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Who Is Afraid of Perpetual Trusts?

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Introduction

Throw a stone into a room full of law professors, and it is virtually impossible to hit someone who will defend perpetual trusts. Yet since 1995, eighteen states have repealed their rules against perpetuities, and there are now twenty-one states that permit trusts to last forever. Many academics have responded with a virtual pile-on, calling the repeals a "race to the bottom"[1] at best and "loony"[2] at worst. Lawrence Waggoner, Professor Emeritus at the University of Michigan School of Law and Reporter for the *Restatement (Third) of Property: Wills and Other Donative Transfers*, has made another contribution to the scrum.[3] Professor Waggoner does not just dislike perpetual trusts. They are, in his description, "folly."

Professor Waggoner nominally aims his critique at wealthy individuals who desire perpetual trusts and the lawmakers who enable them by passing favorable legislation. He lodges five specific objections: (1) after a certain period of time, the beneficiaries of perpetual trusts will be insufficiently related to the trust creator; (2) after a certain period of time, there will be too many beneficiaries of a perpetual trust; (3) perpetual trusts will be expensive to manage; (4) outdated trust instruments will hamper management of perpetual trusts; and (5) trustee turnover will negatively impact perpetual trusts. This Essay considers each of his objections in turn, and concludes that Professor Waggoner's concerns are misplaced and exaggerated. Perpetual trusts raise important policy concerns, to be sure, but "folly" is in the eye of the beholder. The legal system does not yet have enough experience with perpetual trusts to understand their full implications. A more prudent approach would be to embrace a variation on the long-standing approach to perpetuities problems: let's wait and see.

I. The Promulgation of the Perpetual Trust

Professor Waggoner begins his essay with an explanation of the origins of the perpetual trust movement. Like most lawyers, lawmakers and academics,

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1. *See, e.g.*, Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 Cornell L. Rev. 1035 (2000).

2. Mark L. Ascher, *But I Thought the Earth Belonged to the Living*, 89 Tex. L. Rev. 1149, 1160 (2011).

3. Lawrence W. Waggoner, *From Here to Eternity: The Folly of Perpetual Trusts*, Univ. of Mich. L. Sch. Pub. L. & Legal Theory Working Paper Series No. 529, Dec. 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1975117.

Professor Waggoner frames the generation-skipping transfer ("GST") tax exemption as the "spark" for the rise of the perpetual trust. Generally speaking, the GST tax is an extra wealth transfer tax imposed—in addition to the gift tax or estate tax—on transfers to beneficiaries two or more generations below the giver. Each taxpayer has a certain exemption from GST, and if the exemption fully "covers" transfers to a particular trust, the trust assets will be forever free from GST tax, no matter how large the trust grows. Max Schanzenbach and Robert Sitkoff's empirical research on state trust business makes a persuasive case that the desire to forever shield transfers from the GST was the catalyst for perpetual trusts.[4] Mary Louise Fellows adds further context, describing the "dry tinder on which that spark [of GST] fell" as an historic tolerance for dead-hand control, donor-centric trusts laws, legislative simplification of the common-law rule against perpetuities, and the commercialization of estate planning.[5] To that list, one should add the increase in the number of ultra-wealthy individuals—i.e., those who could afford to "give away" the amount covered by the GST exemption, by funding an irrevocable trust for grandchildren and more remote descendants.[6]

The perpetual trust became popular in an era of increasing cultural conservatism and anti-tax sentiment.[7] The Reagan era's embrace of "trickle-down economics" included the introduction of the lowest income tax rates in decades, but also increased awareness of the importance of available exclusions and exemptions, such as the GST.[8] Tax sensitivity on the part of the ordinary citizen made George H.W. Bush's campaign proclamation "Read my lips—no new taxes" one of the most recognizable catchphrases of the late 1990s. I am persuaded, as Professor Waggoner is, by the evidence presented by Schanzenbach and Sitkoff. But for the GST, perpetual trusts would not have become popular. At the same time, though, the perpetual trust movement needs to be understood in the larger social and economic context of cultural and fiscal conservatism.

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4. Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 Yale L.J. 356, 410 (2005); Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 Cardozo L. Rev. 2465, 2466 (2006).

