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RAP Traps

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RAP TRAPS

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In [our statutes, our state] has an invaluable public heritage which should be charged only with intelligent conservatism . . . .
George H. Hand[1]

South Dakota repealed the Rule Against Perpetuities in 1983. The repeal proved to be the seed from which the state's trust industry grew. This article—the first of two linked pieces—begins by surveying the common law version of Rule Against Perpetuities ("RAP"), how it has traditionally been taught, and its labyrinthine, counter-intuitive mechanics. It holds many traps for both the wary and the unwary alike. In the pages which follow, a handful of inadequate contemporary reforms to the rule will be outlined, and the potentially devastating application of the rule to trusts and long-term family wealth planning will be touched upon. A second article will then review the caselaw applying RAP in South Dakota prior to 1983, consider how South Dakota RAP diverged from orthodox common law RAP, and retell the story of the official legislative repeal of the rule.

I. INTRODUCTION

The trust and fiduciary services industry in South Dakota is alive and well.[2] The industry supports important jobs and economic vitality for the state. The reasons underlying that success are numerous, but one spark in particular, which initiated the growth of professional trustee services was undoubtedly the State's repeal of the common law Rule Against Perpetuities ("RAP").[3] The repeal of RAP took place forty years ago, in 1983.[4] The official end of RAP, coupled with

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1. George H. Hand, *Preface* to THE REVISED CODES OF THE TERRITORY OF DAKOTA VI (1877) (Geo. H. Hand, ed., 2d ed. 1880).

2. *See* Kalena Thomhave, *Why the Superrich Are Flocking to South Dakota*, NATION (Oct. 25, 2021), https://perma.cc/THB7-LYR2 ("South Dakota has been a bastion of extreme wealth, a place for multimillionaires and billionaires around the world to stash their money in vehicles known as trusts."); David Wiltse & Filip Viskupič, *South Dakota's Wealth Is in Finance. South Dakotans Still Think It's in Farming*, WASH. POST (Oct. 14, 2021), https://perma.cc/L4PE-EYJM ("South Dakota trusts manage more than $360 billion in assets—roughly the size of Denmark's annual gross domestic product, and six times South Dakota's.").

3. *See* Christopher M. Reimer, *The Undiscovered Country: Wyoming's Emergence as a Leading Trust Situs Jurisdiction*, 11 WYO. L. REV. 165, 199 (2011) (attributing that state's trust industry growth to legislation allowing "[n]ear[ly] perpetual trusts").

4. SDCL § 43-5-8 (2004). In early 2022, in the wake of the news of the Pandora Papers, the South Dakota Trust Association composed a letter to the Congressman Bill Pascrell explaining:

> South Dakota, like many other states, repealed the rule against perpetuities and adopted modern trust laws to allow families to engage in legacy and generational

the fact that South Dakota lacks a state income tax, were the initial business climate environmental factors which allowed for trust industry growth.[5] The state's trust privacy and asset protection options were—and are—icing on the cake.[6] Today, the South Dakota Division of Banking reports that trust industry growth continues.[7] The official fortieth anniversary of the death of RAP therefore justifies a celebration of sorts. To that end, this article supplies the party hats and noisemakers in the form of an exploration of RAP's common law life—a life seemingly devoted to setting traps and doing very little else in the way of productive social outcomes.

> estate planning without an arbitrary cutoff date that requires termination. Dynasty trusts permit a family to coordinate the transfer of wealth as well as family values, incentives, and legacies to future generations according to the wishes and terms of the settlor. Such trusts are often used in South Dakota to pass on family businesses, farms, and ranches which further a family's commitment to values and philanthropy.

Letter from S.D. Tr. Ass'n to Congressman Bill Pascrell (Jan. 4, 2022) [hereinafter Letter 2]. The letter continued:

> The suggestion that perpetual trusts are untaxed and unregulated is severely misrepresented. All trusts must pay and abide by all federal and state taxation rules at all times. This includes gift taxes, estate taxes, generation skipping transfer taxes (GST), income taxes, FATCA, and FBAR. All trust income is taxed by the federal government annually. Non-grantor trusts normally reach the highest federal marginal tax rate at much lower thresholds than individual taxpayers and therefore pay higher income taxes.

Id.; *see also* Daniel Pascucci, *How Western States Help the Wealthy Avoid Taxes, Creditors*, LAW 360 2 (July 16, 2021) https://perma.cc/2YPH-D6Y4 (explaining that states like South Dakota "have built robust and growing industries" and compete for trust deposits, a "race [which] started with changes to the rule against perpetuities – an unwieldy vestige of English common law . . . ."). As to the correct capitalization of the "Against" within the rule's three word title, consult Jesse Dukeminier, Jr., *Perpetuities: Contagious Capitalization*, 20 J. LEGAL EDUC. 341 (1968). "For perpetuities buffs, any change in the rule against perpetuities, even a change so seemingly insignificant as capitalizing 'Against', incites a conversation, possibly an argument." *Id.* at 341. It seems to me that if RAP is an accepted acronym (and it is), then the capitalization of 'Against' must inevitably follow, else it would be RaP.

5. *See* Alexis Leondis, *Is Setting Up a Trust in South Dakota Really Worth It?*, BLOOMBERG (Oct. 14, 2021), https://perma.cc/RH6Q-CBVL (noting the advantages for trusts located in South Dakota). Leondis writes:

> South Dakota offers everything a wealthy person setting up a trust could want. There is no state income tax or capital gains tax, so investment gains on assets placed in the trust are tax-free if it's structured correctly. Robust protections provide anonymity and shield assets from creditors. And special provisions allow trusts established there to last forever, which means those assets would never be subject to the federal estate tax . . . .

Id.

6. *See In re* Chun Quan Yee Hop's Estate, 469 P.2d 183, 188 (Haw. 1970) (Kobayashi, J., dissenting) (calling RAP "perplexing, confusing and fraught with concealed traps") (internal citation omitted); ROBERT S. HUNTER, ILLINOIS PRACTICE SERIES, ESTATE PLANNING & ADMINISTRATION § 195.1 (4th ed. 2021) (emphasizing: "One of the most dangerous traps in drafting wills and other legal instruments is the Rule Against Perpetuities."); W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 721-24 (1952) (characterizing RAP as inflexible and a trap for the unwary).

7. *See* S.D. DEP'T OF LAB. & REGUL., ANNUAL REPORT FY 2021 36 (2021), https://perma.cc/6D4L-9REG (reporting: "Trust assets grew by more than 36% year over year due to new companies ramping up operations, existing company growth, and impressive growth in investment markets."). Trust company examination, supervision, and charter fees to the State totaled $1,767,185 in 2021. *Id.*

This article will serve as a preface to a second article which will examine RAP in South Dakota prior to the State's legislative repeal of the rule in 1983.[8] In this article, the foundation is laid by explaining the basic parameters of RAP in its common law form. Taking an entire article to lay this foundation is required on account of RAP's complexity. RAP is notoriously complex and oftentimes unjustifiably harmful to legitimate transactions, gifts, and trusts.[9] RAP may have relatively noble ends, but the legitimate intentions it lays waste to in pursuing its goals far offset its negligible benefits.[10] The traps which RAP lays are counter-intuitive and, in insisting upon a remorseless logic, often bordering on the illogical.[11] We will see the true character of RAP revealed in the discussion which follows. RAP is a mess.

This article devotes itself to no small task: outlining the basic structure and operations of that mess—common law RAP. The particulars and nuances of RAP as it existed in South Dakota—*if* it existed in South Dakota—will be deferred for the time being. Instead, common law RAP is the subject of our present inquiry, beginning with the English origin of the rule and the principal tomes of authority which American courts turn to when they find themselves confronted with it.

II. BACKGROUND AND DISCUSSION

The common law origins of RAP are traceable to the seventeenth-century English *Duke of Norfolk's Case*.[12] Common law judges authored RAP in its original format, not legislators. It took many years and many cases to form into any kind of coherence. The classic monograph for the American version of the rule is John Chipman Gray's *The Rule Against Perpetuities*,[13] which went through several editions beginning in 1886, culminating with the fourth edition published posthumously in 1942.[14] Gray is outsized. He is considered so authoritative that he "is one of the relatively few American works habitually cited by English Courts

8. SDCL § 43-5-8 (2004).

9. *See* David M. Becker, *A Methodology for Solving Perpetuities Problems Under the Common Law Rule: A Step-By-Step Process That Carefully Identifies All Testing Lives in Being*, 67 WASH. U. L.Q. 949, 953 (1989) (observing that "more than any other rule of law, the common law rule against perpetuities is shrouded with confusion and mystery").

10. *See* Fox v. Snow, 76 A.2d 877, 881 (N.J. 1950) (Vanderbilt, C.J., dissenting) (emphasizing that "the rule is arbitrary and serves no public policy").

11. *See* Emily J. King, *Arundel Corp. v. Marie*, 35 U. BALT. L.F. 140, 141 (2005) (noting the "often illogical possibilities [RAP] proposes") (internal citation omitted).

12. Duke of Norfolk v. Doctrine of Perpetuities (1682) 22 Eng. Rep. 931. The rule was then further developed in a handful of key cases: Lloyd v. Carew (1697) 1 Eng. Rep. 93; Stephens v. Stephens (1736) 25 Eng. Rep. 751; Long v. Blackall (1797) 101 Eng. Rep. 875; Thellusson v. Woodford (1805) 32 Eng. Rep. 1030; and Cadell v. Palmer (1833) 5 Eng. Rep. 745; *see also* George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19, 21 (1977) (clarifying that the rule was initially called "a rule *of* perpetuities and not a rule against perpetuities") (emphasis added). Even in its infancy, the rule was cloudy and controversial. *See id.* at 39 (citing evidence—as early as the late seventeenth century—"of the uncertainty that beclouded the opinions of the judges as to what constituted a perpetuity").

13. JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES (3d ed. 1915).

14. 6 AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES 3 (A. James Casner ed. 1952) [hereinafter 6 ALP].

in preference to works on the same subject by English authors."[15] Other influential book-length treatments include Jesse Dukeminier's *Perpetuities Law in Action*, Robert Lynn's *The Modern Rule Against Perpetuities*, and Simes and Smith's four volume *The Law of Future Interests*.[16] Richard Powell's, George Bogert's, and Austin Scott's treatises are reliable and widely cited.[17] The Restatement, of course, comes in handy, though oriented more towards reform than restatement.[18] Among law review articles, W. Barton Leach's *Perpetuities in a Nutshell* is essential, along with his follow-ups including the aptly titled *Reign of Terror* article.[19] But there are several others which are noteworthy as well.[20]

The sources outlined above have surveyed the RAP landscape with a microscopic, exhaustive lens. They are recommended for the lawyer who wishes to grasp RAP's intricacies. Interestingly, judges tend to rely upon and cite to secondary sources such as these in analyzing RAP to a greater degree than with other legal issues.[21] It is not my intent to match the depth of prior commentators in the section which follows, but merely to sketch a brief outline of the rule's workings. The fact that courts seem to prefer academics to other judges for

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15. *Id.*

16. JESSE DUKEMINIER, JR., PERPETUITIES LAW IN ACTION: KENTUCKY CASE LAW AND THE 1960 REFORM ACT (1962); JOHN A. BORRON, JR., originally authored by LEWIS M. SIMES AND ALLAN F. SMITH, THE LAW OF FUTURE INTERESTS (Edwin T. Hood & Julie M. Cheslik, eds, 3d ed. 2023) [hereinafter, SIMES & SMITH]. ROBERT J. LYNN, THE MODERN RULE AGAINST PERPETUITIES (1966). Another excellent and practical treatise is DAVID M. BECKER, PERPETUITIES AND ESTATE PLANNING: POTENTIAL PROBLEMS AND EFFECTIVE SOLUTIONS (1993).

17. AMY MORRIS HESS ET AL., BOGERT'S THE LAW OF TRUSTS AND TRUSTEES (2022) [hereinafter, BOGERT'S]; AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS (4th ed. 1987); RICHARD R. POWELL, THE LAW OF REAL PROPERTY (1949).

18. Division VIII of RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS (§§ 27.1-3) (2011) is titled "Public-Policy Limitation on Dead-Hand Control: the Rule Against Perpetuities."

19. W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938); W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952); *see also* W. Barton Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973 (1965) (updating the original again). Leach also co-authored a book on RAP. J.H.C. MORRIS & W. BARTON LEACH, THE RULE AGAINST PERPETUITIES (2d ed. 1962).

20. Carolyn Burgess Featheringill, *Understanding the Rule Against Perpetuities: A Step-by-Step Approach*, 13 CUMB. L. REV. 161 (1982); Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867 (1986); Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1 (1992); Thomas P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513 (2003); Robert J. Lynn & James W. Carpenter, *Applying the Rule Against Perpetuities to Class Gifts: The Influence of Leach*, 43 TEX. L. REV. 37 (1964); Myres S. McDougal, Future Interests Restated: Tradition Versus Clarification and Reform, 55 HARV. L. REV. 1077 (1942); Ralph A. Newman, *Perpetuities, Restraints on Alienability, and the Duration of Trusts*, 16 VAND. L. REV. 57 (1962); Richard R. Powell, *Nutshells and Perpetuities*, 7 U. CHI. L. REV. 489 (1940); Daniel M. Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?*, 56 MICH. L. REV. 683 (1958); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005); Charles Sweet, *The Monstrous Regiment of the Rule Against Perpetuities*, 18 JURID. REV. 132 (1906).

21. *See* Cattail Assocs. v. Sass, 907 A.2d 828, 840 (Md. Ct. App. 2006) (citing Leach, Gray, and others); Atl. Richfield Co. v. Whiting Oil and Gas Corp., 320 P.3d 1179, 1185-86 (Colo. 2014) (citing Leach, Gray, Dukeminier, and Simes & Smith); ConocoPhillips Co. v. Koopman, 547 S.W.3d 858, 867 (Tex. 2018) (citing Powell); Estate of Dahlke *ex rel*. Jubie v. Dahlke, 319 P.3d 116, 129 n.13 (Wyo. 2014) (citing Lynn); White v. Fleet Bank of Me., 739 A.2d 373, 378 n.10 (Me. 1999) (citing Waggoner); Berry v. Union Nat'l Bank, 262 S.E.2d 766, 771 (W. Va. 1980) (citing Bogert).

mapping RAP does suggest that courts are not always as adept as they ought to be when it comes to RAP. It is a difficult rule.[22] It is a demanding rule.

So, why RAP? For what purposes was this difficulty created? The *Symphony Space, Inc. v. Pergola Properties, Inc.*[23] court (a case analyzed in more detail below) sums up the primary ambitions behind the rule.[24]

> The Rule against Perpetuities evolved from judicial efforts during the 17th century to limit control of title to real property by the dead hand of landowners reaching into future generations. Underlying both early and modern rules restricting future dispositions of property is the principle that it is socially undesirable for property to be inalienable for an unreasonable period of time. These rules thus seek "to ensure the productive use and development of property by its current beneficial owners by simplifying ownership, facilitating exchange and freeing property from unknown or embarrassing impediments to alienability . . . ."[25]

RAP is intended to function as a pro-private enterprise constraint and thereby help ensure the marketability of resources, especially real property, though it applies to transfers of personal property as well.[26] Theoretically, if too much property and resources are taken off the market for too long, economic growth will be dampened. Free alienability is desirable.[27] *The Duke of Norfolk's Case* is often characterized as firmly laissez-faire, removing major restraints on alienation so that "successful men would rise and the incompetent would fall, regardless of the efforts or prominence of their ancestors."[28] Here, one can also discern the voicing of secondary, less laissez-faire justifications: curtailing dead hand control as an end in itself and leveling the playing field by leveling the rich.[29] RAP, in this

22. *See* Buxton v. Kroeger, 117 S.W. 1147, 1161 (Mo. 1909) (Woodson, J., dissenting) (conceding that RAP "is often found difficult" to apply); Moose v. Moose, 261 Ark. N-55, 2 (Ark. 1977) (en banc) (unreported) (acknowledging that RAP is "difficult in application").

23. 669 N.E.2d 799 (N.Y. 1996).

24. *Id.* at 802-03; Thomas E. Simmons, *R.I.P. RAP (1889-1993)*, 69 S.D. L. Rev. (A)(4) (forthcoming 2024) [hereinafter *Part II*].

25. *Symphony Space*, 669 N.E.2d at 802-03 (internal citation omitted).

26. *See* Sherman v. Richmond Hose Co. No. 2, 130 N.E. 613, 616 (N.Y. 1921) (applying RAP to future interests in personal property); Morrison v. Piper, 566 N.E.2d 643, 645 (N.Y. 1990) (applying RAP to preemptive rights). *But see* Producers Oil Co. v. Gore, 610 P.2d 772, 773 (Okla. 1980) (reasoning that "the Oklahoma rule against perpetuities does not apply to contractual preemptive options in operating agreements under oil and gas leases"); Am. Nat. Res., LLC v. Eagle Rock Energy Partners, 374 P.3d 766, 769 (Okla. 2016) (finding that RAP does not apply to "contracts which are entirely personal.").

27. *See* Wildenstein & Co. v. Wallis, 595 N.E.2d 828, 831-32 (N.Y. 1992) (asserting that RAP (and its lesser-known partner of a rule which directly attacks restrains on alienation) as "striv[ing] to strike a balance between society's interest in the free alienability of property and the rights of owners to direct future transfers."); Lewis M. Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 723 (1955) (concluding that RAP "strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy" and that "it is socially desirable that the wealth of the world be controlled by its living members and not by the dead").

28. Haskins, *supra* note 12, at 21.

29. *See* Leach, *Reign of Terror*, *supra* note 6, at 727 (justifying RAP insofar as it removes the "threat to the public welfare from family dynasties").

frame, represents not a mechanism for permitting free enterprise but as combatting the intentions of ancestors and wealth itself.[30] To encourage commerce is a far cry from undermining the success of commerce champions.[31] Indeed, more cautious historians have construed *The Duke of Norfolk's Case* itself not as free market friendly at all, but as anti-mercantile:

> [A] new climate of opinion has emerged, and an increasing number of historians have accepted the theory that the dominant ethos of the seventeenth century was that prevailing in a landed class generally hostile to mercantile or capitalist ideas. Such a class might be expected to take a jaundiced view of the free alienability favored by eager city buyers.[32]

Most justifications of RAP today, though, cite free alienability as the primary objective.[33] Marketability is good.[34] Alienability is awesome. So are freedom of disposition and freedom of contract, but everything has limits. RAP sets some. But without any degree of self-conscious irony, RAP happily decimates testamentary and commercial objectives in the name of advancing them. It recklessly throws out the baby to protect the bathwater for a community of vague, theoretical bathers who deserve a freely alienable tub of suds.[35] The last thing RAP wants to see is any aristocratic bath toys bobbing about in the soap.

Whether RAP actually achieves its goal and whether its achievements outweigh the cost of its complexity and its disruption of transfers which violate its strictures can be reasonably called into doubt, for in attempting to reinforce wealth generation and bolster marketability, it also frustrates transactions and upends both testamentary and inter vivos gifts.[36] To understand how RAP functions, an

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30. Simes, *supra* note 27, at 722 (noting that to the extent that RAP combats wealth, per se, the income and estate tax are much more effective weapons).

