon the disclaimer or release of a preceding interest, a future interest held by a person other than the disclaimant or releasor takes effect as if the disclaimant or releasor had died or ceased to exist immediately before the time of distribution, but a future interest held by the disclaimant or releasor is not accelerated in possession or enjoyment. For purposes of this paragraph, "time of distribution" means the time when an interest would have taken effect in possession or enjoyment.

(b) [Except as provided in subsection (c),] [t]he rule in subsection (a) also applies upon the conveyance of an interest to the persons who are presumptively entitled to the next eventual estate.

[(c) If the identity of the persons who would be entitled to possession or enjoyment of the next eventual estate would be affected by the acceleration of the interest, then the following rules apply:

(1) The property that is the subject of the next eventual estate shall not be distributed outright but shall instead be held in trust for the persons presumptively entitled to the next eventual es-

tate, such class of persons to increase or decrease according to actual events.

(2) The beneficiaries of the trust created by subsection (c)(1) shall have the right to income and all other rights of a life tenant. They shall also have any interest in the corpus held by the holder of the preceding estate.

(3) If none of the beneficiaries of the trust created by subsection (c)(1) is in being, the income shall be accumulated and added to corpus.

(4) The trust created by subsection (c)(1) shall terminate when the persons presumptively entitled to that next eventual estate become entitled to the possession or enjoyment of that estate, taking only actual events into account.]

Section 11. Prospective or Retrospective Application.

(a) Sections 1 through 3 and 5 through 10 of this Act apply to any governing instrument whether the instrument was executed prior to, on, or after the effective date of this Act.

(b)(1) Except as extended by subsection (b)(2) of this Section 11, Section 4 of this Act applies to a future interest or a power of appointment that is created on or after the effective date of this Act. For purposes of the preceding sentence, a future interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(2) If a future interest or a power of appointment was created before the effective date of this Act and is determined in a judicial proceeding, commenced on or after the effective date of this Act, to violate any rule against perpetuities as that rule existed before the effective date of this Act, a court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the future interest or power of appointment was created.

B. Commentary to the Act

Each uniform act is traditionally accompanied by commentary explaining the purposes of the act and the choices made by its drafters. What follows is only a partial commentary to the proposed Uniform Future Interests Act. If the Act were to be promulgated by the Uniform Law Commission, the full

commentary would include much of the material from Part II of this Article. To avoid repetition, the discussions from Part II have not been reproduced here. Rather, the commentary below builds on what has been said in Part II. It is designed to provide additional information about the provisions of the Act where such additional information would be helpful.

Sections 1–3. These sections simplify the classification of possessory and future interests. The language has been drawn from Professor Waggoner's proposed statute, except for Section 3, which has been modified to eliminate classifications based upon vesting.

Section 4. This section abolishes the rule against perpetuities. Instead, future interests and powers of appointment are subject to a fixed durational limit of 90 years. Interests and powers that violate the limit qualify for deferred reformation.

This section departs significantly from the Uniform Statutory Rule Against Perpetuities. Thus, the Uniform Law Commission, having invested time and effort in the drafting and promulgation of the Uniform Rule, may hesitate to embrace this new proposal. The same hesitation may be felt by legislatures that have taken the trouble to enact the Uniform Rule. The understandable reluctance to revisit decisions is known as path dependence.³³³ To overcome the path dependence here, one can only re-emphasize the advantages of a fixed durational limit over a rule against the remoteness of vesting. These are three-fold: first, a fixed durational limit eliminates the administrative difficulties and considerable litigation created by the current need to determine whether an interest is vested or contingent; second, a fixed limit more directly achieves the purposes of the rule against perpetuities by targeting long-lasting interests irrespective of classification; and third, a fixed limit obviates any need for the artificial distinction between contingent interests and those that are vested subject to defeasance.³³⁴

Let us now turn to the provisions of each subsection.

Subsection (a) abolishes the rule against perpetuities.