5. Mary Louise Fellows, *Why the Generation-Skipping Transfer Tax Sparked Perpetual Trusts*, 27 Cardozo L. Rev. 2511, 2511 & 2518–2519 (2006).

6. *See* Kevin Phillips, The Politics of Rich and Poor: Wealth and the American Electorate in the Reagan Aftermath 239 (Appendix A) (1990) (citing Thomas J. Stealey, Marketing to the Affluent (1988) (number of centamillionaires in the U.S. increased from 700 in 1985 to 900 in 1986 and 1200 in 1987)).

7. *See* Michael J. Graetz, 100 Million Unnecessary Returns: A Simple, Fair, and Competitive Tax Plan for the United States 35–42 (2008) (describing anti-tax sentiment).

8. One estate planning attorney testified before Congress in 1984 that the proposed changes to the GST, later enacted in 1986, would lead to the proliferation of trusts designed to take maximum advantage of the GST exemption. *Generation-Skipping Transfer Tax: Hearings Before the H. Comm. on Ways and Means*, 98th Cong. 335, 336 (1984) (testimony of Raymond Young) cited in Schanzenbach & Sitkoff, *supra* note 4, at 2477.

II. Fear Not the Perpetual Trust

A. Degree of Relatedness

Professor Waggoner's first critique of perpetual trusts—i.e., that over time, beneficiaries will bear a diminishing blood quantum tie to the trust's settlor—is somewhat misleading. He writes:

> With each step down the generational ladder, the settlor's genetic relationship with the descendant-beneficiaries will decline rather precipitously. . . . At the 14th generation (i.e., the generation born about 300 years after the settlor's death), the settlor's genetic relationship is reduced to about 0.0061 per cent, which—due to our common origins—is about the same relationship one has with any randomly selected member of the population.[9]

While Professor Waggoner's mathematics is sound enough, degree of relationship between trust grantor and beneficiary has no relevance to a trusts's validity. There is no aspect of trust or other law that requires a trust's beneficiaries to be related to the settlor within a certain degree of consanguinity, if at all. Presumably Professor Waggoner does not object to the perpetual nature of *charitable* trusts on the grounds that the beneficiaries are insufficiently "related" to the settlor. Indeed, one of the tests for determining whether a trust has a valid charitable purpose is whether it is "sufficiently beneficial to the community" by relieving poverty, advancing education, religion, health or another governmental purpose.[10] In other words, a charitable trust's beneficiaries must be sufficiently *unrelated* to the settlor.[11] Instead of disallowing private express perpetual trusts, as Professor Waggoner would favor, a more moderate approach would be to import from the charitable trust context the doctrine of *cy pres*. This would allow a court to reform a trust if the original trust purposes can no longer be accomplished.[12]

Professor Waggoner's blood-quantum objection lacks a readily accessible logic and is hampered by negative associations with the history of blood-quantum laws in the United States.[13] Unfortunately, Professor Waggoner's

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9. Waggoner, *supra* note 3, at 5.

10. Jesse Dukeminier et al., Wills, Trusts, and Estates 757 (8th ed. 2009) ("To be classified as charitable, a trust must be for the relief of poverty or for the advancement of education, religion, health, or governmental or other purposes that is sufficiently beneficial to the community to justify the preferential treatment afforded to a charitable trust."). *See also* Restatement (Third) of Trusts § 28 (2003).

11. *See* Restatement (Third) of Trusts § 28 cmt. a(1) (2003) (trust for education of settlor's descendants is not a charitable trust). *Cf.* United Bank v. Blosser, 624 S.E.2d 815 (W.Va. 2005) (a trust providing scholarships to members of the family of the settlor is charitable).

12. Dukeminier et al., *supra* note 10, at 760–776. Professor Sitkoff, the current author of the Dukeminier text, suggests that *cy pres* doctrine might serve as a template for future modification of perpetual trusts. *Id.* at 899–900.

13. *See* Indian Reorganization Act of 1934, 25 USCA § 461 et seq. (recommending, among other things, certain formal tribal structures be created to recognize tribe membership

rhetoric obscures a more legitimate concern about the extent of a grantor's understanding that most future trust beneficiaries will be virtual strangers. Of course, if this is the objection, then the solution is not to ban all perpetual trusts, but rather to implement safeguards to ensure that potential grantors are aware of the tenuous family ties that future beneficiaries may have.