31. *See, e.g.*, *In re* Estate of Anderson, 541 So.2d 423, 428 (Miss. 1989) (justifying RAP as a response to the demand that courts "curb trusts which can protect wealthy beneficiaries").

32. Haskins, *supra* note 12, at 22.

33. *But see* James J. Kelly, Jr., *Land Trusts That Conserve Communities*, 59 DEPAUL L. REV. 69, 109 (2009) ("A law and economics dialogue—once dominated by calls for maximizing the realm of the free market—now includes the recognition by some of the relevance of alienability restrictions to supporting community and other social goods.").

34. North Carolina's Supreme Court Justice Louis B. Meyer explains:

> Concerned with the ability of royalty and landed gentry to control indefinitely the disposition of their real and personal property, the courts of England first began prohibiting long-term inalienability of property. The early English cases gave rise to the common law rule against perpetuities recognized by the majority of American jurisdictions . . . . The underlying and fundamental purpose of the common law rule against perpetuities is the protection of society by allowing full utilization of land. As commonly noted, "[t]he rule [against perpetuities] evolved to prevent . . . property from being fettered with future interests so remote that the alienability of the land and its marketability would be impaired, preventing its full utilization for the benefit of society at large as well as of its current owners.

Vill. of Pinehurst v. Reg'l Invs. of Moore, Inc., 412 S.E.2d 645, 648 (N.C. 1992) (Meyer, J., dissenting) (internal citations omitted).

35. *See id.* (emphasizing: "Although sound in its general prohibition of long-term inalienability of property, the rule against perpetuities is probably the most widely criticized principle of common law.").

36. *See* Wildenstein & Co. v. Wallis, 595 N.E.2d 828, 831-32 (N.Y. 1992) (describing RAP as "a rigid formula that invalidates any interest that may not vest within the prescribed period" with

examination of the rule in action is required. In the following section, the rule's principles and how it operates are described.

A. CHURLISH RAP IN A BREVILOQUENT NUTSHELL

Five basic points must be asserted at the outset, the meaning of which will probably only become clear after working through a few examples and hypotheticals. Dukeminier described these points as RAP's "internal logic."[37] He wrote of these points as a "golden thread, which leads in and out of the intricate passages of the Rule [A]gainst Perpetuities . . . ."[38] His points are the first five (I've added a sixth):

1. RAP is a What-*Might*-Happen Rule of Proof
2. RAP is Unconcerned with the Duration of Estates
3. The "Perpetual" RAP Period is Far Short of Perpetual
4. RAP Invalidates Future Interests Which Vest Too Remotely
5. RAP Upsets Grantor Intent[39]
6. Not All of RAP's Possibilities Are Actually Possible

First, RAP is a logical rule of proof which considers what might happen at the creation of a future interest.[40] It requires the forecasting of possible futures.[41] As Dukeminier frames things, "The donee of an interest must prove that his interest will vest upon creation or vest or fail thereafter within the applicable perpetuities period. If there is any possibility that the interest will remain contingent after the perpetuities period expires, the interest is void."[42] The test, Lynn explains, "is a possibilities test, not a probabilities test, nor an actualities test."[43] The inquiry considers whether there is any scenario in which a future interest would vest (or fail to vest) beyond a period equal to a life in being plus twenty-one years. If there is such a scenario, even if it is extremely unlikely to occur, RAP invalidates the future interest and wipes it away. RAP obliterates future property interests in order that property be more freely alienable.[44]

For example: Aaliyah devises Whiteacre "to Bajes for life, remainder to Bajes' child who first reaches the age of twenty-two." At Aaliyah's death, Bajes

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accompanying "capricious consequences" which amount to "a 'Reign of Terror'") (internal citations omitted).

37. Dukeminier, *Modern Guide*, *supra* note 20, at 1868.

38. *Id.* at 1913.

39. *Id.* at 1867-1913.

40. *See In re* Estate of Anderson, 541 So.2d 423, 428 (Miss. 1989) (characterizing RAP "as a theorem, as a rule of logical proof").

41. *See* Joyner v. Duncan, 264 S.E.2d 76, 81-82 (N.C. 1980) (explaining that "if there is any possibility, when the interest is created, that it may vest in interest at a remote time, then, under the rule, that interest is void") (internal citations omitted).

42. Dukeminier, *Modern Guide*, *supra* note 20, at 1870.

43. LYNN, *supra* note 16, at 33 (emphasis omitted).

44. *See* Arundel Corp. v. Marie, 860 A.2d 886, 890 (Md. 2004) (explaining that "the Rule was designed to promote the alienability of property"). The Rule also "facilitates the alienability of property, helps prevent uncertain title, and encourages owners to make effective use of their property." *Id.* (internal citations omitted).

has five children (C-G) ages seventeen, eighteen, nineteen, twenty, and twenty-one. It is quite likely that within a year's time, Bajes' oldest child, Gabina, will reach the age of twenty-two whereupon the remainder will vest in Gabina. Once Gabina's remainder vests, it is alienable by Gabina (so that Gabina can sell, encumber, or devise it), and even if she goes on to predecease her mother, Gabina's estate will be vested with the remainder interest. Thus, under this most probable of scenarios, upon the testator's death, the contingent vested remainder in Gabina will vest in about twelve months. How long it takes for the vested remainder to become possessory is irrelevant; it's vesting that counts. But because RAP requires the donee to prove that the contingent remainder following Bajes' life estate must vest (or fail to vest) within a life in being plus twenty-one years in all circumstances, alternative, far less likely scenarios must also be considered.

Consider, for example: Aaliyah dies. Next, Bajes becomes pregnant with her sixth child (whom she plans to name Haboos). When Bajes goes into labor, her five young adult children climb into a taxi to meet her at the hospital. Tragically, their taxi careens off the Brooklyn Bridge. All five children die. Then Bajes dies on account of a complicated delivery survived by her newborn daughter, H. All of this transpires before Bajes' oldest child had reached age twenty-two and now there is only a single newborn child of Bajes alive, baby Haboos. We will not know whether Haboos will survive to age twenty-two for another twenty-two years. Thus, it is possible that the remainder interest would either vest (if Haboos reaches the age of twenty-two) or fail to vest (if Haboos does not) until a span of time longer than Bajes' lifetime plus twenty-one years. Accordingly, the remainder interest is void. None of Bajes' children take. Instead, Bajes receives fee simple from Aaliyah's estate.

The lesson under our first point is that RAP requires an improbable possibilities analysis of remote vesting.[45] It is a question of what might happen.[46] Unlikeliness is irrelevant.[47] And about the only things that are certain in RAP world are presumptions, the primary ones being: "everyone living on a given day might die the next and that every living person is capable of having children . . . ."[48]

Second, RAP is unconcerned with the duration of estates.[49] What RAP is concerned with is remote vesting, not perpetual ownership.[50] Indeed, the most favored estate (because it is the most marketable) is the fee simple estate, and the

45. *See* Gray v. Gray, 188 S.W.2d 440, 443 (Ky. 1945) (explaining that RAP examines "the suspension of the ultimate vesting of an estate").

46. *See* Maher v. Maher, 139 F.Supp. 294, 296 (E.D. Ky. 1956) ("It is the mere shadowy, though unlikely, possibility of the happening of such contingency that brings the case within the inhibition.").

47. *See id.* ("The rule provides against possibilities . . . .").

48. Frank L. Jones, *Measuring Lives Under the Pennsylvania Statutory Rule Against Perpetuities*, 109 U. PA. L. REV. 54, 55 (1960).

49. *See* Joyner v. Duncan , 264 S.E.2d 76, 82 (N.C. 1980) ("The rule does not apply to limit the duration of a trust.").

50. *See id.* (explaining that "the duration of . . . vested interests may extend beyond the period of the rule") (internal citation omitted).

fee simple estate enjoys a perpetual duration.[51] RAP *prefers* the perpetual fee simple estate, as can be seen in the previous example in which the rule voided a future interest and replaced a life estate and a contingent remainder with fee simple by operation of law. It must be conceded that individual human beings themselves do not enjoy a perpetual material existence. A human being's ability to own property is always foreshortened by the human being's natural life span, although artificial legal persons (like corporations) often enjoy a perpetual existence. Nothing prohibits a family or a corporation from owning property forever. Most justifications of RAP claim that it is not about wealth distribution, but only with making redistributions possible by ensuring that property is more capable of being bought and sold on the marketplace. It "contributes to the probable utilization of the wealth of society."[52] Some RAP defenders do praise it as a wealth leveler; as a sort of common law Robin Hood doctrine.[53] However, as again demonstrated by the example above, RAP can actually act to further concentrate wealth; the operation of RAP generated a Whiteacre owned in fee simple by Bajes, an estate far more valuable than her mere life estate. At the same time, RAP voided the alternative contingent remainders which were intended to vest in one of her children. By voiding future interests (typically held by younger consumers) and expanding present possessory estates (typically held by income-earning grown-ups), RAP is more of a King John than a Robin Hood.

Third, there is some false advertising that needs clarification. The Rule Against Perpetuities does not address perpetuities at all. The "perpetual" RAP period is far short of perpetual. It's a catchy name, granted. Most everyone detests perpetuities, but the Rule Against Perpetuities would be more accurately named the Rule Against Future Interests Which Might Not Vest For Twenty-One Years Plus a Lifetime. But that is kind of wordy. The point is that a "perpetuity" does not mean perpetual, it means more than a lifetime plus twenty-one years.[54]

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51. *See* Norris v. Methodist Home, 464 S.W.2d 677, 678 (Tex. Civ. App. 1971) ("a fee simple is favored").

52. RESTATEMENT (FIRST) OF PROP. IV, I *Introductory Note* (1944). The Restatement Third notes:

> Legal historians have concluded, however, that promoting free alienability of land was not the original purpose of the Rule: "[The] connection [of the common-law Rule] with the value of freedom of disposition was not originally established because of some economic theory about the merits of a free market in land; 17th century lawyers had not read Adam Smith."

RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 27 (2011) (quoting A.W.B. SIMPSON, LEADING CASES IN THE COMMON LAW 78-79 (1995)); *see also* Lewis M. Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 710 (1955) (asserting that "the Rule against Perpetuities furthers alienability; if it were not for this Rule, property would be unproductive and society would have less income.").

53. *See* HARVARD LAW REVIEW, Note, *Dynasty Trusts and the Rule Against Perpetuities*, 116 HARV. L. REV. 2588, 2588 (2003) (explaining that "the Rule has been thought to promote the free flow of commerce by placing a limit on the length of time property can be subject to nonvested future interests, which decrease alienability"); Eric Kades, *Of Piketty and Perpetuities: Dynastic Wealth in the Twenty-First Century (and Beyond)*, 60 B.C. L. REV. 145, 199 (2019) (claiming that "dissipation of family fortunes can be a potent tool for breaking up dynastic family wealth and increasing socioeconomic mobility").

54. *Part II*, *supra* note 24, at (A)(3).

Fourth, RAP invalidates future interests which vest too remotely. It is all about "vesting."[55] Understanding when an interest technically vests (or affirmatively fails to vest) is key to understanding the rule's operation. To vest does not mean to become possessory, nor does it mean for a future interest to become a present interest. It means only that the future interest is no longer contingent. More will be said of this later.

Fifth, RAP upsets grantor intent.[56] It overturns it. It upends what was intended. The rule thus runs counter to the primary premise of private law, giving effect to the intent expressed in a governing instrument. RAP's purported aim is to constrain dead hand control—at the expense of intent. Not only is RAP not a rule of construction, it is the very antithesis of a rule of construction.[57] It voids construction in order to achieve its own questionable conception of social goods.

Sixth, and finally, RAP's idea of what is "possible" is singular. Typically, in the law, assertions are susceptible to proof. Thus, for example, if a donor deeds a gravel pit to his son so long as the pit produces gravel, remainder to his daughter, able lawyers would be prepared to prove how long the pit might produce gravel; whether, for example, the pit is certain to be exhausted well within a decade, let alone a lifetime plus twenty-one years. Assume that a court, after considering evidence and testimony, enters a finding that the pit will be exhausted in ten years or less. Assume that the parties to an action all stipulate to that fact. Will this permit the gift to survive RAP? No, because such a fact is never possible in the weird world of RAP.[58]

The consensus seems to be that it has failed to achieve its aims.[59] Lynn asserts: "Insofar as the Rule was intended to preclude the creation of family dynasties, it has proved to be a signal failure. As a device to facilitate marketability, it is exceptionally awkward."[60] As a trap for drafters, it has proved singular.[61] Yet it remains alive and well in many jurisdictions in spite of its ineffectiveness. It has, however, been effective at a least one thing: bafflement. It has baffled laymen, lawyers, and law students for hundreds of years.

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55. *Part II*, *supra* note 24, at (A)(5).

56. *See* Lufburrow v. Williams, 263 S.E.2d 535, 536 (Ga. Ct. App. 1979) (characterizing RAP not as "a mere rule of construction" but "a positive mandate of law"); *In re* Schmitz's Estate, 332 N.W.2d 666, 669 (Neb. 1983) (explaining that the "rule against perpetuities is not a rule of construction but a rule of property").

57. *See* Verner F. Chaffin, *The Rule Against Perpetuities as Applied to Georgia Wills and Trusts: A Survey and Suggestions for Reform*, 16 GA. L. REV. 235, 237-38 (1982) (asserting that RAP's "function is to police and defeat the donor's intent when he seeks to extend his post-mortem control beyond permissible community bounds").

58. *Part II*, *supra* note 24 at (A)(6)(a).

59. Chaffin, *supra* note 57, at 238. "Critics have cast doubt upon its effectiveness as a device for carrying out public policy and have charged that the Rule invalidates perfectly reasonable gifts because the draftsman was careless or ignorant." *Id.*

60. LYNN, *supra* note 16, at 10. Lynn feels that RAP "does help to strike a balance between the wishes of the dead and the desires of the living with respect to the use of wealth." *Id.*

61. *See* Chaffin, *supra* note 57, at 239 (noting: "The ease with which the Rule may be violated has enlarged the potential liability of the attorney . . . .").

1. Rudimental Future Interests Subject to the Rule

Before RAP itself can be examined in detail, an explication of the present possessory estates and the future estates coupled with them must be undertaken since some—but not all—varieties of future interests are subject to the Rule.[62] The threshold question is whether a future interest—an estate—is subject to RAP. Estates have been called "[t]he distinctive feature of English-American land law . . . ."[63] They were unknown by Romans or any of the continental (civil) law jurisdictions.[64] Estates are the means by which the duration land can be apportioned into successive intervals; intervals which might be measured by lives, years, or future events (contingencies) which may or may not occur.[65] The legal recognition of estates permit the owner of land (that is, an estate) to carry out a transfer (including a testamentary transfer) by which she can specify who shall enjoy the land in the present as well as in the future.[66] Estates were also recognized in chattels.[67]

The classification of various estates can be daunting. Estates are primarily classified into two kinds: freehold estates (which endure for an indefinite and unfixed period of time; theoretically forever) and nonfreehold estates (which exist for a fixed period).[68] They are also distinguished according to whether the interest is a present one or a future one, and further by their terms or mode of creation.[69] The classification of estates has bedeviled law students for many years and is often cited as the most challenging (and useless) intellectual exercises required of 1L students—difficult on account of the levels of abstraction involved and useless because many varieties (e.g., the fee tail) have disappeared from the contemporary legal landscape or their distinctions are increasingly ignored.

At South Dakota's lone law school, Professor John Davidson taught 1Ls the course titled "Property" for many years and utilized the respected Cribbet and

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62. *See* Warren v. Albrecht, 571 N.E.2d 1179, 1180 (Ill. App. Ct. 1991) ("Interests subject to the rule are contingent remainders, executory interests (or devises), options to purchase land not incident to a lease for years, and powers of appointment."). "Interests not subject to the rule are present interests in possession, reversions, vested remainders, possibilities of reverter, powers of termination, charitable trusts, and resulting trusts." *Id.* (quoting RALPH E. BOYER, SURVEY OF THE LAW OF PROPERTY 159 (3d ed. 1981)).

63. HERBERT THORNDIKE TIFFANY, A TREATISE ON THE MODERN LAW OF REAL PROPERTY AND OTHER INTERESTS IN LAND 27 (abridged ed. 1940).

64. *Id.* n.2. As late as the thirteenth century, "estate" described not an interest in land but rather the status of a feudal tenant:

> but, under [the] feudal system, personal status was so closely connected with proprietary rights that one was said to have status of tenant for life or of tenant in fee, according to duration of his feudal holding, and consequently but a slight change of expression was necessary to use word with reference to extent of his interest in land.

Id. (internal citations omitted).

65. *Id.* at 27.

66. *Id.* at 28.

67. John Chipman Gray, *Future Interests in Personal Property*, 14 HARV. L. REV. 397 (1901); Gruen v. Gruen, 496 N.E.2d 869 (N.Y. 1986). *But see* TIFFANY, *supra* note 63, at 28 (claiming: "Estates can exist not only in land, but in 'incorporeal things real,' but cannot be created in chattels . . . ").

68. TIFFANY, *supra* note 63, at 29.

69. *Id.*

Johnson casebook. The fifth edition of that text, published in the year following South Dakota's repeal of RAP, provides this helpful outline of estates which puts the estates to which RAP applies in the proper context:

CLASSIFICATION OF INTERESTS IN REAL PROPERTY

I. Freehold Estates (these are real property)
- A. Fee Simple (always inheritable)
  - 1. fee simple absolute
  - 2. fee simple defeasible (also called base or qualified fee)
    - a. fee simple subject to a special limitation (also called fee simple subject to common law limitation; fee simple determinable)
    - b. fee simple subject to condition subsequent
    - c. fee simple subject to executory limitation
- B. Fee Tail (successor to fee simple conditional – always inheritable)
- C. Life Estates (never inheritable)
  - 1. created by deed or will (conventional life estates)
    - a. life estate for the life of the grantee
    - b. life estate for the life of one other than the grantee – called estate pur autre vie
  - 2. created by operation of law (legal life estates)
    - a. fee tail after possibility of issue extinct
    - b. dower
    - c. curtesy
    - d. estate during coverture

II. Non-freehold Estates (chattels real – not inheritable at common law – treated as personal property)
- A. Tenancy for years (for a term)
- B. Tenancy for period to period (meaning year to year, month to month or week to week) – periodic tenancy
- C. Tenancy at will
- D. Tenancy at sufferance (not really an estate)

III. Concurrent Estates (meaning ownership or possession by two or more persons at the same time)
- A. Joint tenancy
- B. Tenancy by the entirety
- C. Tenancy in common
- D. Tenancy in coparcenary

IV. Incorporeal Interests in Real Property (these cannot be possessed physically because they consist of mere rights)
- A. Easements
- B. Profits
- C. Covenants running with the land

D. Equitable servitudes
E. Licenses

V. Future Interests
A. Reversions
B. Possibilities of reverter
C. Rights of re-entry for condition broken (more recently called powers of termination)
D. Remainders
1. vested remainders
2. contingent remainders *
E. Executory interests *
1. executory limitations created by deed
a. springing uses
b. shifting uses
2. executory devises created by will
a. like springing uses
b. shifting uses[70]

Under its classic, orthodox version, RAP only applies to two varieties of future interests: contingent remainders and contingent executory interests (designated with an "*" above; parts V(D)(2) and V(E) of the outline).[71] RAP is unconcerned with vested remainders, reversions, possibilities of reverter, and rights of entry for conditions broken.[72] It theoretically leaves unmolested indefeasibly vested executory interests, but there exists, according to Lynn, "little authority" on this point.[73] One cluster of the RAP-exempt future interests are easy to identify as ones retained by the grantor: reversions, possibilities of reverter, and rights of entry.[74] Dukeminier emphasizes: "Future interests retained by the transferor—reversions, possibilities of reverter, and rights of entry—are not subject to the Rule Against Perpetuities."[75] RAP leaves grantor-retained future interests intact, even where it might be a very, very long time before the future interest vests, such as a grant to a grantee so long as no horseplay is permitted on the premises.