Subsection (b) establishes the fixed durational limit of 90 years. The text is based upon Sections 1(a)(2), 1(b)(2), and 1(c)(2) of the Uniform Statutory Rule Against Perpetuities, although the Uniform Rule's provisions dealing

333. See, e.g., Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 609 (2001) (describing how "a step in one direction decreases the cost . . . of an additional step in the same direction"); Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1676 (2002) (observing that legislatures "make policy choices that become entrenched de facto through path dependence and inertia").

334. *Supra* notes 315 & 328 and accompanying text.

with powers of appointment have been consolidated here.³³⁵ Ninety years was chosen as the durational limit, for two reasons. First, as Professor Waggoner has explained in connection with the Uniform Rule, ninety years approximates the average period of time, under current law, that a standard perpetuity saving clause will permit a trust to endure.³³⁶ Such a clause typically provides that the trust will terminate no later than at the death of the last survivor of the settlor's descendants who were alive or in gestation at the time of the trust's creation, plus 21 years.³³⁷ If that last survivor were a newborn baby (hence, with a life expectancy of 77 years³³⁸), then the trust would be permitted to endure for approximately 98 years. But many settlors do not have a newborn descendant, or one in gestation, at the time of trust creation. Thus, the average period permitted by the saving clause is less than 98 years, and 90 is a reasonable approximation. Second, twenty-four legislatures are already familiar with a 90-year period due to their adoption of the Uniform Rule.³³⁹

Subsection (c) defines the time at which a future interest or power of appointment is created. The text draws heavily on Section 2 of the Uniform Rule.³⁴⁰

Subsection (d) provides for the deferred reformation of a future interest or power of appointment that would violate the 90-year durational limit. It tracks the language of Section 3 of the Uniform Rule and includes its suggested provision eliminating the common-law doctrine of infectious invalidity.³⁴¹

335. See UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(a)(2), 8B U.L.A. 236 (2001 & Supp. 2002) (providing that a nonvested interest invalid at common law is also invalid under the Uniform Rule unless it "either vests or terminates within 90 years after its creation"); *id.* § 1(b)(2), at 236 (providing that "a general power of appointment not presently exercisable because of a condition precedent," if invalid at common law, is also invalid under the Uniform Rule unless "the condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation"); *id.* § 1(c)(2), at 236-37 (providing that general testamentary or nongeneral powers of appointment invalid at common law are also invalid under the Uniform Rule unless "the power is irrevocably exercised or otherwise terminates within 90 years after its creation").

336. See Waggoner, *Rationale*, *supra* note 237, at 166-68 (explaining the reasoning behind the 90-year period of the Uniform Rule).

337. See FAMILY PROPERTY LAW, *supra* note 9, at 1223 (reproducing a standard perpetuity-saving clause).

338. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2001 tbl. 96 (2002) (listing the most recently calculated life expectancy at birth, from 1999 data, as 74.1 years for males, 79.7 years for females, and 77.0 years overall).

339. *Supra* notes 239-62 and accompanying text.

340. See UNIF. STATUTORY RULE AGAINST PERPETUITIES § 2, 8B U.L.A. 267 (2001 & Supp. 2002) (defining when a nonvested property interest or power of appointment is created).

341. See *id.* § 3, at 273 (providing for deferred reformation "in the manner that most

Subsection (e) lists the future interests and powers to which the 90-year limit does not apply. Three categories of these should be mentioned. First, the limit does not apply to nondonative transfers arising in commercial settings. Second, the limit does not apply to future interests held by governments or charities if the preceding interest is also held by a government or charity. In each of these two cases, the limits track the provisions of Section 4 of the Uniform Rule.³⁴² With respect to commercial interests and powers, there are other statutes, such as marketable title acts³⁴³ and the Uniform Dormant Mineral Interests Act,³⁴⁴ that are better suited to controlling restraints on alienation in commercial transactions.³⁴⁵ With respect to interests held by governments or charities, the exemption here is simply a codification of the common-law principle that these future interests were excluded from the rule against perpetuities if they were preceded by an interest similarly held.³⁴⁶ Third, and last, the section does not apply to so-called "honorary trusts," such as trusts for the saying of masses, or trusts for animals. These are more properly dealt with by separate provisions, such as Sections 408 and 409 of the Uniform Trust Code.³⁴⁷