Professor Waggoner's opposition to perpetual trusts unquestioningly internalizes anti-perpetuity sentiments from the Victorian era and before. Historically, durational limits on trusts were explained as desire to minimize so-called "dead hand" control. In this analysis, the law permits entrustment as an appropriate extension of a grantor's moral right to decide what is best for those beneficiaries that he knows personally.[14] Under these mores, a *pater familias* is better positioned than the law to direct a trust's resources. Such patriarchal authority remains superior to the law only as far as the grantor's knowledge extends—that is, not indefinitely.

Perhaps in proverbially simpler times, this justification had greater purchase. A more modern view might consider that trusts do not necessarily prevent beneficiaries from accessing wealth, but rather preserve wealth in an otherwise litigious era. In other words, twenty-first century trusts might function less as mechanisms for controlling trust beneficiaries than for shielding assets from claims by others (including the government in the form of taxes). Future research would be important in understanding the modern purpose and function of the private express trust. If it is true that the perpetual trust is more a vehicle for wealth preservation than wealth direction, then the settlor's strong blood relatedness (or lack thereof) to the bene-beneficiaries does no meaningful work in Professor Waggoner's theory. To be sure, perpetual trusts carry more than a whiff of the quixotic quest for immortality[15] or at least for a name as resonant as Carnegie, Rockefeller, or Gates. But striving is a great American tradition.

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based on blood quantum). Perhaps the most notable example in recent years is the effort by the Cherokee establishment to deny tribe membership to descendants of African and African-American slaves known as the "Cherokee Freedmen." *See, e.g.*, Nash v. Cherokee Nation (D.D.C. 2011), http://www.cherokee.org/Docs/Org2010/2011/10/32733NashfedordtransNDOkla.pdf. *See generally* S. Alan Ray, *A Race or a Nation? Cherokee National Identity and the Status of Freedmen's Descendants*, 12 MICH. J. RACE & L. 387 (2007). There is also the painful legacy of segregationist "one-drop" rules that were used systematically for centuries to deprive African-American people of rights. *See* Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule*, 1600–1860, 91 MINN. L. REV. 592 (2006). Professor Waggoner's objection is a sort of reverse—a "not enough drops" rule—for deciding when a trust is somehow no longer justified, in his estimation.

14. ARTHUR HOBHOUSE, THE DEAD HAND: ADDRESSES ON THE SUBJECT OF ENDOWMENTS AND SETTLEMENTS OF PROPERTY 188 (1880) ("A clear, obvious, natural line is drawn for us between those persons and events which the Settlor knows and sees, and those which he cannot know and see. Within the former province we may trust his natural affections and his capacity of judgment to make better dispositions than any external Law is likely to make for him.").

15. *See, e.g.*, RAY MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD (2010).

B. Number of Trust Beneficiaries

Professor Waggoner's second critique of perpetual trusts is that over time, they will have too many beneficiaries. He forecasts that "after 350 years, [the trust would have] about 114,500 beneficiaries... The beneficiaries, each with standing to bring a lawsuit against the trustee for violation of any of the trustee's fiduciary duties, would have to book Rungrado May Day Stadium in Pyongyang North Korea or Salt Lake Stadium in Kolkata India for a meeting."[16]

His mathematics are accurate enough. Again, though, Professor Waggoner's critique seems from another era. Nineteenth-century lawyers could not have imagined twenty-first-century facts. But laws of procedure can and do adapt to changed circumstances. To object to perpetual trusts on the grounds that a traditional in-person meeting of beneficiaries would be difficult is to allow the tail of stadium seating to wag the dog of donative transfers. The two should have nothing to do with each other. Procedure must serve, not limit, contemporary trust practice. Professor Waggoner's objections to trusts with large numbers of beneficiaries do not ring true given that there are a variety of mechanisms—guardians *ad litem*, virtual representation or use of a "qualified beneficiary,"[17] to name just a few—that could be deployed in the administration of perpetual trusts, if procedures permitted.