Classification of those estates and interests which are subject to the rule, then, ought to be straightforward, one might think. One would be wrong, however. Distinguishing between hierarchies of transferee-held future interests is often ticklish. Distinguishing, for example, between a contingent remainder (subject to RAP) and a vested remainder (immune from RAP) can prove elusive.

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70. JOHN E. CRIBBET & CORWIN W. JOHNSON, CASES AND MATERIALS ON PROPERTY, 244-45 (5th ed. 1984).
71. LYNN, *supra* note 16, at 15.
72. *Id.*
73. *Id.* (internal citations omitted).
74. Dukeminier, *Modern Guide*, *supra* note 20, at 1869.
75. *Id.* (emphasis omitted).

For example: A'mal deeds a life estate in Whiteacre "to Bushra, remainder to Charman, but if Charman dies before Bushra does then remainder to Diwa instead." Logically, the RAP newbie might classify Charman's and Diwa's future interests (which are both contingent on whether Charman survives Bushra) as alternative contingent remainders. They are both contingent upon whether or not Charman survives Bushra. So, one might conclude, they are both contingent remainders. Wrong. Alternative contingent remainders are a thing, to be sure, but here, Charman's interest would be correctly classified as a vested remainder and Diwa's future interest as a contingent executory interest. Why? Because the words grant Charman a vested interest and afterwards a clause divests her of it if the survivorship event does not occur. That is, "because the condition is expressed as subsequent in form."[76]

Compare: A'mal deeds a life estate in Whiteacre "to Bushra, remainder to Charman if Charman survives her, otherwise to Diwa." This language would create alternative contingent remainders. Why?! Because "the conditional element is incorporated into the description of, or into the gift to the remainder-man . . . ."[77] The distinction can be made based on the difference in language, but the distinction seems rather arbitrary.[78]

Or consider the problem of distinguishing between a possibility of reverter and a contingent executory interest. This one is a bit easier since—the attentive reader will recall, RAP is unconcerned with transferor-retained future interests.

Observe: Ali deeds Whiteacre "to Bilal so long as the premises are not used as a laundromat." Twenty years pass. Ali makes a Will leaving everything to Cemal, an infant. Twenty more years pass, and Ali dies. Another forty years pass, and Whiteacre begins to be utilized as a laundromat. Cemal has just turned sixty. Bidal held a determinable fee. Ali retained a possibility of reverter, exempt from RAP. Therefore, immediately upon the laundromat's ribbon-cutting, Whiteacre passes in fee simple to Ali's estate and thence—via probate—to Cemal as his legatee. RAP remains unoffended and inoperative.

Compare: Ali deeds Whiteacre "to Bilal so long as the premises are not used as a laundromat, then to Cemal." The facts are otherwise identical—after sixty

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76. Albert Martin Kales, *A Modern Dialogue Between Doctor and Student on the Distinction Between Vested and Contingent Remainders*, 24 L.Q. REV. 301, 305 (1908) [hereinafter Kales I].

77. GRAY, *supra* note 13, § 108, at 85.

78. *See* Kales I, *supra* note 76, at 315 (relaying a humorous and fictional dialogue between law student ("S") and law professor (Doctor; "D") on this very distinction). To wit:

> *S*. . . . your distinction between vested and contingent remainders seems even to fail to mark the difference between remainders to which the Rule against Perpetuities applies and those to which it does not. Am I not right?
>
> *D*. The dilemmas which you suggest certainly attend what I conceive to be the true distinction between vested and contingent remainders.
>
> *S*. Would you then state of what use is your distinction? Why should any one pay the slightest attention to it or try to master it?
>
> *D*. Its mastery is a tribute which the past exacts.
>
> *S*. And the retort to oppressive demands for tribute is revolution.

Id.

years, laundromat services commence on the premises. In this case, Bidal held a determinable fee and Cemal a contingent executory interest—a shifting contingent executory interest, to be precise. Springing executory interests are subject to RAP, and since the condition of laundromat operations might have occurred more than twenty-one years after Bidal's death, the future interest is void. In this case, however, the law would intervene and construe a possibility of reverter still held by Ali.[79] Thus, when the laundromat operations commence on site, the property will re-vest in Ali (or, more accurately, his estate, since he's dead by then). Moreover, if Ali recognized his drafting problem before his death, he could have devised his possibility of reverter to Cemal and accomplished his aims (i.e., for Bidal to enjoy the property until a laundromat starts up, whereupon to Cemal). The problem of achieving grantor intent presented by RAP—in this hypothetical fact pattern—is capable of being fixed by a good trusts and estates lawyer.

But—and here's another twist—consider if the grant had read slightly differently: Ali deeds Whiteacre "to Bidal, but if a laundromat is operated on the premises, to Cemal." This conveyance ("to Bidal, but if") must be contrasted with the previous example ("to Bidal so long as"). In the present case, Cemal's future interest is void under RAP, yet Ali does not retain a right of entry by implication and therefore cannot fix the deed by devising the future interest to Cemal.[80]

Clear as mud?

The Rule also can apply to interests beyond the contingent remainder and the contingent executory interest such as an option to purchase. The *Symphony Space* case is an illustration of a commercial option running afoul of RAP.[81] Some RAP adorers have gone so far as to try to extend its reach to all contingent future interests.[82] At the same time, distinctions between certain future interests—contingent remainders and contingent executory interests in particular—have begun to face.[83] All of this is really a lot for most law students to digest.[84] Perhaps too much.[85]

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79. LYNN, *supra* note 16, at 28-29 n. 36.

80. *Id.*; Robert J. Lynn & John F. Ramser, *Applying the Rule Against Perpetuities to Functional Equivalents: Copps Chapel and the Woburn Church Revisited*, 43 IOWA L. REV. 36, 42 (1957).

81. *Part II*, *supra* note 2454 at (A)(4).

82. *See* Kales I, *supra* note 76, at 313-14 ("[RAP] is a modern rule dictated by modern public policy, and the tendency naturally is to make it apply to *all* contingent future interests . . . .") (emphasis added); *see also* Dukeminier, *Modern Guide*, *supra* note 20, at 1868 (stating "[t]he assumption that only *contingent* future interests are objectionable is questionable"); LYNN, *supra* note 16, at 27-28 (noting, as to the categorization of future interests subject to RAP, "*there is little emphasis on the categories as they exist in recent cases*").

83. Jesse Dukeminier, *Contingent Remainders and Executory Interests: A Requiem for the Distinction*, 43 MINN. L. REV. 13 (1958).

84. *See* John K. Phoebus, *The Rule Against Perpetuities – The Implication of a Reasonable Time for the Performance of a Contingency to the Vesting of Future Interests in Commercial Transactions – Maryland's Hybrid Approach to the Rule Against Perpetuities in Commercial Contexts*, 101 DICK. L. REV. 619, 620 (1997) (confirming that "the Rule Against Perpetuities has long vexed students . . . .").

85. *See* Darryl C. Wilson, *Waltzing to R.A.P.*, 39 CREIGHTON L. REV. 129, 131 (2005) (casting the problem as one of conceptual severability). "[S]tudents' ability to understand the subject [of RAP] depends on their ability to grasp concepts involving competing interests that stand apart from the tangible thing (res) itself." *Id.* "Many students are simply too overwhelmed with the law school experience as a

The Property textbooks bear out the suspicion that many law professors have simply given up trying to navigate the RAP labyrinth. Cribbet and Johnson, in the textbook I studied while a 1L law student, included section headings for doctrines somewhat related to RAP—The Rule in Shelley's Case, the Doctrine of Worthier Title, and the Destructibility of Contingent Remainders.[86] The authors included just one case—*The City of Klamath Falls v. Bell*[87]—which touched upon RAP, and their discussion of RAP was limited to a single sentence: "[An executory interest] falls within the embrace of the Rule Against Perpetuities, [possibilities of reverter and powers of termination] do not (although they may be barred by relevant statutes of limitation . . . .)"[88] That's it. Rather than further examine RAP, the textbook simply defers to more advanced law school courses: "The full treatment of the complex Rule Against Perpetuities is reserved for a later course in the curriculum."[89] (Presumably, that later course is Trusts & Wills.) And with that, Cribbet and Johnson concluded, enough had been said, which was very little indeed. Certainly, they left RAP largely mystical and unexplained.

At South Dakota's law school, Professor Davidson consistently devoted some lecture time to the topic and emphasized the rule's concern with excessive "dead hand" control.[90] He also took note of South Dakota's official repeal of the rule in 1983 and was not above including a dense RAP fact pattern in an essay question in which the call of the question would be whether the future interest was "good" under common law and whether it was "good" under South Dakota, testing on whether the student recalled both the workings of the rule and the fact that it has been legislatively rejected.[91] Over time, though, it seems that the time he devoted to the topic waned as its coverage in the standard textbooks retreated.[92] Later, Professor and Dean Emeritus Barry Vickrey typically introduced the rule and emphasized its complexity by reference to a California case holding that an attorney who negligently violates RAP has not even committed negligence as a matter of law, such are the rule's difficulties.[93]

Certainly, perpetuities rules are no mere backwater; the seven-volume American Law of Property treatise devoted one entire volume (the sixth) to RAP and its relatives.[94] But in South Dakota, at least, de-emphasizing RAP could be pedagogically justified on the basis that the state legislature repealed the rule in 1983.[95] Among law schools generally, the de-emphasis might be slightly less

whole to feel comfortable in applying these theoretical, yet necessary, basic abstractions so soon in their graduate studies." *Id.* Students simply lack enough context, Wilson argues, especially as 1L students. *Id.*

86. CRIBBET & JOHNSON, *supra* note 70.

87. 490 P.2d 515 (Or. 1971).

88. CRIBBET & JOHNSON, *supra* note 70, at 330-36, 336 (emphasis omitted).

89. *Id.* at 366.

90. Email from Susan Montgomery to Author (May 25, 2022, 1:31pm) (on file with author).

91. Email from Susan Montgomery to Author (Aug. 1, 2022) (on file with author).

92. *Id.*

93. Email from Barry Vickrey to Author (Aug. 1, 2022) (on file with author); Lucas v. Hamm, 364 P.2d 685 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962).

94. 6 ALP, *supra* note 14, *passim*.

95. SDCL § 43-5-8 (2004).

convincingly justified on the basis of the increasing diversity of RAP varieties as states attempted to reform the rule in various fashions.[96] State law variety is seldom a justification for de-emphasizing a traditional part of the curriculum. Typically, law school textbooks will adhere to teaching a rule in its traditional form or utilize a model act or uniform law as a framework, even if it does not represent the majority rule. Rather, it seems, the de-emphasis of RAP in the law school curriculum was primarily due to a cost-return analysis: the cost to the law school instructor in insisting that her students master RAP on at least an elementary basis was significantly greater than the benefit her students would receive from it.[97] Moreover, contemporary legal topics might be seen as more relevant and crucial to the success of future lawyers than the morass of wealth-planning challenges wrought by a sixteenth century case involving a Duke from far across the pond.[98]

Knowing RAP can be quite beneficial.[99] Still, the effort required to grasp it is simply off the charts.[100] Not only do law students abhor its grueling edifice, so do a not insignificant number of law school professors.[101] Professor Barton Leach described RAP as nauseating.[102] Recently, on the USD Law List Serv managed by Professor Emeritus Roger Baron, one South Dakota attorney replied to a comment about the rigor imposed by Professor John Hagemann in the Federal Jurisdiction course with this quip: "Unless you were 8 months pregnant and answering (or fumbling at answering) questions about the Rule Against Perpetuities for 48 straight minutes from Prof. Davidson, I have no sympathy for you."[103] Perhaps even when the rule still retained its prominent place in the Property courses across the country, the mastery levels of student learning was marginal, or the students too-quickly forgot the mechanics of RAP after the course

96. *See* David M. English, *The Impact of Uniform Laws on the Teaching of Trusts and Estates*, 58 ST. LOUIS U. L.J. 689, 696 (2014) (describing the academic environment in which the reform of RAP laws made the subject even more difficult to teach).

97. English, *supra* note 96, at 696 ("With perpetual or near-perpetual trusts now allowed in a majority of U.S. states, an instructor may justifiably give the Rule Against Perpetuities a lower priority, particularly given other emerging topics demanding greater attention . . . .").

98. *E.g.*, Sarah J. Schendel, *Listen!: Amplifying the Experiences of Black Law School Graduates in 2020*, 100 NEB. L. REV. 73, 129 ("How am I supposed to care about the Rule Against Perpetuities when I am literally fighting against a system of racism daily by just being."); *see also* Leonard Levin & Michael Mulroney, *The Rule Against Perpetuities and the Generation-Skipping Tax: Do We Need Both?* 35 VILL. L. REV. 333, 342-43 (1990) (describing the shift of RAP).

99. *See* Becker, *supra* note 9, at 959 (asserting that "the common law rule against perpetuities continues to be exceedingly important"). *But see* Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023, 1026-27 (1987) (predicting that understanding and applying RAP would become obsolete).

100. The Colorado Supreme Court recently described RAP as "infamous"—a doctrine "dreaded by most law students . . . ." Atl. Richfield Co. v. Whiting Oil and Gas Corp., 320 P.3d 1179, 1180 (Colo. 2014) (en banc) (internal citation omitted).

101. *See* Becker, *supra* note 9, at 953 (opining: "The rule presents a problem for teachers because it is difficult to teach and for students because it is difficult, if not impossible, to learn.").

102. *See* W. BARTON LEACH & JAMES K. LOGAN, CASES AND TEXT ON FUTURE INTERESTS AND ESTATE PLANNING 672 (1961) (acknowledging that "[n]o one can read the perpetuities cases . . . without some sense of nausea").

103. Posting of Shari Langer, shari.langer@gmail.com, to usdlaw-list@usd.edu (June 30, 2022, 11:33am) (on file with author).

was finished.[104] In response, RAP is currently slated for omission from the "NextGen bar exam" by the National Conference of Bar Examiners.[105] Lawyers and judges are equally turned off, as evidenced by the acknowledgements within judicial opinions.[106] In the summer of 2022, when I was writing this article, colleagues would often ask what I was working on. When I responded to the question, "What are you working on now?," my response—that I was writing on the Rule Against Perpetuities—generated a uniform response from other lawyers: "Ugh!" RAP—even mere mention of it—elicits moans and groans.

As a consequence of widespread RAP eschewal, it should come as no surprise that not infrequently, lawyers and judges commit errors in applying the rule.[107] This leads to a plethora of legally binding but incorrect judicial decisions which further complicate matters. At some point, one has to posit a strictly utilitarian question—like the law professors who more or less gave up trying to teach RAP—whether the rule is even worth it (or, as some professors might frame things: "Whether the cost to the instructor is worth the negligible benefits to the students").[108] But before we can truly ponder that question, an understanding of the rule, in spite of its prickles, is essential. And so, into the common law briar patch we must go.

2. Statement(s) of the Rule

Gray articulated the most widely quoted version of RAP. It is: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[109] This represents "the most universally accepted definition of the common law rule . . . ."[110] Even this straightforward

104. *See* Robert L. Fletcher, *Perpetuities: Basic Clarity, Muddled Reform*, 63 WASH. L. REV. 791, 793 (1988) (asserting: "The Rule Against Perpetuities is regularly presented to law students as a species of the Horrible Heffalump, to be approached if at all with certain knowledge that it cannot be understood."). "[C]ontemporary Property teachers respond to the dilemma in a number of ways. These range from not teaching the common law Rule at all to extensive coverage, and many variations in between." Maureen E. Markey, *Ariadne's Thread: Leading Students Into and Out of the Labyrinth of the Rule Against Perpetuities*, 54 CLEV. ST. L. REV. 337, 341 (2006).

105. AALS List Serv (Aug. 4, 2022, 2:41pm).

106. *See, e.g.*, Shaver v. Clanton, 26 Cal. App. 4th 568, 573 (Cal. App. 2003) ("convoluted and confusing"); *see also* Adam J. Hirsch, *Cognitive Jurisprudence*, 76 S. CAL. L. REV. 1331, 1349 n.78 (2003) (characterizing Gray's treatise as "mind-numbing").

107. RAP has "provided gainful (although not necessarily useful) employment for veritable legions of lawyers along with the opportunity for the judiciary to write arcane opinions, splitting hairs with abandon." PHILLIP J. NEXON, THE BEGINNINGS OF PROPERTY LAW IN MASSACHUSETTS § 1.5 (4th ed. 2022).

108. This might sound like a selfish way of approaching pedagogical questions about what to leave in and what to leave out of course content. But Professor Emeritus John Davison, who taught Property for decades at the USD law school, once offered me sage advice when I sought his counsel about how to teach Property myself (which I did for two years). I was spinning in several directions at once, trying to figure out how to make time for topics that might otherwise go untaught like inverse condemnation and mortgages in a curriculum that was already stock-full of numerous challenging doctrines and rules. Gently, he articulated: "You need to figure out what not to teach." It was sage advice that really sank in the more I thought about it.

109. GRAY, *supra* note 13, at 191.

110. Producers Oil Co. v. Gore, 610 P.2d 772, 774 (Okla. 1980) (internal citation omitted).

phrasing is not without controversy.[111] The rule is more nuanced than Gray's twenty-seven words suggest.[112] Leach wanted the rule rewritten to: Generally speaking, "no interest is good unless it must 'vest,' if at all, not later than twenty-one years after some life in being at the creation of the interest."[113]

I rather fancy Herbert Thorndike Tiffany's framing: "The rule against perpetuities prohibits the creation of a future contingent interest unless, by the terms of its creation, the interest must vest within a life or lives in being, and twenty-one years thereafter."[114] In any case, the rule can, it is true, be concisely stated, though not comprehensively. Leach's insistence on bracketing it with "Generally speaking" demonstrates that there are a number of exceptions and nuances which a briefer statement necessarily omits.[115] Even explicating the rule's elements within a concise statement of the rule requires a good deal of further examination. The rule—except where codified—is also adept at ducking a close textual analysis such as one would apply to statutory text. In the case of common law RAP, the "words have no legislative force; we do not have to construe them as if they were incorporated in a statute . . . ."[116] The common law is more amorphous than that.[117] After all, the first edition of the treatise reciting Gray's formulation was only published in the late 19th century.[118]

In the preceding section, we considered the "interest(s)" covered by the rule. In the three subsections which follow, we will examine the RAP period ("twenty-one years after some life in being at the creation of the interest"), the measuring

111. *See* Alan Newman, *The Intention of the Settlor Under the Uniform Trust Code: Whose Property Is It, Anyway?*, 38 AKRON L. REV. 649, 654-55 n.20 (2005) (noting that Gray's classic statement of RAP "is inaccurate with respect to contingent interests crated by the settlor of a revocable trust").