Subsection (f) is bracketed as optional. It is designed for the states that wish to permit dynasty trusts. The text is based upon, but does not track exactly, Section 2131.09(B) of the Ohio Revised Code.³⁴⁸

closely approximates the transferor's manifested plan of distribution and is within the 90 years" permitted by the Uniform Rule); *id.* § 3 cmt., at 276-77 (offering statutory language that would abolish the doctrine of infectious invalidity).

342. See *id.* § 4, at 279-80 (listing exclusions from the Uniform Rule).

343. See, e.g., UNIF. MARKETABLE TITLE ACT § 3(a), 13 U.L.A. 311 (2002) (defining marketable record title as "an unbroken record chain of title to real estate for 30 years or more").

344. See UNIF. DORMANT MINERAL INTERESTS ACT § 4, 7A U.L.A. 202 (2002) (permitting the termination of mineral interests after 20 years of nonuse).

345. See Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 REAL PROP. PROB. & TR. J. 569, 600 (1986) (stating the view of the Uniform Rule's drafting committee "that the control of commercial transactions that directly or indirectly restrain alienability is better left to other types of statutes").

346. UNIF. STATUTORY RULE AGAINST PERPETUITIES § 4 cmt. B, 8B U.L.A. 282 (2001 & Supp. 2002).

347. See UNIF. TRUST CODE § 408, 7C U.L.A. 63 (Supp. 2002) (regulating trusts for the care of animals); *id.* § 409, at 64 (authorizing certain noncharitable trusts without ascertainable beneficiaries). For criticism of earlier provisions found in Section 2-907 of the Uniform Probate Code, see generally Adam J. Hirsch, *Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws*, 26 FLA. ST. U. L. REV. 913 (1999).

348. The Ohio statute provides:

No rule of law against perpetuities . . . shall apply . . . if the instrument creating the trusts specifically states that the rule against perpetuities . . . shall not apply to the trust and if either the trustee of the trust has unlimited power to sell all trust assets

Sections 5–7. These sections eliminate the three archaic rules of future interest law discussed in subpart II.C: the rule of the destructibility of contingent remainders, the rule in Shelley's Case, and the doctrine of worthier title. The text of each section is based on the first sentence of Section 2-710 of the Uniform Probate Code, which abolishes the worthier-title doctrine.³⁴⁹

Section 8. This section is designed to provide for the full alienability of all future interests in all circumstances but one. That one exception occurs when the interest is in a trust with a valid spendthrift provision. The text of this section draws partly on Section 132 of *Scott on Trusts*,³⁵⁰ and partly on Section 502(c) of the Uniform Trust Code.³⁵¹ The exception for spendthrift trusts is bracketed because a small minority of American jurisdictions decline to permit them.³⁵²

Section 9. Subsection (a) codifies the general rule at common law that when a future interest fails, it is treated as if it had never existed. Subsection (b) applies this rule to the particular case of a defeasible possessory interest followed by provisions that have failed; in such cases, the defeasible interest becomes absolute.

Section 10. This section establishes rules governing the acceleration of a future interest in the event of a disclaimer, release, or conveyance. The basic rule follows Section 6(b)(4) of the Uniform Disclaimer of Property Interests Act: a future interest held by a person other than the disclaimant accelerates, but a future interest held by the disclaimant does not.³⁵³ The section modifies the general rule in two important respects. First, it extends the rule to accelera-

or if one or more persons, one of whom may be the trustee, has the unlimited power to terminate the entire trust.