What Professor Waggoner seems to truly lament is the loss of the personal relationship between wealthy individuals and their bankers that would have been more common in bygone eras. Professor Waggoner is working with an idealized model in which the personnel at the local bank know their wealthy clients and the clients' families on a personal level. What he seems to have difficulty imagining are modern banking relationships in the internet era. The heyday of face-to-face banking, even for the ultra-wealthy, is long past. One is likely to be far more familiar with the location of the closest automatic teller machine than the schedule of a particular bank officer at the closest brick-and-mortar bank. In that sense, there is a shot of disingenuousness throughout Professor Waggoner's argument. With respect to the vast majority of trusts—not just perpetual trusts—institutional trustees of the twenty-first century are large corporate entities with thousands and thousands of trusts under management, with day-to-day work on all but the largest of trusts being handled by 9-to-5 employees with no personal relationship to the trust settlor. That the trust officers do not know all of the beneficiaries of the trusts that they administer is merely a fact of modern fiduciary practice, not an argument against perpetual trusts.

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16. Waggoner, *supra* note 3, at 7.

17. *See, e.g.*, Davis v. U.S. Bank National Association, 243 S.W.3d 425 (Mo. Ct. App. 2007) (use of "qualified beneficiaries" to represent other beneficial interest-holders).

C. Managerial Costs

Professor Waggoner's third objection is that perpetual trusts raise intractable management problems. He envisions that "[a]s the settlor's descending line divides and redivides into hundreds and then thousands of branches, the trustee would have to employ and assign more and more trust officers, each with primary operational responsibility—aided by ever-advancing technologies—for a manageable number of branches."[18] Whether this is true, however, remains to be seen. As Professor Waggoner himself notes, each perpetual trust is different. He imagines a trust that requires subdivision upon the termination of the life of each preceding beneficiary in the bloodline. Many perpetual trusts, however, are structured as "pot" trusts for the benefit of the settlor's descendants living from time to time. With these trusts, the division and redivision imagined by Professor Waggoner never occurs. Even if a trustee, either of a pot trust or a separate share trust, exercises a decanting power to "divide and redivide the original trust into sub-trusts," as Professor Waggoner acknowledges could happen, it is not necessarily true that each subtrust would be assigned a single trust officer to feed and care for the trust on a daily basis.

Professor Waggoner underestimates the efficiencies in complex trust administration. Common trust funds are a mainstay of most banks and trust companies having a significant portfolio of fiduciary business. These funds facilitate collective investment across multiple small trusts. Furthermore, as any trust officer could testify, the amount of time required to administer any particular trust is not necessarily correlated to the number of beneficiaries that the trust has. Some trusts with few beneficiaries require a great deal of administrative time; other trusts with a large number of beneficiaries require minimal administrative time. If Professor Waggoner's concern is the cost of disseminating information to trust beneficiaries, that concern is easily addressed in the electronic age by email and password-protected websites. In an odd sense, it is possible that a trust with a huge number of beneficiaries could be the easiest for a professional trust company to serve. A beneficiary with a one-one-thousandth interest in a particular trust's income likely will demand very little from the trustee. Each prospective trustee should have the freedom to make an independent business decision about taking on the administration of a perpetual (or other) trust. These sophisticated institutions do not need academics and uniform law commissioners to protect them from poor decision-making.

Professor Waggoner appears incredulous that state legislators might have understood the potential complexities when they voted to permit perpetual trusts. Three times in his relatively short essay, Professor Waggoner overtly questions lawmakers' motives and competence. Consider:

> I ask for a third time, this time in a slightly different way: If the foregoing projections [about numbers of beneficiaries] and other concerns had been before them, would the state legislators still have been convinced that it is

18. Waggoner, *supra* note 3, at 10–11.

> good public policy to authorize perpetual trusts, and would the wealthy still have been convinced that the tax advantages are worth putting them in place?[19]

These passages are problematic in at least two respects. First, Professor Waggoner decries the involvement of "state banking groups and estate-planning attorneys"[20] in perpetual trust legislation, as if other legislative processes were free from all exogenous influences. It strains credulity to suggest that legislators who voted to abolish effectively the Rule Against Perpetuities in more than twenty states[21] were duped by a group of lawyers and bankers. If so, then lawmakers in some of the same states, along with others, were similarly "duped" (by academics and other law reformers) into enacting the Uniform Trust Code.