112. *See* W. Barton Leach, *Perpetuities: New Absurdity, Judicial and Statutory Correctives*, 73 HARV. L. REV. 1318, 1320 (1960) (stating that "it is too often forgotten that these twenty-seven words are simply an attempt by courts and text-writers to formulate in brief compass the results of a body of case law enunciating a policy against having property tied up by remote future interests"); *see also* Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc., 986 So.2d 1279, 1282 (Fla. 2008) ("The rule against perpetuities is generally stated with deceptive simplicity . . . .").

113. Leach, *Nutshell*, *supra* note 19, at 639 (emphasis added).

114. TIFFANY, *supra* note 63, at 260.

115. Leach, *Nutshell*, *supra* note 19, at 639.

116. Leach, *Absurdity*, *supra* note 112, at 1320.

117. Professor Alfred Reeves sketches the evolution of RAP:

> [The Rule Against Perpetuities' perpetuities period] was first fixed at one life in being. Then it was extended to any number of lives *in being*, by the Duke of Norfolk's Case, which may be regarded as settling the *principle* involved; and this change was allowed because it simply makes the measurement the longest life of those named–"the candles are all buring at once." Then, after much debate, the period of twenty-one years as measuring a minority was added; and, to provide for the case of posthumous offspring, the fraction of a year required for gestation of a child. And, finally, it was settled that the twenty-one years might be made as an absolute period, without regard to any minority. The two centuries required for the working out of this important piece of judicial legislation, closed, in 1833 . . . .

2 ALFRED G. REEVES, A TREATISE ON THE LAW OF REAL PROPERTY 1261 n.2 (1909) (internal citations omitted).

118. Leach, Nutshell, supra note 19, at 639.

lives, and the term "vest."[119] We will begin with the RAP period (sometimes referred to—misleadingly—as "the perpetuities period").[120]

3. The Perpetuities Period

As highlighted above, the traditional common law perpetuities period which, if overstepped, brings the full invalidating force of RAP to bear, is not perpetual. It is, rather, a life (or lives) in being plus twenty-one years. A bit more than twenty-one years and a lifetime amounts to "perpetuality." Why this seemingly arbitrary length of time? Presumably, it permits the minimum extension of certain types of future vesting, which would allow a testator to provide for one or more individuals that she knew (lives in being) plus a group of not-yet-born persons (future children of the living individuals, for example) so long as everything was concluded upon their majority (age twenty-one under the common law). Thus, a testator could devise a life estate in Whiteacre to her daughter, remainder to her daughter's children upon their twenty-first birthdays. Anything greater than that, RAP would take to task. The thinking seems to be that this span of future time is the greatest in which foresight is reasonably possible. The eyesight in planning for events beyond the perpetuities period dims, RAP assumes, so much that it becomes unreliable: "In a will a man of property could provide for all of those in his family whom he personally knew and the first generation after them upon attaining majority."[121] Stated another way:

> 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 or see. Within the former province we may trust his natural affections and his capacity of judgment to make better dispositions than any external Law is likely to make for him. Within the latter, natural affection does not extend, and the wisest judgment is constantly baffled by the course of events.[122]

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119. JOHN CHIPMAN GRAY, RULE AGAINST PERPETUITIES (1886). Compare this earlier wordier formulation:

> If an estate be so limited as by possibility to extend beyond a life or lives in being at the time of its commencement, and twenty-one years and a fraction of a year (to cover the period of gestation) afterwards, during which time the property would be withdrawn from the market, or the power over the fee suspended, it is a perpetuity and void as against the policy of the law, which will not permit property to be inalienable for a longer period.

The Arundale Corp. v. Marie, 860 A.2d 886, 890 (Md. Ct. App. 2004) (quoting Barnum v. Barnum, 26 Md. 119, 171 (Md. 1866)).

120. *See* TIFFANY, *supra* note 63, at 262 (explaining that "before the development of the rule the word 'perpetuity' was used in an entirely different sense from that of 'remoteness of vesting'"). RAP might "be more properly termed as the 'rule against remoteness . . . .'" *Id.* at 263.

121. 6 AMERICAN LAW OF PROPERTY § 24.16, at 51 (1952).

122. Arthur Hobhouse, *The Devolution and Transfer of Land*, Address Delivered at the Social Science Congress at Leeds (Oct. 1871), *in* THE DEAD HAND: ADDRESSES ON THE SUBJECT OF ENDOWMENTS AND SETTLEMENTS OF PROPERTY 161, 188 (1880).

The RAP analysis is undertaken when a future interest is created—upon delivery of a deed for inter vivos conveyances or upon the testator's death in the case of a devise by Will or revocable trust.[123] The perspective in which the RAP questions are asked are even at the moment of the creation of the interest. This is so even when the analysis is being undertaken years or decades later. Everything that actually happened after the creation is to be cast aside and ignored.[124]

One additional wrinkle can now be inserted: RAP also includes actual periods of gestation.[125] This nuance escaped Gray's condensed statement of the rule, but it is implied within it. If the idea is that a testator ought to be able to provide for those he knew (e.g., his children) and those he did not (e.g., his unborn grandchildren) at least until their legal majority (age twenty-one), then one must imply a period of gestation for any posthumous grandchildren (e.g., a grandchild born to the testator's son's wife a few months following her spouse's death). Otherwise, on account of the possibility of posthumous issue, a gift of a life estate to the son, remainder to the son's first child to turn twenty-one would be void. The period of gestation is simply an acknowledgement of the biological possibility of posthumous births. But even here, RAP is not as simple as it might appear initially, for we are not allowing hypothetical periods of gestation (e.g., approximately nine months) but actual ones.

It has often been said that under RAP an executory interest must vest within a life or lives in being and twenty-one years and nine-and-a-fraction-months. But this is not a correct statement of the rule. There must be an actual period of gestation; there can be no nine-month period in gross. A more accurate statement is that for purposes of RAP a person thereafter born alive is deemed to be in being when begotten but not born. Thus, the person in being whose life is the measure of the period may be begotten but not born at the time the testator dies. Or the donee of the future interest may not be born until nine months after a life in being and twenty-one years. Indeed, both periods of gestation may exist with respect to the same future interest. Thus, a testator might bequeath a sum of money to the

123. Second National Bank of New Haven v. Harris Trust and Savings Bank, 283 A.2d 226, 228 (Conn. 1971).

124. *But see Part II*, *supra* note 24 at (A)(9) (discussing the "wait-and-see" RAP reform).

125. *See* Smerchek v. Hamilton, 606 P.2d 491, 494 (Kan. Ct. App. 1980) (stating "The rule against perpetuities is not without exceptions, but basically it provides that no future interest in property can lawfully be created unless it will vest within twenty-one years after some life or lives in being at the time of the creation of the interest, plus actual periods of gestation.") (internal citation omitted); Brown Bros. Harriman Trust Co. v. Benson, 688 S.E.2d 752, 755 (N.C. App. 2010) (explaining that "the common law rule invalidates any future interests that are not certain to vest or terminate within 21 years and a gestational period after a life or lives in being"). Technically (or more technically), two periods are allowed in some cases:

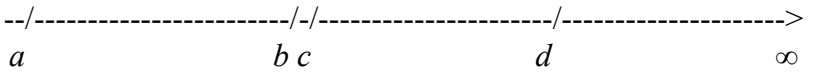
> Two periods of gestation may accordingly be allowable in particular cases, that is, one period as regards the person "in being" at the date of the testator's death or execution of the conveyance, and the other as regards to the person who is to take on attaining twenty-one. So, a gift to testator's grandchildren who attain the age of twenty-one will be good, although the only grandchild who does attain such age may be the posthumous son of testator's posthumous son.

2 TIFFANY REAL PROPERTY § 399 (3d ed. 2022). In other cases, *three* periods are permissible. *See infra* notes 126-130 and accompanying text (discussing this further).

youngest male lineal descendant of X living twenty-one years after the death of testator's first son. Testator's first son might be a posthumous child, and the youngest male lineal descendant of X might not be born until twenty-one years and nine months after the death of that posthumous child. In fact, Professor Gray suggests the following case where there might be three periods of gestation: "Suppose, for instance, a devise to testator's children for life, on their death to be accumulated till the youngest grandchild reaches twenty-one, and then to be divided among all the grandchildren then living, and the issue then living of any deceased grandchild."[126] As he suggests, it would be possible for the testator to have a posthumous child who dies leaving two children, A and B, one of whom, B, a posthumous child, is the testator's youngest grandchild to reach twenty-one.[127] A dies just before B attains twenty-one, leaving a posthumous child C, born after B attains twenty-one.[128] It is believed that the gift to C would be valid though three periods of gestation are involved.[129]

In a number of other situations, the law regards a person as in being when he is begotten but not born, if this construction is beneficial to the donee. Thus posthumous heirs take; a remainder contingent on the existence of the remainderman will not fail if the remainderman is born within the period of gestation after the termination of the preceding estate of freehold; and as a matter of construction courts are inclined toward a construction which treats posthumous children as in existence during the period of gestation if such a construction is beneficial to them. "In the application of the Rule Against Perpetuities it would appear that there is no exception to the proposition that under the Rule Against Perpetuities a person subsequently born is deemed a person in being during the period of gestation, whether this presumption be beneficial to him or not."[130]

Enough said regarding periods of gestation, surprisingly tricky insertions in and of themselves. We have now completed a full description of the perpetuities period, comprised of three elements: twenty-one years, a life or lives in being, and gestation periods. One might visualize the rule's period as follows:



a *b c* *d* ∞

Point *a*: Creation of the interest (and commencement of the RAP period); for inter vivos gifts, the date of the gift's delivery; for testamentary gifts, the date of

126. ALBERT MARTIN KALES, LAW OF REAL PROPERTY (FUTURE INTERESTS) 191 (1927) (quoting GRAY, RULE AGAINST PERPETUITIES §§ 221, 222 (2d ed. 1900)) [hereinafter KALES II].

127. *Id.* "The testator leaves a posthumous child who dies leaving one child, *A*, born, and another, *B*, *enventre sa mere* [i.e., in his mother's womb]." *Id.*

128. *Id.* "*B* is born and reaches twenty-one, but, before he does so, *A* dies, leaving his wife pregnant, who gives birth to a child [i.e., *C*] after *B* reaches twenty-one." *Id.*

129. *See* KALES II, *supra* note 126, at 192 (offering that "The learned author [i.e., Gray] is of opinion that the ultimate gift over is valid.").

130. SIMES & SMITH, *supra* note 16, § 1224.

the testator's death. Point *a* is also the temporal perspective from which the possible remote vesting analysis is undertaken.

Line segment *a*-*b*: A measuring life; a human lifetime (or joint lives).

Line segment *b*-*c*: A period of gestation.

Line segment *c*-*d*: Twenty-one years. Thus, line segment *a*-*d* represents the RAP period.

Line segment *d*-∞: A period in excess of the RAP period. Any possibility in which a future interest might vest in this period renders the future interest void at point *a*. It matters not whether the future interest will probably vest during the RAP period, nor even whether the future interest has, in fact, vested during the RAP period—but rather whether it *might* have vested beyond it. RAP invalidates a future interest which might vest outside the RAP period along with future interests which *have* vested, but for the invalidating effect of RAP upon them.

4. Life (or Lives) in Being

Which life—or lives—represent the measuring life—or lives—for purposes of RAP? This, according to Professor Dukeminier, is "[t]he most crucial puzzle confronting the beginning student of the Rule against Perpetuities . . . ."[131] With some hypotheticals, the particular life in being by which to measure the first part of the RAP period is unambiguous. Sophisticated drafters will oftentimes select the joint lives by which to measure the RAP period, not uncommonly lives of famous individuals which are easily ascertainable, sufficiently numerous, and not necessarily connected with the transfer of property itself.[132] In certain cases, identifying the life or lives in being can prove challenging.[133] In some instances, the RAP period drops the lives-in-being component altogether.[134]

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131. Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1648 (1985). Without solving the measuring lives puzzle, Dukeminier cautions, "[Y]ou may as well abandon all hope of applying the common law Rule correctly." *Id.*; *see also* Jones, *supra* note 48, at 57 (claiming that: "Though it is possible . . . to make certain positive statements about measuring lives under the common-law rule, these propositions, even collectively, do not jell into anything like a definition of the term.").

132. *See* TIFFANY, *supra* note 63, at 266 (emphasizing that the persons in being whose lives are to be measured need not "have any connection with the property, they need not be persons taking prior estates and need not even be relatives of persons given interests in the property"). *But see* Becker, *supra* note 9, at 972-73 (asserting that "a group of relevant lives in being" is restricted to "those who have some causal connection to the vesting of the interest under consideration"). Dukeminier and Waggoner debated this point in the context of wait-and-see reforms (which are unpacked in *Part II*, *supra* note 54, at (A)(9)). *Compare* Jesse Dukeminier, *A Response by Professor Dukeminier*, 85 COLUM. L. REV. 1730, 1730 (1985) ("[A] validating life at common law must be a person who can affect vesting. . . ."), *with* Lawrence W. Waggoner, *Perpetuities: A Perspective on Wait-and-See*, 85 COLUM. L. REV. 1714, 1716 (1985) ("[T]he common law Rule does not, in my view, identify the lives to be used in measuring off the wait-and-see perpetuity period.").

133. Professor Lewis Simes concluded that "there is no satisfactory test other than to keep trying different lives until you find one which [validates the interest]. . . ." Lewis M. Simes, *Reform of the Rule Against Perpetuities in Western Australia*, 6 U.W. AUSTL. L. REV. 21, 24 (1963).

134. *E.g.*, Murphy Expl. & Prod. Co. v. Sun Operating Ltd. P'ship, 98-CA-00429-SCT (¶ 24) (Miss. 1999) (McRae, J., dissenting) ("Where the agreement fails to reference a measuring life and the parties to the agreement are corporations, the measuring life is twenty-one years from the date of the contract.") (internal citations omitted); Stuart Kingston, Inc. v. Robinson, 596 A.2d 1378, 1383 (Del. 1991) ("A life

In such instances, the RAP period is only twenty-one years. But thankfully, in many examples, identifying the measuring life is quite obvious. Typically, the life tenant will be the measuring life. In other circumstances, however, the measuring life or lives are less clear.

For example: Afreen bequeaths Whiteacre "to Batool for thirty years then to all my issue (i.e., descendants) then living." At Afreen's death, Batool is twenty-five years old, and Afreen's descendants are three young adults. Because the gift is a bequest, the time for conducting the RAP analysis is at Afreen's death (and so obviously, Afreen cannot be the measuring life). The measuring life appears to be Batool. Alternatively, it might be Afreen's issue. Dukeminier asserts that the measuring lives are all of Batool's issue in being at Afreen's death since "[b]y procreating or dying, these persons can affect the identity of the beneficiaries."[135] They bear a causal relationship to the interests involved. The bequest, of course, is void under RAP.[136] If Batool is the measuring life, Batool could die within a year of Afreen. It will take more than twenty-one more years to determine which of Afreen's issue are living as required for vesting under the Will. Indeed, it would take an additional twenty-nine years following Batool's death. If all of Afreen's issue living at his death are the measuring lives, remote vesting is still a problem. Consider this possibility: A year after Afreen's death, his first grandchild is born, and his three children die after they hire a Curb ride to lower Manhattan. It will take more than an additional twenty-one years to identify which descendants of Afreen's—if any—are living thirty years after his death.

In other instances, identifying the measuring life can be quite difficult. Only relatively recently have scholars attempted to frame a test by which the measuring life can be identified.[137] Previously, lawyers and judges were forced to fend for themselves.[138] Dukeminier and Waggoner debated the issue.[139] Becker's test is

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in being must be a human life and if there is no measuring life, the interest must vest or fail within twenty-one years.") (internal citation omitted).

135. Dukeminier, *The Measuring Lives*, *supra* note 131, at 1666 (emphasis omitted).

136. *Id.*

137. The Restatement offers this guidance:

> The measuring lives are as follows:
>
> > (1) Except as otherwise provided in paragraph (2), the measuring lives constitute a group composed of the following individuals: the transferor, the beneficiaries of the disposition who are related to the transferor and no more than two generations younger than the transferor, and the beneficiaries of the disposition who are unrelated to the transferor and no more than the equivalent of two generations younger than the transferor.
> >
> > (2) In the case of a trust or other property arrangement for the sole current benefit of a named individual who is more than two generations younger than the transferor or more than the equivalent of two generations younger than the transferor, the measuring life is the named individual.

RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 27.1(b) (2011). This is not an attempt to restate the common law; it is more in the nature of a suggested reform insofar as the Restatement "measures the perpetuity period by generations rather than by lives in being at the creation of the interest." *Id*. cmt. a. Presumably, this represents a simplification, although the Restatement saw fit to include a detailed table for assigning generations to relatives of the transferor in order to track its logic. *See also Part II*, *supra* note 2424, at (A)(9) (discussing RAP reforms).

138. BECKER, *supra* note 16, 194.

139. *Part II*, *supra* note 24, at (A)(9).

the most coherent and thoughtful. While excellent, the explanation also reveals the difficulty involved. He calls it "The Methodology" and elaborates several steps: Step One, Step Two, Step Three A, Step Three B, "The Critical Test," Step Three C, Step Three D, and finally, Step Four.[140] It is thorough and coherent, and I will not attempt to do it justice by summarizing it here.

Finally, an example in which the measuring life is simply jettisoned from the RAP period altogether can be found in the case of *Symphony Space, Inc.*[141] In the State of New York, RAP was codified. The codification adopted the common law rule:

> No estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved. In no case shall lives measuring the permissible period of vesting be so designated or so numerous as to make proof of their end unreasonably difficult.[142]

New York courts have confirmed that the statutory provision simply codifies the common law framing of RAP.[143] Thus, *Symphony Space* should be read as a common law RAP decision. It centered around a two-story building on New York's Upper West Side with two distinct areas within it.[144] Slightly more than half of the building was comprised of a theater with the rest allocated to commercial space.[145] The building's owner, Broadwest Realty Corporation, had failed to locate a permanent tenant for the theater and operated the building at a loss.[146] But in 1978, Broadwest calculated that its investment could cashflow if it qualified for a charitable exemption from property taxes and so structured a sale-leaseback with Symphony Space, Inc., a nonprofit entity which had previously rented the theater for several one-night events.[147] The sales price was just $10,010, but in exchange, Symphony Space leased the more lucrative commercial half of the property back to Broadwest for $1 per year along with an option to repurchase while Broadwest remained liable on the building's $243,000

140. BECKER, *supra* note 16, 191-395.

141. 669 N.E.2d 799 (N.Y. 1996); *see also* Patricia Y. Reyhan, *Perpetuities Perpetuated*: *Symphony Space, Inc. v. Pergola Properties, Inc*., 60 ALB. L. REV. 1259 (1997) (analyzing the case).