OHIO REV. CODE ANN. § 2131.09(B)(1) (West 1994 & Supp. 2003).

349. See UNIF. PROBATE CODE § 2-710, 8 U.L.A. 204 (1998) (providing in pertinent part that "[t]he doctrine of worthier title is abolished as a rule of law and as a rule of construction").

350. See SCOTT ON TRUSTS, *supra* note 22, § 132 (stating that "[a] beneficiary can transfer his interest either inter vivos or by will, either in whole or in part, either absolutely or as security or in trust").

351. See UNIF. TRUST CODE § 502(e), 7C U.L.A. 75 (Supp. 2002) (providing in pertinent part that a beneficiary "may not transfer an interest in a trust in violation of a valid spendthrift provision"). For background on the Uniform Trust Code, see generally David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143 (2002); Langbein, *supra* note 7, at 66–79.

352. See FAMILY PROPERTY LAW, *supra* note 9, at 835–36 (discussing cases from New Hampshire and Kentucky).

353. UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 6(b)(4), 8A U.L.A. 54 (Supp. 2002) (providing that "[u]pon the disclaimer of a preceding interest, a future interest held by a person other than the disclaimant takes effect as if the disclaimant had died or ceased to exist immediately before the time of distribution, but a future interest held by the disclaimant is not accelerated in possession or enjoyment").

tions caused by release or conveyance. Second, it specifies that its provisions are default rules that can be altered by provisions in the governing instrument indicating the grantor's contrary intention.

The section also contains provisions, bracketed as optional, for jurisdictions sharing the concerns of Professors Roberts and Hirsch about the strategic use of acceleration. These optional provisions codify Professor Roberts's proposal.³⁵⁴ They provide that if acceleration would affect the identity of the persons entitled to possession or enjoyment, then the property shall not be distributed outright, but rather held in trust until the persons presumptively entitled to the property become entitled to it according to the terms of the grant and actual events.

Section 11. This section addresses the prospective or retrospective application of the Act. Sections 1-3 and 5-10 apply retrospectively. They apply to all governing instruments in existence on the Act's effective date, regardless of when the governing instrument was executed. The sections eliminate the classification of future interests, abolish outdated rules, and govern the alienability and acceleration of future interests. These new rules will unsettle few expectations and require the redrafting of few, if any, instruments. The one section that applies prospectively is Section 4, imposing the 90-year limit on future interests and powers of appointment. This new approach will require some number of documents to be redrafted, although fewer than might be expected given that several states have made durational limits optional or have abolished such limits entirely.³⁵⁵ Still, to avoid upsetting expectations, the 90-year limit applies only to interests or powers created after the Act's effective date. The language governing the prospective application of the 90-year limit is drawn from Section 5 of the Uniform Rule.³⁵⁶ That section of the Uniform Rule also provides that a court may use its equitable powers to reform a pre-existing interest or power that violates an earlier rule against perpetuities;³⁵⁷ this helpful provision is incorporated into the current Act.

IV. Conclusion

Future interests are essential to the Anglo-American law of property. They allow ownership to be shared among generations and, thus, permit great

354. *Supra* notes 66-70 and accompanying text.

355. *Supra* notes 271-73, 281-94 and accompanying text.

356. *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES § 5(a), 8B U.L.A. 285 (2001) (providing in pertinent part that the Uniform Rule "applies to a nonvested property interest or a power of appointment that is created on or after the effective date").

357. *See id.* § 5(b), at 285 (authorizing reformation of interests and powers that violate a former rule against perpetuities).

flexibility in donative transfers. Yet the law of future interests is built on unnecessary and unhelpful classifications and burdened with outdated rules of substantive law. The proposal put forward here, a Uniform Future Interests Act, eliminates the classificatory superstructure and reforms the substantive rules, while at the same time retaining the temporal division of ownership that is at the heart of family property law. This Article urges the Uniform Law Commission and state legislatures to embrace this proposal.

NOTES