Law professors are one of the engines that power these supposedly neutral law reform groups that Professors Max Schanzenbach and Robert Sitkoff have identified one of the sources of "top down" reform of the law of trusts and estates.[22] Academic insiders will claim that they—unlike estate planners and bankers—have no financial stake in the legislation they propose. This is true insofar as most law professors do not depend on income from the practice of law to earn a living. But successful law reform efforts redound to the reputational benefit of the faculty members involved. After all, to the professor who has not chosen his career primarily for the money, bragging rights might be more valuable than any bankers' and lawyer's fees.

Professor Waggoner's critique of bankers' and lawyers' involvement is a thinly-veiled accusation of interest capture.[23] Given Professor Waggoner's involvement with legal reform institutions such as the American Law Institute, it would seem that some interest capture (by supposedly neutral law reform projects) is acceptable to Professor Waggoner, but other interest capture (by bankers and lawyers for ultra-wealthy individuals) is unacceptable. If indeed lawmakers are as uninformed and unthinking as Professor Waggoner suspects, then adoption of the Uniform Trust Code, for example, is as deeply problematic as is perpetual trust legislation. To be sure, a more moderate critique is that bankers and lawyers have a direct financial interest in the perpetual trust industry, whereas law professors and law reformers either have non-monetary interests (e.g., ego and professional satisfaction) or interests not

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19. *Id.* at 13–14.

20. *Id.* at 3. Here I adopt Max Schanzenbach and Robert Sitkoff's definition of abolition as "any modification of the Rule that would allow for a perpetual trust of intangible personal property or that so lengthened the perpetuities period that I no longer represents a practical constraint on trust duration." Schanzenbach & Sitkoff, *supra* note 4, at 2466 n.1.

21. The states allowing perpetual trusts are: Alaska, Arizona, Colorado, Delaware, D.C., Florida, Idaho, Illinois, Maine, Maryland, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Virginia, Wisconsin and Wyoming.

22. *See* Max M. Schanzenbach & Robert Sitkoff, *The Prudent Investor Rule and Trust Asset Allocation: An Emprical Analysis*, 35 ACTEC JOURNAL 314, 314 & 318 (2010).

23. *See, e.g.*, Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 299 (2004).

subject to ready quantification (e.g., enhanced professional reputation). But interest capture is an inapposite critique.

The second significant problem with Professor Waggoner's analysis of the legislative process here is that he seems to imply that the "real" beneficiaries of perpetual trusts uniquely are lawyers and bankers. I suspect that both Professor Waggoner and I would agree that any trust law is undesirable if it financially benefits bankers and lawyers to the exclusion of trust beneficiaries. It is not immediately obvious that lawyers and bankers benefit more from setting up perpetual trusts than other trusts. But it is not clear that the provision of *any*—or even a *significant*—financial benefit to bankers and lawyers in the form of professional fees or commissions is a meaningful objection to the existence of perpetual trusts. To make a loose analogy, class action lawyers typically benefit (in the form of legal fees) more than any one individual member of the represented class. But that is no objection to the existence of class actions themselves. A potential long-term benefit of perpetual trusts to legal or banking professionals is no more valid an objection to perpetual trusts. Presumably if perpetual trusts were not created in the first place, then lawyers and bankers would be just as busy—and generating the same level of fees—in marketing other types of trusts to future generations. Perhaps Professor Waggoner's critique is of a "bottom up"[24] law reform movement powered by lawyers and bankers that moved faster and more nimbly than any "top down" group has.

D. Outmoded Trust Instruments

Aging is inevitable; this is true for both people and legal documents. Professor Waggoner predicts that trust documents will not fare well with age: "If the past is any guide to the future, an early 21st century perpetual-trust document will seem as obsolete to those in distant centuries as a 17th century document appears to us today."[25] From architecture to zeppelins, that which seems modern at any one point almost certainly will not seem so in the future. Still, it is equally true that legal documents, including trusts, can be valid, enforceable and effective without being *à la mode*.