142. N.Y. EST. POWERS & TRUSTS LAW § 9-1.1(b) (McKinney 2018). Part (a) of this statute contains the parallel rule against suspending the absolute power of alienation for a period longer than a life or lives in being plus twenty-one years and a period of gestation. EPTL § 9-1.1(a); *see also Part II*, supra note 54 at (C) (discussing the rules against suspension of the power of alienation). Previous statutory versions of RAP in New York employed a perpetuities period of "two lives in being plus actual periods of minority . . . ." Symphony Space, Inc. v. Pergola Props., Inc., 669 N.E.2d 799, 803 (N.Y. 1996) (internal citation omitted). But this was deemed too complicated and so the legislature reformed the rule back to its common law version. *Id.* (internal citation omitted).

143. Alexander v. Dolen, 232 N.E.2d 861, 866 (N.Y. 1967); Bleecker St. Tenants Corp. v. Bleeker Jones LLC, 945 N.E.2d 484, 485 (N.Y. 2011).

144. *Symphony Space*, 669 N.E.2d at 800. The building was "situated on the Broadway block between 94th and 95th . . . ." *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

mortgage.[148] The transaction saved $30,000 in annual property taxes and still produced $140,000 lease income for Broadwest, since it retained the ability to sublet the commercial space.[149] Symphony Space, meanwhile, could expand the reach of its outreach, having secured a permanent location for plays and other kinds of performances.[150]

Broadwest's option allowed it (not unreasonably) to repurchase the building back from Symphony Space for approximately two to three times the $10,010 sales price during "Exercise Periods":

> (a) at any time after July 1, 1979, so long as the Notice of Election specifies that the Closing is to occur during any of the calendar years 1987, 1993, 1998 and 2003;
>
> (b) at any time following the maturity of the indebtedness evidenced by the Note . . . ;
>
> (c) during the ninety days immediately following any termination of the Lease . . . ;
>
> (d) during the ninety days immediately following the thirtieth day after [a notice of default on the Note] . . . .[151]

The option was structured to run with the land as a recorded covenant and bind any future owners of the building.[152] The parties closed on the deal in December of 1978.[153] About two and a half years later, Broadwest sold its leasehold and option (along with two additional structures) to a trio of buyers: Pergola Properties, Inc. and two other entities.[154] The price was $4.8 million.[155] Within a few years, the cluster of properties had appreciated to $27 million.[156]

In 1985, Symphony Space found itself in default and Pergola Properties exercised its option to repurchase the theater and commercial space structure.[157] The nonprofit theater group resisted Pergola's efforts and commenced a declaratory action.[158] It claimed "that the option agreement violated the New York statutory prohibition against remote vesting . . . ."[159] The defendants counterclaimed for rescission based on mutual mistake.[160] The trial court ruled for Symphony Space, the intermediate appellate court affirmed, and so did the New York Supreme Court.[161]

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148. *Id.* at 800-01. Under the terms of the deal, Symphony Space paid $10 down and structure the remaining $10,000 of the purchase price on installments over twenty-five years. *Id.* at 801.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 802.

153. *Id.* at 801.

154. *Id.* at 802.

155. *Id.*

156. *Id.* The $27 million appraisal was conducted in August of 1988. *Id.*

157. *Id.* Pergola Properties also gave notice that it was exercising its option under section (a) of the Exercise Period—which was not contingent upon a default by Symphony Space. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

Three issues were framed.[162] The first was whether RAP applies to commercial options; second, whether, assuming it does apply, RAP was violated; and third, whether, assuming it was violated, the courts should adopt a "wait and see" approach.[163] The New York Supreme Court disposed of all the issues in favor of Symphony Space.[164] RAP won.[165] Pergola—and the clear intent of the parties—lost.[166]

Citing Simes's and Smith's *The Law of Future Interests* and Leach's *Perpetuities in a Nutshell*, the court addressed the first issue with the following observation: "Under the common law, options to purchase land are subject to the rule against remote vesting . . . ."[167] Until the optionee exercises the option, it holds "a contingent, equitable interest in the land" which "creates a disincentive for the landowner to develop the property and hinders its alienability, thereby defeating the policy objectives" of RAP, the court explained.[168] Here, the justices cited Dukeminier and Powell.[169] The court acknowledged the critics—including Professor Leach—who doubt the wisdom of applying the lives plus twenty-one year period which was developed in the context of family gift donative transfers to commercial transactions.[170] Options are particularly nettlesome when filtered through a RAP invalidity analysis (Dukeminier: "To apply the Rule to [options] . . . is to fit them into a Procrustean bed.")[171] But the New York court saw no reason to doubt that the New York Legislature intended RAP to apply across the board.[172] After all, the existence of the option between Symphony Space and the original building's owner "significantly impedes the owner's ability to sell the property to a third party, as a practical matter rendering [the building] inalienable."[173] And RAP's remote vesting thrust is directed primarily at better ensuring the alienability of realty and the structures upon it.

Next, the court undertook to determine if the option violated RAP. The RAP period—typically a life or lives in being plus twenty-one years (and a period of

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162. *Id.* at 802-04.

163. *Id.*

164. *Id.* at 802.

165. *Id.* at 802-09.

166. *Id.* at 807-09.

167. *Id.* at 804 (citing SIMES & SMITH, FUTURE INTERESTS, *supra* note 16, §§ 132, 1244); Leach, *Nutshell*, *supra* note 19, at 660; London & S.W. Ry. Co. v. Gomm [1882] 20 Ch 562.

168. *Symphony Space*, 669 N.E.2d at 804 (internal citations omitted). Similarly, the court emphasized, Symphony Space is also deterred from undertaking improvements to the property "since it will eventually be claimed by the option holder at the predetermined purchase price." *Id.* at 806.

169. *See id.*

170. *E.g.*, W. Barton Leach, *Perpetuities Reform by Legislation: England*, 70 HARV. L. REV. 1411, 1416 (1957) ("I proposed that a rule established for the control of family settlements had no proper application to commercial interests . . . ."). However, Professor Barton Leach also proposed that commercial options which stand apart from a lease agreement "should be *more* strictly limited than the period of the Rule Against Perpetuities." *Id.* (emphasis added).

171. Dukeminier, *Measuring Lives*, *supra* note 131, at 1701. Professor Dukeminier also grouped "(1) donative transfers into noncharitable purpose trusts; [and] (2) forfeiture restrictions on the use of land" into the three property dispositions which RAP has always handled particularly unsatisfactorily. *Id.*

172. *Symphony Space*, 669 N.E.2d at 804 (internal citations omitted).

173. *Id.* at 805. The court construed the long-term option as a "Sword of Damocles." *Id.*

gestation)—is shortened when, on account of the parties being corporations with theoretically perpetual existence, there is no measuring life. "Where, as here, the parties to a transaction are corporations and no measuring lives are stated in the instruments," the court explained, "the perpetuities period is simply 21 years."[174] The Exercise Period of the option included "any time" so long as the closing date was set for 1987, 1993, 1998, or 2003.[175] Since 2003 was more than twenty-one years after the creation of the option interest in 1978, vesting outside the twenty-one-year period had been theoretically possible at the creation of the interest.

Finally, Pergola Properties urged the court to rejigger RAP from a remote vesting analysis, which is undertaken at the creation of the interest into a "wait and see" approach (and codified by reformers in some states).[176] Under the "wait and see" approach, the fact that remote vesting might occur does not invalidate a future interest at inception. Instead, the future interest is presumed valid until the interest vests or the RAP period expires. If the future interest vests within the RAP period, the interest remains valid. If the RAP period elapses without the future interest vesting, it becomes invalid upon the expiration of the RAP period.

In this case, if the wait and see approach was adopted, the option would remain valid "since it was exercised by 1987, well within the 21-year limitation."[177] New York had previously rejected such an approach, however.[178] Moreover, given that New York has codified RAP, as a matter of statutory interpretation, a wait and see approach was clearly a stretch.[179] Instead, the court concluded, a future interest—including a commercial option—"is void from the outset if it *may* vest too remotely."[180] The option in question, the court insisted, "offends the Rule."[181] Thus, the option was declared invalid.[182]

The court also rejected Pergola's request to rescind the agreement due to a mutual mistake since "the parties' mistake amounts to nothing more than a misunderstanding as to the applicable law . . . ."[183] Although contracts may, in courts of equity, be rescinded based on mutual mistakes of fact or law, not every mistake of law rises to the level of a legal mistake justifying rescission.[184] To apply the equitable remedy of rescission to a transaction triggering RAP would run counter to the function of RAP. Rescission "is designed to void a transaction because it fails to carry out the parties' true intent . . . ."[185] But that's the whole

174. *Id.* at 806 (internal citation omitted).
175. *Id.*
176. *Part II*, *supra* note 24, at (A)(9).
177. *Symphony Space*, 669 N.E.2d at 808.
178. *Id.* (internal citations omitted).
179. *See id.* (explaining: "The very language of EPTL 9-1.1, moreover, precludes us from determining the validity of an interest based upon what actually occurs . . . .").
180. *Id.* (internal citations omitted).
181. *Id.*
182. *Id.*
183. *Id.* at 809.
184. *Id.* at 808.
185. *Id.* at 809 (quoting the lower court's opinion).

idea of RAP. RAP exists in order "to defeat the intent of the parties."[186] RAP runs counter to the basic premise of rescission, which reconsiders the intent of the parties in light of a mistake.[187]

Symphony Space illustrates several key RAP concepts and concerns. Two will be noted here. The first is the application of RAP to options. Not every jurisdiction applies RAP to commercial options.[188] Indeed, an option to re-purchase would arguably escape RAP's invalidating effects as it is an interest in land reserved by the grantor; like a reversion, possibility of reverter, or power of termination.[189] The second key point from *Symphony Space* is its illustration of the "perpetuities period" when there are no measuring lives. All the parties to the transaction were artificial legal persons (corporations) with potentially perpetual existences, and the instruments in question apparently failed to designate any measuring lives, and so RAP simply defaulted to a perpetuities period of twenty-one years.

5. To Vest or Not to Vest

Perhaps the stickiest aspect of RAP is contained within a single term: to "vest."[190] Leach noted that "the word 'vest' . . . in the case law of the Rule has an elasticity so great as to make it virtually meaningless except in usual types of family settlement."[191] Rubenstein says: "[I]t seems the more one knows about the Rule, where the technical meaning of vested interest is vital, the foggier are one's notions about its meaning."[192]

Everyone has a "vested interest" in the economy and the weather, but RAP has its own view of a vested interest.[193] Vest here is a term of art; a technical term

186. *Id.* (internal citation omitted). "Similarly, damages are not recoverable where options to acquire real property violate the Rule against Perpetuities, since that would amount to giving effect to the option." *Id.* (internal citations omitted).

187. *See, e.g.*, SDCL § 53-11-2(1) (2017) (providing that rescission may be available when "consent of the party rescinding . . . was given by mistake"); LA. CIV. C. Art. 1949 ("Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred . . . .").

188. *See generally* SIMES & SMITH , *supra* note 16, § 1244 (noting that "the weight of authority in the United States is to the effect that an option to purchase contained in a lease is valid, even though it may be exercised at a time beyond the period of the rule").

189. *See* Rucker v. DeLay, 289 P.3d 1166, 1171 (Kan. 2012) (noting that reversions are untouched by RAP) (citation omitted); ConocoPhillips Co. v. Koopman, 547 S.W.3d 858, 868 n. 5 (Tex. 2018) (noting that a possibility of reverter is outside the scope of RAP) (citation omitted); Central Delaware County Authority v. Greyhound Corp., 588 A.2d 485, 488 (Pa. 1991) (noting that rights of reentry and powers of termination are exempt from RAP); RESTATEMENT OF PROP. § 377 (AM. L. INST. 1944) (noting the "inapplicability of the rule to interests left in, or limited in favor of, the transferor").

190. *E.g.*, Hunt v. Carroll, 157 S.W.2d 429, 436 (Tex. Civ. App. 1941) (offering, in a RAP context, that "[t]he word 'vest' means to give an immediate, fixed right of present or future enjoyment: a vested estate is an interest clothed with a present, legal, and existing right of alienation: estates are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate; they are contingent while the person to whom, or the event upon which they are limited to take effect remains uncertain").

191. Leach, *Absurdities*, *supra* note 112, at 1320.

192. BERNARD JOSEPH RUBENSTEIN, RUBENSTEIN'S INTRODUCTION TO PERPETUITIES 15 (1959).

193. *Id.*

with a precise technical meaning which can only be mastered after gaining a comfortable familiarity with future interests.[194] For this reason, Leach's re-framing of Gray's RAP insisted on placing "vest" within quotation marks.[195] Essentially, Dukeminier explains, "an interest is vested when the taker is ascertained and any conditions precedent are met."[196] Stated the other way around, an interest is not vested when "the beneficiary is unascertained or if the interest is subject to a condition precedent . . . ."[197] Vesting is not synonymous with possession. "A vested remainder means that the person having the vested interest remainder is a person in being who has an immediate right to the possession of the property on the 'determination' (end) of all intermediate or precedent interests."[198] In other words, "[i]t means there is a person (or persons) who are legally sure to take the property when the time comes for vesting in possession, there now being no contingency as to the identity of the recipient nor any contingency as to event."[199]

Vesting is most commonly in play in the context of class gifts.[200] The question then becomes whether class membership can be ascertained within the perpetuities period. A class gift survives a RAP attack as a single unit.[201] It's "all or nothing."[202] A class gift cannot pass through a RAP gauntlet partially intact.[203] Stated another way, a class gift must "close" within the perpetuities period.[204] Therefore, class gifts require a two-step analysis to determine whether they violate RAP: whether the class membership closes with the final identification of all class members and also whether the interests of those members vest.[205]

For example: Aquib devises the residue of his estate to "such children of my son, Babasaheb, who attain the age of twenty-five." Babasaheb survives the testator with one child, Cimrin, age twenty-six. The entire class gift is void. Babasaheb may have another child sometime after the death of Aquib and not attain the age of twenty-five until more than twenty-one years after Babasaheb, the measuring life. Even though Cimrin would otherwise have a vested interest in

194. *Id.* at 43.

195. *Part II*, *supra* note 24 at (A)(2).

196. Dukeminier, *Modern Guide*, *supra* note 20, at 1887.

197. *Id.*

198. RUBENSTEIN, *supra* note 192, at 43.

199. *Id.*

200. A "class gift" is "[a] gift to a group of persons, uncertain in number at the time of the gift but to be ascertained at a future time, who are all to take in definite proportions, the share of each being dependent on the ultimate number in the group." *Class Gift*, BLACK'S LAW DICTIONARY (11th ed. 2019).

201. SIMES & SMITH, *supra* note 16, § 1265.

202. BECKER, *supra* note 16, at 75 (internal citation omitted). But separate shares—distinct classes—could be created to ensure smaller classes sealed off from other classes so as to not affect other shares. *Id.* at 75-76; *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 27.1 rep.'s note 9 (2011) (describing the "specific sum doctrine" and the "sub-class doctrine" applicable to class gifts under RAP).

203. SIMES & SMITH, *supra* note 16, § 1265.

204. *Id.*

205. *Id.*; *see also* Leake v. Robinson (1817) 35 Eng. Rep. 979 (invalidating a class gift for remoteness and rejecting the argument that the gift could be split and thereby upheld as to those class members whose interest would vest or fail to vest within the perpetuities period).

the class gift upon the testator's death, the entire class gift fails because of the potential that one class member's interest would not vest in time.[206] If there is no alternative residuary devise, the residue will instead pass by intestacy.

6. Some Noteworthy Perpetuities Problems

The literature on RAP returns time and again to several well-known problems which highlight the ruthlessness of the rule, both in terms of its invalidating punch and its legendary counter-intuitiveness. Four such problems are summarized below with titles which Leach playfully invented.[207] They serve as apt illustrations for the rule in action especially in contexts in which a seemingly reasonable gift is struck down as void on account of a highly unlikely, but theoretically possible, potentiality. The requirement that an interest vest within the perpetuities period is absolute.[208] Thus: "The mere improbability of its occurrence after that time is immaterial."[209]

a. The August Slothful Executor and Magic Gravel Pit

Witness this example of the slothful executor problem: Anees dies with a Last Will and Testament containing this gift: "Upon the admission of this Will to probate, I give to my daughter, Busr, the residue of my estate, outright and free of any trust." The gift is void under RAP because Busr's inheritance will not vest until the admission of Anees's Will to probate, an event which is not guaranteed to occur within Busr's lifetime plus twenty-one years.[210] Vesting is postponed

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206. SIMES & SMITH, *supra* note 16, § 1265. There are many additional sub-rules and rabbit holes with class gifts, including an exception for per capital gifts, gifts involving sub-classes, class gifts subject to conditions precedent, and class gifts subject to divestment. *Id.* §§ 1266-69. Your author will spare the reader all the gory details.

207. *See* Jesse Dukeminier, Jr., *Perpetuities: The New Empire*, 77 YALE L.J. 159, 161 (1967) [hereinafter "Dukeminier, *Empire*"] ("With an acid wit both lethal and therapeutic, Leach heaped scorn on such hobgoblins of orthodoxy as the fertile octogenarian, the unborn widow, the magic gravel pit, the fertile decedent, and the precocious toddler (Leach joyfully supplied the names)."). Rubenstein adds this caution:

> Some readers might say, "Well, I'll take my chances with the rare unborn widow or rare fertile octogenerain, etc., so I won't worry about the Rule." This reminds this author of the mule-seller, who quieted objecting buyers, who found the mules after purchase were stumbling into trees, by the statement that they were not blind but just did not give a darn.

RUBENSTEIN, *supra* note 193, at 13.

208. TIFFANY, *supra* note 63, at 267-68.

209. *Id.* at 268.

210. TIFFANY, *supra* note 63, at 265; *see also* Miller v. Weston, 189 P. 610, 611-12 (Colo. 1920) (invalidating a Will provision pursuant to RAP). In *Miller*, the decedent's Will first (unnecessarily) vested the decedent's property in his executors:

> I hereby constitute William E. Weston and I. S. Smith of Fairplay, Colorado, and either of them, should the other be dead, or refuse to act, executors of this will and trustees of my property, real and personal, and all rights and credits, to whom, on the admission of this will to probate, the title and ownership of my said property rights and credits shall go . . . .

until probate, which might never happen, especially if the named executor is a bit of a procrastinator. Rigid possibilities must be rigidly adhered to.[211] RAP dishes out invalidity rather generously.

A related example is known as the magic gravel pit problem which derives from a fact pattern like this one: Abdallah dies with a Last Will and Testament containing this devise: "To my daughter, Binish, if she is then living, upon the sale of my gravel pit by my executor, which shall occur upon the pit being worked out." Upon Abdallah's death, the pit appears to enjoy a remaining useful life of about a year. In fact, however, the pit produces gravel for three years after Abdallah's passing. The gift to Binish, however, is void under RAP. At Abdallah's death, the gravel pit could have continued to produce gravel for a

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Miller, 189 P. at 611. "The testator then proceed[ed] to make various bequests of money, with a residuary clause distributing the remainder, if any, among certain legatees." *Id.* Next, the Will continued:

> [A]s soon after my decease as reasonably may be practicable without material sacrifice of the value of my estate . . . my executors [shall] sell and convert into money the lands and other assets of my estate at least to the extent that may be sufficient to pay off the money bequests of this will, and that complete execution and discharge of the power and trust to realize into money the assets of my estate and fully to distribute the funds thus realized be performed as early as may be done consistently with fair money returns from said estate, my recommendation being that the estate be fully administered and distributed within two years after the admission of this my will to probate, unless the court of probate sanction a longer continuance of the administration . . . .

Id. The Colorado Supreme Court held that the first paragraph quoted above was invalid under RAP since "the clause 'on the admission of this will to probate' postpones the vesting of the title and ownership in the executors until the probate of the will, which may never happen." *Id.* at 612 (citing Johnson v. Preston, 80 N.E. 1001 (Ill. 1907)). The intermediate appellate court had reasoned that a presumption that probate will occur within a reasonable period of time—and certainly within a lifetime plus another twenty-one years—should operate. *Id.* The Colorado Supreme Court found this idea rather outrageous:

> Such a presumption, if based on the theory that the probate is so likely to take place that it may be regarded as a certainty, substitutes probability for certainty, and leaves the measure of uncertainty sufficient to evoke the action of the rule to the determination of the court or jury, and, if based upon the theory that the probate is required by law to be made, necessitates the premise that an estate may be limited upon the happening of anything that is required by law; for example, when Smith testifies to the truth, or when Jones pays his debts.

Id. (citing GRAY, *supra* note 13, § 214). The court reasoned: "The devise, then, to the executors, is void, and they take no title . . . ." However, the first paragraph could be omitted while still giving effect to the remaining provisions of the Will, since it was not necessary that the executors take title before distributing the estate. *Id.* The executors—as executors—could administer an estate without taking title to it. *Id.* To this, however, the contestants next argued that the legacies *also* violated RAP insofar as the testator required that properties first be sold and the testator's insistence that "the sale must be 'according to the best judgment of the trustees' offends the rule against perpetuities, because the trustees may not determine to sell before 21 years after the death of the testator." *Id.* at 612-13. Not so, the Colorado Supreme Court explained. The legacies vested upon the testator's death; estate administration protraction would not alter this fact. *Id.* "There is here no postponement, not even to await the title which the testator thought he had conferred upon his executors in the second clause. All the legacies are due at once upon the testator's death." *Id.* at 612 (referencing Brandenburg v. Thorndike, 28 N.E. 575 (Mass. 1885); GRAY, *supra* note 13, §§ 214, 214c). *But see* Bellfield v. Booth, 27 A. 585 (Conn. 1893) (reasoning that postponement of vesting until probate of the decedent's estate does not violate RAP).

211. SIMES & SMITH, *supra* note 16, § 1228; *see also, e.g.*, Richards v. Tolbert, 208 S.E.2d 486 (Ga. 1974) (relating a scenario where a will was found and probated fifty-seven years after the testator had died).

period in excess of a lifetime plus twenty-one years.[212] The possibility was remote, but it was theoretically possible, even if one produces proof that the gravel pit could not have produced gravel for anything close to the perpetuities period.[213] And so, RAP invalidity must follow. The donor intended for Binish's gift to vest (or fail to vest) in about twelve months. It would have vested (but for RAP) in three years (well within the perpetuities period). But those facts are irrelevant when RAP applies.

b. The Notorious Fertile Octogenarian

Here is an example of the fertile octogenarian problem: Amal devises Whiteacre "to Borna, a widow, for life, thereafter to the Borma's children for their joint lifetimes, thereafter to Borna's grandchildren as tenants in common, in fee simple." At Amal's death, Borna is eighty-nine and a half years old and has three children, all daughters, C-E, ages 50-60, along with three adult grandchildren, G-I, ages 20-30, along with half a dozen great-grandchildren. The interests of the grandchildren would be classified as contingent remainders; they're not contingent on account of a survivorship requirement under the text of Amal's Will. (Presumably their estates will take even if they don't.) But the grandchildren's interests are not yet vested because the class of grandchildren is subject to open; more grandchildren of Borna could theoretically still be born up until the date of Borna's children's deaths. What is likely is that Borna will die survived by her three adult daughters, and eventually they will die survived by Borna's three grandchildren, all of whom qualify as lives in being without even the need for recourse for an additional twenty-one years (plus periods of gestation, although that is more of a moot point given that none of the grandchildren have XY chromosomes). In that scenario, the grandchildren's interests vest immediately (or within periods of gestation) following the last of their mothers to die. RAP is a logical possibilities test.[214] And it is possible that a scenario could evolve in which remote vesting occurs.

Consider: All three of Borna's children, C-D die in another car accident involving the Brooklyn Bridge, this one the fault of a Lyft driver. At the funeral of the oldest daughter, Borna bumps into an old high school flame, and one thing leads to another. Nine months later, Borna gives birth to a relatively miraculous fourth daughter, F. It is a wonderful event except for one little problem: a serious RAP possibilities problem. F, you see, was not a life in being at Amal's death, the starting date for the creation of the future interests under consideration. And F

212. *In re* Wood [1894] 3 Ch. 381; *see also Part II*, *supra* note 24, at (A)(6)(a); Leach, *Perpetuities in Perspective*, *supra* note 19, at 731-32 (describing the magic gravel pit problem).

213. Leach, *Perpetuities in Perspective*, *supra* note 19, at 731-32.

214. *E.g.*, Joshua Greenfield, Note, *Dad Was Born a Thousand Years Ago? An Examination of Post-Mortem Conception and Inheritance, with a Focus on the Rule Against Perpetuities*, 8 MINN J.L. SCI & TECH. 277, 200 (2007) (considering RAP in conjunction with less than "the most far-fetched logically possible scenario that can be conjured").

could have a child (a new Borna grandchild), say, twenty-five years after Borna's death. And you know what that means.[215] None of the grandkids take.[216]

c. The Peerless Unborn Widow

Here is an example of the unborn widow problem: Aliza conveys Whiteacre by deed "to Burhan, a life estate, then to Burhan's widow, for her surviving lifetime, if she survives him, remainder in equal shares to Burham's children who survive his widow as tenants in common in fee simple." At the time of the delivery of the deed from Aliza, Burham is married to Cantara, and they have three adorable children, A-C, ages five to ten. Naturally, everyone expects that Burham, being the male, is more likely than not to predecease his spouse, and after their two successive life estates, their three children will take Whiteacre in equal thirds. Sure, it is possible that they will have a fourth child, but even a fifth or a sixth child would not create a RAP problem. Burham is the measuring life. The class of Burham's children will close at Burham's death (plus a period of gestation) and vest immediately so long as they survive Burham—and if not, their interest will not vest. Case closed, right?

Wrong. What creates a RAP problem is both incredibly unlikely and undeniably possible: Burhan's lovely wife Cantara is brutally assaulted by an Uber driver, and dies. Nearly six decades passes before Burham re-enters the dating scene, and as luck would have it, he meets an intelligent, generous young woman named Zenith, a mere twenty years old (i.e., an eligible bachelorette who was unborn at Cantara's death). It is a heart-warming event for Burhan in his twilight years, but it is the death-knell for his children's future interests, even if it does not actually happen. Why? Because it is possible for an unborn widow like Zenith to give birth to one more child of Burham's, for Burham to die, and then for Zenith to die more than twenty-one years after Burham's death. Thus, the class of grandchildren would close more than twenty-one years after Burham's life-in-being. (Zenith cannot be a measuring life in being because she was—wait for it—the unborn widow.[217] She was not a life in being at the creation of the interest because she had not yet come into existence. And if one measures twenty-one years from the death of Burham, one comes up short.)

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215. LYNN, *supra* note 16, at 70-74.

216. Law.com's Legal Dictionary defines the "fertile octogenarian" as:

> an unrealistic notion that any person (male or female) is capable of having a child no matter at what age, infirmity or physical deficiency. Thus, if property title could not pass to one's child so long as he or she might have or acquire a sibling, then he/she must wait until mother and dad have actually died, unnecessarily tying up the property. Most states have passed laws to cure this anomaly.

Fertile Octogenarian, Legal Dictionary, LAW.COM, https://perma.cc/VF4Z-78N5 (last visited June 28, 2022).

217. LYNN, *supra* note 16, at 74-75; Leedia Gordeev Jacobs, *Rule Against Perpetuities: The Second Restatement Adopts Wait and See*, 19 SANTA CLARA L. REV. 1063, 1070 (1979); Kyle G. Durante, *A Modern Guide to the Modifications of the Rule Against Perpetuities in New York*, 32 TOURO L. REV. 947, 963 (2016).

It is possible. And that is all it takes. The grandchildren lose. They take nothing, in spite of the improbabilities of a remote vesting event, and in spite of a wholesome, inoffensive, and otherwise perfectly legal grantor intent.

d. The Lionized Precocious Toddler

If your brain hurts, blame RAP, not your author. We have one more RAP problem to consider, that of the precious toddler.

Here goes: Adara makes a Will devising Whiteacre "to Baheela for life, remainder to such of her grandchildren living at my death—or born within five years thereafter—as each attains age twenty-one." At Adara's death, Bahleela, age sixty, is living and has one child, Cantara, age forty. Cantara has three middle school-aged children. What will almost certainly happen is that at Adara's death, Beheela will come into possession of her life estate, an estate which will terminate at her death when she'll be survived by those three grandchildren who will have already reached age twenty-one. Nice and easy-peasy; lemon squeezy.

But RAP doesn't like nice—nor easy. Once again, as RAP insists, the problem is one of possible and even improbable futures, and it only takes one possible future in which a future interest vests outside the timeframe of life plus twenty-one years plus a period of gestation to void all of those future interests entirely. Here is the possible future that creates the RAP problem with the precocious toddler: One month following testator Adara's death, Bahleela gives birth to a second child, the Dude. And she dies as a result of complications during childbirth. Let us now presume that you, the attorney, enter the picture in order to ascertain whether Adara's testamentary gift conforms to RAP. The three now-adult aged children of Baheela consult with you in the days following their mother's death. Initially, it would appear that Cantara's three children, being over age twenty-one, would enjoy vested remainders. But RAP appearances can be deceptive. And it would appear that there is no way for their uncle, the Dude (age one) could give birth to a grandchild in the next four years.

Wrong. Theoretically, toddlers can produce offspring. It's extremely improbable. The odds are very long. But it is possible.

Imagine: The Dude matures very, very rapidly, and at age two, the Dude inseminates a maiden who gives birth to a lively youngster, Ekra. The hypothetical Ekra is therefore a grandchild living within five years of Adara's death. We will not know whether Ekra will reach her twenty-first birthday until more than twenty-one years after Baheela's death. And therefore, the future interest is not good.

The precocious toddler hypothetical turns on a potential ambiguity in the definition of "grandchildren." If "grandchildren" means children of Baheela's children whose parents are alive at Adara's death, the gift is good under RAP because the ultimate number of grandchildren qualifying as remaindermen will be known at the end of Adara's lifetime plus twenty-one years.

Granted, a more reasonable definition of "grandchildren" is children of Baheela's children whose parent (a child of Baheela) is born at any time. And under this definition, the gift to the grandchildren is bad under the Rule. Baheela might have another child after Adara's death who might have a child within five years of Adara's death. This unborn child of Baheela's unborn child might attain twenty-one and qualify to share in the remainder within the period mapped by the Will—but outside the perpetuities period.[218]

"Therefore," Lynn explains, "the ultimate number of grandchildren sharing in the gift might not be known until twenty-one years after the birth of a child to an after-born child of B[ahleeah]."[219] Accordingly, given Lynn's logical possibilities proof, the future interests of Baheela's grandchildren fail.

Lest the reader suspect that I have manufactured or highlighted obscure or ridiculous illustrations to illustrate the idiocy of RAP, I have selected only four problems as examples. There are, in fact, others, such as the problem of the fortuitous adoption, the case of the fertile decedent, and the case of the administrative contingency.[220] There are also pet trust cases too numerous to

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218. Robert J. Lynn, *A Practical Guide to the Rule Against Perpetuities*, 1964 DUKE L.J. 207, 226-27 (1964).

219. LYNN, *supra* note 16, at 60-61.

220. W. Barton Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 ABA J. 10 (1962); Dukeminier, *Empire*, *supra* note 207, at 178. The problem of the fortuitous adoption is as follows:

> Suppose that A devises "to B for life, then to B's children for their lives, remainder to the grandchildren of B." Although "grandchildren" is construed to mean "grandchildren whenever born," the gift to grandchildren is good under the orthodox Rule if "children" is construed to mean "children of B who predeceased A or were alive at A's death." The ultimate number of grandchildren sharing in the gift will be known at the end of lives in being at A's death, namely, at the death of the survivor of B's children.
>
> "Children" might be construed to mean "children of B who predeceased A or were alive at A's death" because B was a woman past the menopause at the execution of A's will, or because B was a man incapable of conceiving a child at the execution of A's will. Should the construction of "children" which saves the gift to grandchildren from invalidity under the Rule be rejected because of the possibility that B might adopt a child after A's death and that child might be unborn at A's death? If so, this is the case of the "fortuitous adoption."

LYNN, MODERN RULE, *supra* note 16, at 61-62. The case of the fertile decedent recognizes post-mortem conception technologies—the mere possibilities of which could invalidate a large number of future interests. Dukeminier, *Empire*, *supra* note 207, at 178 n. 81 (quoting mid-1960s medical technology advancements of not only sperm banks but human ova banks). Lynn explains:

> Suppose that A devises "to B for life, remainder to such of the children of B as attain 21." If "children" is construed to mean "children of B alive at A's death," the remainder is good under the Rule. If a child of B alive at A's death has not attained twenty-one at A's death, he will attain twenty-one, or not, within his own lifetime, and he is a "life in being at A's death. Even if "children is construed to mean "children of B whenever born," the remainder is good under the Rule. A child of B, even a posthumous child, will attain twenty-one, or not, no later than twenty-one years after the lifetime of B and a period of gestation, and B is a "life in being" at A's death. The ultimate number of children sharing in the remainder will be fixed within the perpetuities period, and the requirements of the Rule are satisfied.
>
> But B, anticipating death, might preserve his sperm. B might be survived by a widow capable of conceiving a child. B's widow might conceive a child by B through artificial insemination after B's death. If no child of B had attained twenty-one at

mention.[221] A trust for the benefit of the lifetime of a goldfish, remainder to the children of the testator's sister then living, for example, violates RAP because it is possible (unlikely, granted, but possible) for a goldfish to live twenty-two years.[222] Indeed, it is possible in the way that RAP construes possibilities, for a dayfly to live a century. And a such possibility is all it takes to void future interests under RAP.[223]

At this juncture—before we reach the point of considering the impact of RAP on contemporary law in the context of dynastic and other "perpetual" (as RAP defines it) trusts[224]—I would like to offer two observations on the nature of RAP. First, there is a certain unexamined two-facedness of RAP's intentions. On the one hand, RAP does its invalidating business on the basis of the limitations of donor foresight. "The policy [of RAP] was this: given that one can, to a limited extent only, foresee the future and the problems it will generate, landowners should not be allowed to tie up lands for periods outside the range of reasonable

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> B's death (thus "closing" the class), such posthumous child might qualify to share in the fee simple by attaining twenty-one beyond the perpetuities period. This is the case of the "fertile decedent."

LYNN, MODERN RULE, *supra* note 16, at 61.

> The "administrative contingency" case is one which is concerned with the validity of a gift conditioned on the occurrence of an event that probably will occur within the perpetuities period. . . . . Suppose that A devises "to such of my lineal descendants as are alive at the probate of my will. If "descendants" is construed to mean "descendants whenever born" and it is assumed that probate might occur at any time, the gift to descendants is bad under the Rule because identification of the descendants who qualify to share in the gift might be deferred beyond the perpetuities period.

Id. at 59-60. The case of the administrative contingency is one case where the rule is typically suspended and invalidation does not result. For example, in *Wong v. DiGrazia*, the California Supreme Court was confronted with a ten-year lease to commence upon completion of the construction of a building. 386 P.2d 817 (Cal. 1963). Over a dissent, the court held that the lease was not void under RAP even though—theoretically—vesting of the lease's commencement date might occur remotely, since construction was contractually required to proceed "forthwith" and "continue expeditiously." *Id.* at 823-25. *Wong* distinguished an earlier decision which rejected a similar argument as "deceptively simple." *Id.* at 825 (quoting Haggerty v. City of Oakland, 326 P.2d 957, 966 (Cal. 1958)). The dissent rejected the idea that RAP could depend "upon . . . reasonable probabilities." *Id.* at 830 (Peters, J., dissenting). Were it not for the administrative contingency exception to RAP, an ordinary Last Will and Testament directing payment of the decedent's just debts followed by outright distributions to her then-living children would be invalid since—theoretically, it might take more than twenty-one years and a lifetime to conclude the task of discharging the decedent's creditors.

221. *See* Jennifer R. Taylor, *A "Pet" Project for State Legislatures: The Movement Toward Enforceable Pet Trusts in the Twenty-First Century*, 13 QUINNIPIAC PROB. L.J. 419, 421 (1999) ("A pet trust violates the Rule Against Perpetuities because only the life of the pet would affect the vesting of the interest."). "Only the pet's death would trigger the passing of the unused portion of the trust to the remainder beneficiaries." *Id.*

222. *Part II*, *supra* note 24, at (A). *See* KALES II, *supra* note 125, at 192 (positing a hypothetical scenario where a testator bequeaths an animal to a beneficiary but if the animal should die without issue then to an alternative beneficiary). "It is submitted that a court might refuse to turn itself into a natural history class for determining the comparative length of life of an animal and a human being, and hold the gift void . . . ." *Id.*

223. *See* Fletcher, *supra* note 104, at 800 ("We can see now just how absurd some of the applications of the Rule can be, for the challenger gets the full reward—invalidity of the contingent remainder in its entirety—by being able to come up with just one wildly improbable sequence of events under which the resolution of the uncertainty is postponed to an indefensible time."). *Id.*

224. *Part II*, *supra* note 54, at (C).

foresight."[225] RAP presumes that the actors of the past should be given limited authority to govern future outcomes. But RAP itself is the product of English jurists in 1682.[226] Much has changed since then, including the development of a significant body of data; the multi-century history of RAP's failures.[227] Defenders of RAP cite to the limited foresight of individuals as a justification for limiting their testamentary reach. Hobhouse, for example, said, of testator that their "wisest judgment is constantly baffled by the course of events," and so the law should curtail dead hand control to an existing life span plus another twenty-one years at most.[228] But RAP itself has retained a stranglehold on testamentary freedom for a far, far longer period.