As an initial matter, note that one cannot predict the duration of any trust with certainty. As Professor Waggoner himself notes, "Some model perpetual-trust documents incorporate an escape clause in the form of a nongeneral power of appointment granted to each descendant-beneficiary to appoint his or her share of trust principal outright to his or her descendants."[26] It is not unusual for long-term trusts to have such a provision, and so with many perpetual trusts, each generation of beneficiaries will have the ability to decide whether to continue the trust or not. Just because a perpetual trust *can* last forever does not mean that it will. Indeed there is anecdotal evidence to suggest that grantors of perpetual trusts recognize the need for future flexibility

24. *See* Schanzenbach & Sitkoff, *supra* note 22.

25. Waggoner, *supra* note 3, at 11–12.

26. *Id.* at n.27.

and plan for it by granting powers of appointment.[27] By allowing individual beneficiaries to weigh the benefits and burdens of continuing the trust in the future, many perpetual trusts contemplate the control of wealth by the living. This is precisely what Professor Waggoner is after.

Apart from a flexible trust instrument, smooth trust administration is enabled by legal rules that allow for flexible construction and interpretation in accordance with the mores of the time. In such a climate, a trust instrument that might *seem* obsolete in future centuries (in terms of the language it uses or the paper it written on) need not *be* obsolete. Capacious rules make for greater agility on the part of both trustees and courts. It therefore is for future generations of lawyers to propose modifications or improvements to trust doctrine in order to ensure that courts have the flexibility to give effect to perpetual (or other) trusts drafted long before. The dead hand attempting to control the future might well belong to those who would curb the use of these trusts right now.

E. Trustee Turnover

Professor Waggoner's final enumerated concern is that the trustees of perpetual trusts inevitably will change or go out of business:

> In an era in which banks and other financial institutions go out of business, merge, or are taken over by other banks or financial institutions, the bank or financial institution originally selected will not likely continue in anything like its present form for the next 200 years, 300 years, or for eternity.[28]

It is true that one can have a greater degree of confidence that any one particular financial institution will be in existence one year from now than five hundred years from now. It is unlikely that wealthy individuals are working under any different assumption when they create a perpetual trust. Indeed, many sophisticated trusts contain provisions that allow for the removal of a trustee—with or without cause—by a third-party trust protector or by the beneficiaries themselves. Trustee turnover is anticipated by the very trust structure in some cases. Potential turnover of trustees is not a severe enough potential detriment to deter people from creating and funding perpetual trusts. In fact, one might welcome a change in trustees as a market response that disciplines poor performers. A trusteeship is not a sinecure.

III. Curbing Perpetual Trusts

If the GST drives creation of perpetual trusts, a relatively simple legislative change would drive them out of existence. To curb perpetual trusts, make them subject to the GST. Congress could limit the application of the

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27. *See, e.g.*, Richard W. Nenno, *Planning with Perpetual Dynasty Trusts*, Appendix C (May 13, 2004), http://meetings.abanet.org/webupload/commupload/RP582000/newsletterpubs/nenno1.pdf) (perpetual trust form granting each beneficiary a limited power of appointment).

28. Waggoner, *supra* note 3, at 12.

GST exemption to outright transfers and transfers that will be included in the beneficiary's gross estate for estate tax purposes.[29] Because estate planners have enough experience with similar rules in the context of eligibility for the estate and gift tax marital deduction, such a GST rule would be easily understood by practitioners. Whether Congress would be receptive to such a change is uncertain; lawmakers might want to wait for evidence that Professor Waggoner's worst predictions have come true.

In the meantime, the American Law Institute has produced its *Restatement (Third) of Property: Wills and Other Donative Transfers*, for which Professor Waggoner served as the Reporter. The *Restatement (Third)* proposes a new Rule Against Perpetuities that would eliminate a distinction between contingent interests and vested interests.[30] The proposed rule would use a "two generation" rule for trust duration, where generations are defined as twenty-five years and the trust creator is deemed to be 12.5 years "into" his or her generation. Whether that proposal has any chance of being adopted remains to be seen, but it is certainly more complicated than limiting application of the GST exemption.