Second, as to RAP's logical possibilities test for invalidating grantor-intended benefits for the grantor's loved ones: RAP is the enemy of hope. RAP crushes hope. While hope searches for one scenario among many in which good prevails, RAP insists on scouring the landscape for extremely unlikely possibilities and then elevating them to a stature which quashes all others.[229] It is hope's foe and reason's nemesis.[230] It only takes one ridiculously remote possibility among millions to quash a gift under RAP. RAP opposes the very precept of the virtue of hope. It forces one to assume the worst. It is destructive, unforgiving, and uncompromising. Those qualities are embedded into its very design and quiddity. It is anti-hope. It is vacuous, absurd, and destructive. Such is its very nature. South Dakota was well to be rid of it.[231] Good riddance, I say.

Because RAP is mercilessly rigid and its productivity is questionable, it is best discarded. It is inhuman. We are better off without it.[232] Its demise should be celebrated on this, the fortieth anniversary of its death.[233]

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225. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS ch. 27, intro. note, at 549 (2010) (quoting A.W.B. SIMPSON, LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 159-60 (1987)).

226. Duke of Norfolk v. Doctrine of Perpetuities (1682) 22 Eng. Rep. 931.

227. *See* Dukeminier, *Measuring Lives*, *supra* note 131, at 1710 (noting RAP's traps "into which inexpert lawyers and lay scriveners unwittingly fall"); Lawrence W. Waggoner, *Perpetuities Perspective*, *supra* note 132, at 1714 (agreeing that RAP is "needlessly harsh").

228. Hobhouse, *supra* note 132, at 181.

229. *See* Khwaja v. Khan, 767 S.E.2d 901, 903 (S.C. Ct. App. 2015) (*"If there is a possibility* . . . [a] future interest may not vest within the time prescribed, the gift or grant is void.") (internal citation omitted).

230. *See* Wong v. Di Grazia, 386 P.2d 817, 824 (Cal. 1963) (en banc) (observing that "cases involving the rule against perpetuities constitute a special legal preserve . . . into which the accepted principle of reasonable construction cannot enter").

231. *See* SDCL § 43-5-8 (2004).

232. *See* Patrick K. Hetrick, *Legislative Kudzu and the New Millennium: An Opportunity for Reflection and Reform*, 23 CAMPBELL L. REV. 157, 195 (2001) (bemoaning: "One would have hoped and indeed prayed that reform would have completely obliterated that rule [RAP], at least prospectively."); Reid Kress Weisbord, *Trust Term Extension*, 67 FLA. L. REV. 73, 73 ("Over the last thirty years, most jurisdictions in the United States have repealed or abrogated the Rule Against Perpetuities . . . .").

233. SDCL § 43-5-8.

7. The Remarkable Charitable Trust Exception

There are three principal advantages conferred upon charitable trusts. The first is tax relief. At the federal level, most charitable organization and charitable trust income is not taxed, and donations are tax-deductible by donors.[234] At the state level, charities are partially exempt from real property taxes but not typically from sales taxes.[235] The second advantage accorded to charitable trusts is suspension of the ascertainable beneficiaries requirement which is otherwise applicable to trusts.[236] The third is exemption from RAP.[237] Charitable trusts enjoy RAP relief.[238]

A resonate example of the charitable trust exception to RAP is located in the *Shenandoah Valley National Bank v. Taylor*[239] case. Charles Henry died with a Will devising the bulk of his estate to the trustee of trust for the following purposes:

> (1) On the last school day of each calendar year before Easter my Trustee shall divide the net income into as many equal parts as there are children in the first, second and third grades of the John Kerr School of the City of Winchester, and shall pay one of such equal parts to each child in such grades, to be used by such child in the furtherance of his or her obtainment of an education.
> (2) On the last school day of each calendar year before Christmas [the same distributions shall again be carried out];
> . . .

234. *See* 26 U.S.C. §§ 170, 501(a), 642(c), 2055(a)(2) (listing tax deductions for donors); 26 U.S.C. § 501(a) (providing an exemption for charitable organization's income).

235. *See* SDCL § 10-4-9 to -46 (2020) (real property tax exemption) § 10-45-10 (2020) (sales tax exemption); Evelyn Brody, *All Charities Are Property-Tax Exempt, But Some Charities Are More Exempt than Others*, 44 NEW ENG. L. REV. 621, 625-35 (2010) (considering the diversity of rules governing real property taxes applied to charitable organizations); Harry J. Rubin, *A New Approach to the Problem of Charitable Exemption for Property and Sales Taxes*, 8 J. MULTISTATE TAX'N & INCENTIVES 100, 100 (1998) (noting "never-ending litigation centered on the standards required of charitable enterprises seeking local real property tax and state sales tax exemptions").

236. *See* BOGERT'S, *supra* note 17, § 323 ("A private trust must have an identifiable beneficiary or beneficiaries, but this requirement does not apply to the creation of a charitable trust.").

237. *See* Russell v. Allen, 107 U.S. 163, 167 (1883) (observing that trusts for charitable purposes, "[b]eing for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities").

238. *See* Clinton J. Najarian, *Charitable Giving and the Rule Against Perpetuities*, 70 DICK. L. REV. 455, 465 (1966). Two additional benefits reserved for charitable trusts might also be included: attorney general enforcement and *cy pres*. *See* SDCL § 55-9-3 (2012) (requiring notice upon attorney general in *cy pres* proceedings); *In re* Reese Trust, 2009 SD 111, ¶ 7, 776 N.W.2d 832, 834 (explaining that *cy pres* "is the doctrine that equity will, when a charity is originally or later becomes impossible or impracticable of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible") (internal citation omitted); Banner Health Sys. v. Long, 2003 SD 60, ¶¶ 34-36, 663 N.W.2d 242, 249 (impliedly recognizing the authority of the Attorney General in charitable organization operations). "By statute or common law, all states give the state attorney general the authority to supervise nonprofits organized in the state." Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 22 U. HAW. L. REV. 593, 622 (1999).

239. 63 S.E.2d 786 (Va. 1951).

> (5) . . . if the John Kerr School is ever discontinued for any reason the payments shall be made to the children of the same grades of the school or schools that take its place . . . .[240]

Five remotely related cousins of the decedent challenged the validity of the bequest, arguing that because the trust was not charitable, it violated RAP and therefore failed.[241] The trial court agreed. The Virginia Supreme Court affirmed. Since the trust clearly violated RAP unless the charitable trust exception applied, the sole issue was whether the trust was charitable. And while the trust was generous, its purpose was just that—generosity, and not educational, religious, or promoting health.[242] Mere benevolence, good will, kindness, generosity, and liberality, the court emphasized, is not charity. Any suggestion that the trust was sufficiently related to education was overcome by timing the trust distributions to the schoolchildren at the occasions of Christmas and Easter—times when the children's "minds and interests would be far removed from studies . . . ."[243] The testator's purpose was "to bestow upon the children gifts that would bring to them happiness" and that "falls short of an educational trust."[244] And so, quoting Gray and invalidating the testator's estate plan, the court concluded: "The Rule against Perpetuities is not a rule of construction, but a preemptory command of law. It is not, like a rule of construction, a test, more or less artificial, to determine intention. Its object is to defeat intention."[245]

Charles Henry's trust would not be allowed to "evade, impair or set at naught the rule against perpetuities."[246] So, with that, the court defeated Charles Henry's intention and disappointed hundreds of schoolchildren. The five remote cousins who took instead were, we may safely assume, rather pleased.

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240. *Id.* at 788.

241. *Id.* at 788-89.

242. *Id.* at 790-91. An authoritative classification of charitable purposes includes:

> (a) the relief of poverty;
> (b) the advancement of education;
> (c) the advancement of religion;
> (d) the promotion of health;
> (e) governmental or municipal purposes; and
> (f) other purposes the accomplishment of which is beneficial to the community.

Id. at 789 (quoting RESTATEMENT (FIRST) OF TRUSTS § 368 (Am. L. Inst. 1944)); s*ee also* Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations*, 50 FLA. L. REV. 419, 425-29 (1998) (tracing definitions of charities for tax deduction purposes under English and American law). Defining a charitable organization for one purpose (e.g., exemption from federal taxes) does not necessarily result in the organization being classified as charitable for others. *See, e.g.*, *In re* South Dakota Sigma Chapter House Association for Refund of Taxes, 276 N.W. 258, 260-62 (S.D. 1937) (involving an organization incorporated as a charitable organization that was not entitled to a charitable exemption from property taxes).

243. *Shenandoah Valley*, 63 S.E.2d at 790-91. "It is manifest that there was no intent or belief that the funds would be put to any use other than such as youthful impulse and desire might dictate." *Id.* at 791. The admonishment that the gifts were "to be used . . . in the furtherance of his or her obtainment of education" was a qualification without effect, the court said, since the mandatory distributions gave the trustee no power over the funds once distributed. *Id.*

244. *Id.* at 791.

245. *Id.* at 790 (citing GRAY, *supra* note 13, § 629).

246. *Id.* at 795.

8. Savings Draftsmanship

Given the infamous remorselessness of RAP, the cautious drafter often incorporates a RAP savings clause into an instrument like a trust which might otherwise suffer from an unidentified RAP problem. A savings clause might read like this one which Professor Dukeminier carefully crafted:

> Notwithstanding any other provision in this instrument, this trust shall terminate, if it has not previously terminated, twenty-one years after the death of the survivor of the settlor's issue living at the date this instrument becomes effective. In case of such termination, the then remaining principal and undistributed income of the trust shall be distributed to the settlor's issue then living per stirpes.[247]

However, RAP savings clauses must be utilized with care. They are by no means a one-size-fits-all proposition. For example, if the trust in question does not benefit the settlor's issue, then clearly it would be baseless to direct distribution of the entire trust to them in order to save it from RAP invalidity.[248] Better boilerplate, such as that composed by Dukeminier, might read: "Notwithstanding any other provisions in this instrument, this trust shall terminate, if it has not previously terminated, twenty-one years after the death of the survivor of my issue living at the time of my death, and the corpus shall be then distributed to the income beneficiaries."[249]

But this clause does not work in an inter vivos irrevocable trust context since the measuring lives—the settlor's descendants living at her death—may not be lives in being at the creation of the trust.[250]

Although there are numerous varieties of savings clauses, they all share two components: "the perpetuity-period component and the gift-over component."[251] The first component contains a timeline. It insists that the trust (or other arrangement) shall "terminate no later than twenty-one years after the death of the last survivor of a group of individuals designated in the governing instrument by name or class."[252] It sets the perpetuities period clock for vesting synchronized with the RAP period and embedded into the instrument. The second designates the person(s) in whom the interest will vest (assuming that vesting has not already occurred under the dispositive provisions of the instrument).[253] In most cases, the clause will not apply and the arrangement will terminate prior to the application of the savings clause, and if this occurs, "the period of time marked off by the

247. Dukeminier, *Modern Guide*, *supra* note 20, at 1911.

248. *See* Becker, *supra* note 9, at 957-58 (noting that "once a saving clause is actuated other problems can arise concerning the distribution of principal redirected by the saving clause").

249. Dukeminier, *The Measuring Lives*, *supra* note 131, at 1701.

250. *Id.* This savings clause *would* work in the context of a testamentary trust, however. *Id.*

251. Waggoner, *supra* note 132, at 1718.

252. *Id.*

253. *Id.*

perpetuity-period component is far from fully used up."[254] The instrument, in this sense, and the client's objectives are "over-insured."[255]

9. Neoteric Efforts at Reform

Given the notoriety of RAP's "Reign of Terror," it should come as no surprise that courts, legislators, scholars, and legal reformers have made serious attempts to soften or suspend its application and to simplify its complexities. The evidence of widespread RAP reform strongly suggests that even fans of the rule (who are considered in the following section) must acknowledge the widespread acknowledgement that RAP in its common law form goes too far; it invalidates future interests on too wide a scale with too much remorselessness. Three principal varieties of RAP reform are sketched below. There is also a fourth reform—that which South Dakota implemented forty years ago—outright repeal.[256]

Perhaps the most significant RAP reform is how courts have tamed the rule.[257] The traditional common law attitude of RAP is remorseless.[258] Gray explained how "every provision in a will or settlement is to be construed as if the Rule did not exist, and then to the provision so construed the Rule is to be remorselessly applied."[259] Modern courts take a more restrained approach. Instead of wielding RAP like a bush-wacker in a rainforest, recklessly swinging a sharpened machete at the vines and greenery of donor intent with abandon, courts nowadays tend to assume that the donor intended to create valid interests.[260] This does seem to be a more reasonable approach; it does seem odd to presume that a donor intended to create invalid interests, after all. Yet it also stands RAP on its head since the core function of the rule is to countermand donor intent in the name of reconfiguring property interests into more marketable ones for the benefit of society at large. RAP clears a path through donor intent, one might say. So, it does seem backwards to inject donor intent presumptions into its machinery. But this is indeed what this first variety of RAP reform does. It tries to construe gifts

254. *Id.*

255. *Id.*

256. As of 2006, "almost one-half of all the states ha[d] abolished or severely limited the application of the RAP in one form or another." Ronald J. Scalise, Jr., *New Developments in United States Succession Law*, 54 AM. J. COMPAR. L. 103, 118 (2006). One might even say that RAP "is going the way of the dinosaur" in many states. Note, *Dynasty Trusts*, *supra* note 53, at 2589.

257. *See* John G. Shively, *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, 381 (2000) ("Courts have acted to ameliorate these harsh, aspects of the Rule.").

258. *See* David M. Becker, *If You Think You No Longer Need to Know Anything About the Rule Against Perpetuities, Then Read This!*, 74 WASH. U. L. Q. 713, 713 (1996) (asserting that RAP is "quirky, difficult to justify, and unfair"); W. Barton Leach, *Perpetuities Legislation, Massachusetts Style*, 67 HARV. L. REV. 1349, 1349 (1954) (confirming: "T[he] Rule [A]gainst Perpetuities is a technicality-ridden legal nightmare"); John D. More, Note, *The Uniform Statutory Rule Against Perpetuities: Taming the "Technicality-Ridden Legal Nightmare"*, 95 W. VA. L. REV. 193, 194 (1992) (observing that under RAP, "reasonable dispositions can be rendered invalid by such obscure possibilities").

259. GRAY, *supra* note 13, § 629.

260. Dukeminier, *Modern Guide*, *supra* note 20, at 1887.

in a manner which avoid a RAP violation. In *Symphony Space*, the court placed great reliance on New York's codification of the more liberal construction approach, but to no avail. The court reasoned that even a presumption of validity could not save a transaction in which an option might have vested too remotely:

> Neither the lease nor the mortgage . . . expires until a date in 2003. The lease could therefore be terminated, or Symphony could default on the mortgage, some time prior to 2003 but after the 21-year period lapses in December 1999. Defendants, in turn, could potentially exercise the option during this interval.
>
> Defendants urge that, under EPTL 9-1.3(b), (d), we must presume the parties expected these contingencies to occur, if at all, within the 21-year period. A contrary intention, however, appears in the agreement itself. By specifying in section 4 that the closing date could be scheduled as late as December 31, 2003, the parties manifested their expectation that the contingency might occur and that the option might be exercised as late as October 2003, well beyond December 1999.[261]

The parties' intent—ironically—doomed their intent. The court cites to the parties' intent in invalidating what was intended as expressed in the instrument.

Second, some jurisdictions have taken the "wait and see" approach.[262] This approach was also observed in the discussion of the *Symphony Space* case, above.[263] The Supreme Court of Virginia has described the wait-and-see approach to RAP this way:

> Under [the 'wait-and-see'] doctrine, [RAP] is determined to have been violated or not by taking into consideration events which occur after the period fixed by the rule has commenced. If, upon a later look, the event upon which an interest was made contingent is found to have occurred and the interest has vested or has become certain to vest within the period fixed by the rule, the rule is held not to have been violated.[264]

The wait-and-see approach has its fans.[265] And it has its foes.[266] The wait-and-see replaces RAP's what-might-happen analysis with a what-actually-happens test. As Dukeminier frames things: "Under wait-and-see, the validity of an interest is not judged by what might happen, but rather by whether the interest actually vests within the perpetuities period."[267] Leach originally proposed the

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261. Symphony Space, Inc. v. Pergola Props., Inc., 669 N.E.2d 799, 807-08 (N.Y. 1996).

262. *See, e.g.*, *In re* Pearson's Estate, 275 A.2d 336, 344 (Pa. 1971) (stating "it is necessary that the wait and see rule be applied").

263. *See supra* Part II and accompanying text (discussing *Symphony Space*).

264. Lake of the Woods Ass'n., Inc. v. McHugh, 380 S.E.2d 872, 875 n.2 (Va. 1989) (alterations in original).

265. *E.g.*, W. Barton Leach, *Perpetuities Legislation: Hail, Pennsylvania!*, 108 U. PA. L. REV. 1124 (1960) (praising the approach).

266. *E.g.*, Lawrence W. Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718 (1983) (criticizing wait-and-see).

267. Dukeminier, *Modern Guide*, *supra* note 20, at 1880.

idea.[268] Recall our visualization of the rule, where point *a* represents the creation of the interest and line *a-d* represents the RAP period:

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--/----------------------/-/--------------------/--------------------->
a                      b c                    d                     ∞
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With the wait-and-see approach, point *a* still marks the commencement of the RAP period, but it no longer serves as the temporal perspective from which the possible remote vesting analysis is undertaken.[269] Instead, another point is inserted—let's call it point Δ—which is the time in which the future interest actually vests. If point Δ occurs within the *a-d* time frame, the interest is good:

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--/----------------------/-/---------/------------/--------------------->
a                      b c        Δ           d                     ∞
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But if point Δ occurs beyond the *a-d* time frame, the interest is not good. More precisely, if point Δ has not occurred by the time point *d* is reached, the interest is not good. By then, it no longer matters when the interest will vest because it has taken too long for it to vest, and so RAP intervenes; the interest will never vest. For the less visually inclined reader, Pennsylvania's wait-and-see statute sums up the approach thusly: "Upon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events, any interest not then vested and any interest in members of a class the membership of which is then subject to increase shall be void."[270]

Finally, some jurisdictions have taken a different approach to taming RAP, revising the RAP period. Wyoming, for example, retains common law RAP when it comes to real property.[271] But for trusts, Wyoming replaces the three-part RAP period (life plus gestation plus twenty-one years) with a one-thousand-year duration cap.[272] The uniform law commissioners recommend a RAP period measured by the greater of the traditional RAP period and ninety years, imposing a possibilities-at-inception analysis to the traditional RAP period and a wait-and-see approach to the alternative ninety-year span.[273]

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268. *Id.*; Leach, *Reign of Terror*, *supra* note 19, at 730.

269. *See* SIR ROBERT MEGARRY & H. W. R. WADE, THE LAW OF REAL PROPERTY 254 (5th ed. 1984) (explaining that with the wait-and-see approach, "[t]he perpetuity period itself remains unchanged, and the lives in being which determine the period in any given case ought likewise to remain unchanged").