Of the many valid objections to perpetual trusts, Professor Waggoner appears to have abandoned (or ignored) most of them. Ray Madoff, for example, has criticized perpetual trusts as the trough at which a new American aristocracy will feed, free of the claims of any creditors. Generally speaking, perpetual trusts (and most irrevocable trusts of any duration) include spendthrift clauses that prevent most creditors from ever reaching the beneficiary's interest in the trust.[31] This is true even if the beneficiary has caused harm to others. Because almost all long-term trusts (whether or not perpetual) include spendthrift provisions, Madoff's critique has broad application. Thus law reformers adopting Madoff's view might want to eliminate spendthrift protection from all domestic trusts, or even just perpetual ones. Practically speaking, though, trust business currently subject to the jurisdictions of United States courts likely would relocate to foreign jurisdictions that maintain vigorous spendthrift protection, even for self-settled trusts. Thus, eliminating spendthrift protection from some or all U.S.-based trusts will put tort victims further from justice.

Instead of engaging with critiques offered by Madoff and others, Professor Waggoner insists that perpetual trusts are micro-manifestations of megalomania on the part of the uninformed rich (who themselves are the

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29. A proposal limiting the GST exemption to direct transfers is not new. *See* STAFF OF JOINT COMM. ON TAXATION, 100TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, 1263 (Comm. Print 1987) (the purpose of federal wealth transfer taxes is "not only to raise revenue, but also to do so in a manner that has as nearly as possible a uniform effect. This policy is best served when transfer tax consequences do not vary widely depending on whether property is transferred outright to immediately succeeding generations or is transferred in ways that skip generations.").

30. Ray Madoff, *America Builds an Aristocracy*, N.Y. TIMES, Jul. 11, 2010, at A-19.

31. *See, e.g.*, Sterk, *supra* note 1; Phyllis C. Smith, *The Estate and Gift Tax Implications of Self-Settled Domestic Asset Protection Trusts: Can You Really Have Your Cake and Eat It Too?*, 44 N. ENG. L. REV. 25 (2009).

beneficiaries of uninformed legislators). His focus on dead-hand control has a rich intellectual history, and indeed it is that history—and only that history—that does any work in Professor Waggoner's analysis. Contemporary perpetual trusts are better understood as wealth preservation vehicles in an era of relative political conservativism. Perpetual trusts are the ultimate status symbol, the über-wealthy's Cristal to others' Dom Perignon. Perpetual trusts are a symptom, not the cause, of wealth inequality. Reducing wealth inequality and increasing financial literacy will require educating the public about taxation and its role in operating a democratic government. We should stop fearing perpetual trusts and turn energies to tax literacy projects[32] that would transform "taxation" into something other than a dirty word for most Americans.

Conclusion

From the perspective of the lucky beneficiaries, perpetual trusts are a net economic positive. Regardless of the administrative difficulties or complications associated with perpetual trusts, the trust beneficiaries are better off financially with the trust than without it, as long as administrative costs are paid from the trust. Whether society as a whole is better (or worse) off is far from an easy question and one that merits sustained empirical and theoretical inquiry. A balanced view of perpetual trusts acknowledges the tension between allowing an individual to dispose of property as that individual sees fit, on the one hand, and the fact that some beneficiaries will be rewarded for a genetic connection, however slight, to a wealthy trust creator, and not due to individual merit.

Most academic critiques of the perpetual trust movement, including Professor Waggoner's, are unnecessarily inflammatory. The perpetual trust movement has been called ill advised, loony, and (now) folly. Billions of dollars flow to jurisdictions that permit perpetual trusts, suggesting that there are plenty of practicing lawyers (and clients) who take a vastly different view. Presumably so do legislators in those jurisdictions that have experienced job growth in trust-related businesses. It is to those lawmakers that Professor Waggoner and other academics should take their critiques of perpetual trusts. Doing so acknowledges a divide (how sizeable is not clear) between (or perhaps among) the academy, practicing attorneys and the taxpaying public. Public opinion about perpetual trusts is untested. My personal sense is that the majority of Americans would support (or at least tolerate) perpetual trusts on the theory that someday the estate tax might, in fact, apply to them. That sort of optimism is an article of faith that no amount of provocative rhetoric from the academy can shake.

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32. *See, e.g.*, *Tax Literacy Project*, Arizona State University Sandra Day O'Connor College of Law, https://www.law.asu.edu/programs/programs/taxlaw/taxliteracyproject.aspx.