270. 20 PA. CONS. STAT. § 6104(b) (2006).

271. WYO. STAT. ANN. § 34-1-139(a) (West 2019).

272. WYO. STAT. ANN. § 34-1-139(b) (West 2019). To achieve a 1,000 year duration, the trust must be sitused in Wyoming and provide "that any power of appointment over the trust property, other than interests in real property, terminate and all such interests in trust property vest or terminate no later than one thousand (1,000) years after the trust's creation or such earlier date as is set forth in the trust instrument." WYO. STAT. ANN. § 34-1-139(b)(iv)-(v) (West 2019). For trusts owning real property, common law RAP applies to any personal property in trust; the 1,000 year duration rule applies to realty. WYO. STAT. ANN. § 34-1-139(e) (West 2019).

273. UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(a) (1990). This approach softens RAP (a/k/a "the Common-law Rule") considerably

Simply replacing the three-part traditional RAP period with a term of years, however, could backfire. Consider, for example, a modification to RAP to provide that "no contingent interest is good unless it must vest, if at all, not later than 100 years after the creation of the interest." Under such a formulation, a gift of Whiteacre "to my son for life, remainder at his death to my daughter or her issue if she is then deceased" would invalidate the contingent remainder in the donor's daughter. Why? Because the son might live longer than a century more.

The general consensus of scholars supports the various RAP reforms.[274] Very few praise the ultimate reform South Dakota's legislature selected; simply repealing the rule altogether.[275] But there is a side effect to the various RAP reform approaches; the diverse array of reforms adopted in different states—while perhaps simplifying the rule within particular jurisdictions—creates an even more complex landscape. Nowadays, it is not enough to merely master RAP in its common law form, an endeavor which demands careful attention and study. Rather, the RAP student must master common law RAP alongside its diverse variations.[276] An analysis of the degree of precedential authority when one attempts to apply case law from Oklahoma to New York, for example, now

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> by codifying (in slightly revised form) the validating side of the Common-law Rule and modifying the invalidating side by adopting a wait-and-see element. Under the Statutory Rule, interests that would have been initially valid at common law continue to be initially valid, but interests that would have been initially invalid at common law are invalid only if they do not actually vest or terminate within the permissible vesting period set forth in Section 1(a)(2). Thus, the Uniform Act recasts the validating and invalidating sides of the Rule Against Perpetuities as follows:
>
> *Validating Side of the Statutory Rule:* A nonvested property interest is initially valid if, when it is created, it is then *certain* to vest or terminate (fail to vest)—one or the other—no later than 21 years after the death of an individual then alive. The validity of a nonvested property interest that is not *initially* valid is in abeyance. Such an interest is valid if it vests within the permissible vesting period after its creation.
>
> *Invalidating Side of the Statutory Rule:* A nonvested property interest that is not *initially* valid becomes invalid (and subject to reformation under Section 3) if it neither vests nor terminates within the permissible vesting period after its creation.
>
> As indicated, this modification of the invalidating side of the Common-law Rule is generally known as the wait-and-see method of perpetuity reform.

Id. cmt. A; *see also* Lawrence W. Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718 (1983) (discussing RAP reform).

274. *E.g.*, BOGERT'S, *supra* note 17, § 214 (describing reforms).

275. For a comprehensive listing of the status of RAP—as it applies to trusts—in each state and the District of Columbia see *id*. n.28. Among the states which have now repealed the rule are Alaska (capping powers of appointment at 1,000 years), Delaware (limiting RAP for real property held in trust to 110 years); Idaho, Illinois, Maine, Maryland, Missouri, Nebraska, Nevada (365-year period); New Hampshire, New Jersey, Pennsylvania, Rhode Island, Utah (1,000 year limit); Virginia, Wisconsin, Wyoming (1,000 year limit). Some states require an affirmative opt-out in the governing instrument. Others, like South Dakota, simply repealed the rule altogether. Only three states—South Dakota, Idaho, and Wisconsin—repealed RAP prior to the enactment of the current generation skipping transfer tax in 1986. Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2473 (2006).

276.

> Whatever the reader thinks of the reform, my point is simple: law students must now deal with a statutory overlay. There is significantly more to learn, and the statutory reform has not simplified the area from the standpoint of a law student's attempt to study and comprehend to the extent possible the entire perpetuities conundrum.

Hetrick, *supra* note 232, at 195.

requires an additional analytical comparison of those jurisdictions' particular RAP versions. But for all its complexities, RAP remains popular, at least among academics.[277]

B. RAP INTEREST LAYERS

The layering of legal interests is quite common in today's world. Three examples will suffice: the corporation, the decedent's estate, and the trust. In each, the legal owner may have a unified, freely alienable, and easily marketable estate. A corporation, for example, may own a fee simple absolute estate in Whiteacre with no co-owners or encumbrances. So, too, may an estate or a trust. If the analysis terminates here, no RAP (or RAP-related) problem emerges. RAP could not be more satisfied than when one legal person holds a fee simple estate. This is the very peak of free alienability.

But if one conducts a deeper analysis, one can assess the alienability or contingent nature of a second layer of owners, be they shareholders, legatees, or trust beneficiaries. Those secondary owners may have certain rights to entity-owned property.[278] A legatee has direct rights to devised property, even though estate distributions may be postponed during the period of estate administration.[279] A shareholder may have the right to demand dividends or even corporate dissolution.[280] A trust beneficiary may be able to require trust termination and distribution.[281] But often, the rights of secondary owners—other than legatees—are severely restrained.[282]

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277. *See* Kades, *supra* note 53, at 149 (casting RAP repeal and reform as "nothing less than a prescription for a return to Europe's Belle Époque or America's Gilded Age, the era in the late nineteenth and early twentieth centuries defined by large pools of inherited wealth"); Jack H.L. Whiteley, *Inheritance in an Unequal Age*, 117 NORTHWESTERN U. L. REV. (forthcoming 2023) ("In the dynasty trust's victory, it was equality that lost, and equality of the most popular kind."); *see also, e.g.*, MICHAEL HELLER AND JAMES SALZMAN, MINE! HOW THE HIDDEN RULES OF OWNERSHIP CONTROL OUR LIVES 227-28 (2021) ("South Dakota has made tiny tweaks to arcane ownership rules [which] help create the paths through which America sustains the most unequal distribution of wealth of any major country one earth.").

278. *See generally* Arthur B. Laby, *Resolving Conflicts of Duty in Fiduciary Relationships*, 54 AM. U. L. REV. 75, 141-48 (2004) (touching on the tension between rights of trust beneficiaries and rights of shareholders).

279. *See* SDCL § 29A-3-101 (2004) ("Upon the death of a person, that person's real and personal property devolves to the persons to whom it is devised by will or . . . to the heirs . . . subject to . . . administration.").

280. *See* Ritchie v. People's Telephone Co., 119 N.W. 990, 993 (S.D. 1909) ("If the agents of a company wrongfully refuse to distribute profits, when it is their duty to do so, a court of equity will grant relief at the suit of any shareholder.") (internal citation omitted); *see also* SDCL § 47-1A-1402 (2007) ("A corporation's board of directors may propose dissolution for submission to the shareholders.").

281. *See* Dodge v. Dodge, 92 A. 49, 49 (Me. 1914) ("when all the beneficiaries shall release their rights thereunder, [a] trust may be terminated") (internal citations omitted); Snook v. Sessoms, 350 S.E.2d 237, 238 (Ga. 1986) ("A beneficiary assuredly is empowered to enforce the provisions of a trust . . . .").

282. *E.g.*, *In re* Nat'l Century Fin. Enter., Inc., 755 F.Supp.2d 857, 866 (S.D. Ohio 2010) ("[A] trustee can maintain an action in law or equity against a third person to remedy an injury with respect to trust property as if he held the property free of the trust; generally, beneficiaries of the trust cannot.") (internal citation omitted); Gaff v. Fed. Deposit Ins. Corp., 814 F.2d 311, 315 (6th Cir. 1987) ("[A] shareholder of a corporation does not have a personal or individual right of action for damages based solely on an injury to the corporation.") (internal citation omitted).

Which layer of property rights one analyzes can be outcome determinative. In the *Gerin v. McDonald*[283] case, for example, the court—applying South Dakota law—declined to invalidate a trust, in which the court all but conceded, that violated anti-alienation statutes.[284] The trust provided that distributions could be deferred indefinitely:

> It is not my wish or desire, however, that they shall sell any of my said property at a sacrifice in order to pay such bequests, and for that reason I have not designated any period of time in which these said bequests are to be paid, as I leave that entirely to the judgment and discretion of [the trustees].[285]

The court upheld the bequest by construing the property rights of the trustee as legal owner of trust property rather than the beneficial interests of the trust's beneficiaries.[286]

This is the modern view: to focus on the trustee's alienation rights of trust property and not the beneficiary's power to alienate a beneficial interest. Part of this shift is due to increasingly treating a trustee as legal owner of trust property. Historically, trustees once had much more constrained property rights than they do today:

> The modern trust instrument, if well drawn, will contain broad powers of sale and reinvestment. While the beneficiary who has an equitable estate subject to a future interest may have difficulty in selling his property, that does not make it unproductive. As a practical matter, the trustee will have an absolute legal estate which he can sell, and will be empowered to reinvest the proceeds. While at one time in the history of the law, in the absence of express authorization in the trust instrument, the trustee's powers of reinvestment were extremely limited, today the rapidly extending "prudent man rule" gives the trustee a wide field of selection in making trust investments productive.
>
> Moreover, not only is the trustee empowered by the terms of any well-drawn trust instrument to sell and reinvest in productive property; the law requires him to do so. One of the duties imposed by law upon trustees is to use reasonable care in making the trust property productive.[287]

In addition to the evolution of trustee powers expansion to the point where the trustee now holds title as essentially any other legal owner, a second development in the twentieth century further diminishes the inalienability concerns associated with RAP as it applies to trusts—a topic we turn to fully in the next section.[288] That second development is what has come to be known as

283. Gerin v. McDonald, 64 F.2d 394 (8th Cir. 1933).
284. *Id.* at 394.
285. *Id.* at 395.
286. *Id.* "[T]he provisions, concerning the powers of the trustees to alienate, are decisive." *Id.*
287. Simes, *supra* note 27, at 713.
288. *Part II*, *supra* note 24, at (C).

representation or "virtual representation" of individuals holding future interests—including trust beneficiaries.[289]

Representation refers to the common law recognition that, in certain circumstances, individuals may be represented by others with sufficiently similar economic interests.[290] In this way, notice upon or consent from one can bind another without offending due process or property rights. Virtual representation refers to a similar methodology by which even unborn and unascertained individuals—who otherwise a trustee would be powerless to notify absent the appointment of a guardian ad litem—can also be represented by other individuals with shared interests. Nowadays, virtual representation is typically sketched with some detail in codified sections of trust codes, making it easier to implement with assurance.[291] A full description of the parameters of virtual representation is unnecessary in this context except to note that it addresses situations in which noticing all trust beneficiaries is complicated by minor beneficiaries, or even unborn and unascertained beneficiaries. For example, in a situation where a trustee desires to alienate Whiteacre but hesitates to do so absent a release from all the trust beneficiaries, virtual representation permits the trustee to do so more efficiently. Virtual representation enhances the trustee's willingness to alienate trust property by streamlining notice and consent problems and thereby diminishes the concerns of RAP with property otherwise "tied up" in trust.

C. RAP AND TRUSTS

The application of RAP outside the contexts of the inter vivos and testamentary gifts of real property and the relatively rare commercial transaction is, relatively speaking, an afterthought.[292] Historically, most early RAP decisions deal only with estates in the real property context, specifically contingent remainders and executory interests. Still, it is considered black letter law that RAP applies to equitable interests as well as legal ones.[293] Thus, RAP certainly applies

289. *See* A.E. Anderson, S., *Future Interests-Parties-Unborn Persons-Virtual Representation*, 46 MICH. L. REV. 569, 570 (1948) (noting that under the common law, "unborn contingent remaindermen may be represented, in case there are no living members of the class, by the persons who hold estates which precede or follow theirs, provided some one or more of such persons would be adversely affected by the decree equally with the class not in being and would therefore have the same interests and be equally certain to present to the court the merits of the question on which the decree is sought").

290. *See generally* SIMES & SMITH, *supra* note 16, § 1803 (stating the general rule as "the holder of a future interest may sometimes be bound by a judgment or decree in a proceeding to which he is not a party because he is 'represented' by someone else"); Susan T. Barg & Lyman W. Welch, *State Statutes on Virtual Representation–A New State Survey*, 35 ACTEC J. 368, 369 (2010) (explaining that "[t]he hallmark of the doctrine of virtual representation is that a person who is not a party to a proceeding or agreement is nevertheless legally bound by it because his or her interests were adequately represented by another party").

291. *E.g.*, UNIF. TR. CODE §§ 301-05 (UNIF. L. COMM'N 2010).

292. *See* RESTATEMENT (FIRST) OF PROP. Ch. 26 *Introductory Note* (AM. L. INST. 1944) (noting: "The rule against perpetuities has a subsidiary, but still substantial, significance with respect to the creation of trusts."). Today, however, "the future interest with which the Rule against Perpetuities is concerned is nearly always an equitable interest in a trust." Simes, *supra* note 27, at 713.

293. *E.g.*, Moody v. Bayer Const. Co., Inc., 627 P.2d 1171, 1173 (Kan. Ct. App. 1981) ("The rule against perpetuities governs both legal and equitable interests."); Melcher v. Camp, 435 P.2d 107, 112

to the interests of beneficiaries in trusts. Previously, formulations of the rule by Gray, Leach, and Tiffany were stated.[294] Lewis Simes's formulation deserves mention at this juncture, since it alone takes account of RAP's impact on trusts:

> Limitations which create perpetuities are invalid; a perpetuity arises from a serious, indirect restraint on alienation which may continue for more than a life or lives in being and twenty-one years after the creation of the interest involved; nonvested future interests and limitations which make private trust indestructible are indirect restraints within the meaning of this rule.[295]

When it comes to RAP and trusts, a recurring confusion is often present when courts talk about RAP as placing limitations on the duration of trusts. Properly speaking, as outlined above, RAP is not concerned with the duration of estates (or trusts) but rather with remote vesting. Thus, for example, in theory a perpetual trust which distributes to the Estate of Elvis Presley ought to be valid.[296] So too ought to be a trust which distributes to a corporation in perpetuity—certainly if a nonprofit corporation is the sole beneficiary on account of the charitable trust exception from RAP, but even a for-profit corporation as the sole beneficiary of a perpetual trust ought not to offend RAP.[297]

Here is another example: Aadila funds an irrevocable trust with $100,000. The trust provides for lifetime distributions of mandatory income and discretionary principal to her three toddlers, followed by distributions of the same kind for her children's children for their lifetimes, remainder at the death of his last grandchild to die to the grandchildren's estates in equal shares. The trust's duration exceeds the RAP perpetuities period. The trust may very well continue for the three identified children's lifetimes plus another lifetime—that of the longest living grandchild, a life not in being at the creation of the trust. Since the longest living grandchild's lifetime may exceed twenty-one years, the potential duration of the trust exceeds the RAP perpetuities period.

However, Aadila's trust is not invalid; nor are the future interests of the unborn grandchildren. All of the grandchildren's lifetime beneficial interests and their remainder interests will vest as of the death of the last of the trustor's children to die.[298] Upon the death of the last living of the three toddlers, it is clear that the

(Okla. 1967) ("The rule against perpetuities is applicable alike to real and personal property, including terms for years and other chattel interests, and to both legal and equitable interests therein, however created.") (internal citation omitted).

294. *Part II*, *supra* note 24, at (A)(2).

295. LEWIS M. SIMES, THE LAW OF FUTURE INTERESTS § 490, at 343 (1936); *see also* 6 ALP, *supra* note 14, at 4 (observing that Simes' formulation of RAP "seeks to restate the Rule [Against Perpetuities] so that it lays down the law as to the duration of trusts as well as the vesting of future interests").

296. *See Part II*, *supra* note 24, at (B) (dealing with the layering of interests subject to a RAP analysis).

297. The shareholders' interests in the corporation may shift over time but so long as the corporation (like a decedent's estate)—as a legal person—has had its interests vest within the perpetuities period, RAP would appear to be satisfied. For a discussion of the charitable trust exception to RAP generally, see RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. d. (AM. L. INST. 2003) (stating "Charitable trusts may be of unlimited duration . . . .").

298. 6 ALP, *supra* note 14, at 163. A trust "may last longer than the period of perpetuities, provided that all interests in the trust vest within that period." *Id*.

grandchildren then living (or within a period of gestation at that time) will be ascertained, the class of grandchildren will then close, and all of their interests—their lifetime beneficial interests and their remainders—will be set.

Or consider: Aadila funds an irrevocable trust with $200,000. The trust provides for lifetime distributions of mandatory income and discretionary principal to her husband and upon his death, distributions of the same kind to her three toddlers for their lifetimes, followed by distributions of the same kind for her children's children outright and free of trust in equal shares upon their twenty-first birthdays, if they survive to that age and, to those who do not, their remainder interests shall lapse. Here, both the duration of Aadila's trust and the last-chance vesting of the remainder interests are equivalent. The trust's duration will not exceed lives in being (the trustor's named spouse and three children) plus twenty-one years (the longest time period required following the death of the last of the measuring lives to determine whether a grandchild reaches the magic age at which final distributions are carried out). And the vesting of the grandchildren's remainder interest will either occur (upon their twenty-first birthdays) or not (if they predecease that age) within the same period.[299]

Thus, traditionally, trusts are assessed under RAP with regards to vesting in the same manner as estates. But the frequency with which some courts conduct an assessment with reference to the duration of trusts requires comment.[300] A rule measuring trust duration—along with other related rules—often further complicates an already terrifically complicated RAP analysis.

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299. *See* Charles E. Herzog, Comment, *Corwin v. Rheims and the Rule Against Perpetuities*, 13 U. CHI. L. REV. 300, 301 (1946) (describing this hypothetical and noting that such a trust would be valid under an orthodox application of RAP).

300. For example, *Brown v. Saake* articulates two separate rules: a vesting (i.e., RAP) rule and a trust duration rule. Brown v. Saake, 190 So.2d 56, 59 (Fla. Dist. Ct. App. 1966). The court offers that charitable trusts are exempt from the duration rule—but not from the vesting rule. Charitable trusts must conform to the remote vesting mandate of RAP: "The law makes a marked distinction . . . between charitable trusts and private trusts. In *either* instance, the estate must vest within a life or lives in being and 21 years, plus the period of gestation." *Id.* at 58-59 (emphasis added). But, in the kind of confusion endemic in RAP cases, after saying that both charitable and noncharitable ("private") trusts must abide by RAP, the court contradicts itself in the *very next sentence* and says that charitable trusts enjoy an exemption from *both* rules:

> A gift for charitable purposes being of a public permanent interest may be set up in a trust, be perpetual in its duration *and* not be within the rule against perpetuities. On the other hand, if the trust is dominantly private, then its period of enjoyment is limited to no longer than lives in being and 21 years, plus the period of gestation.

Id. at 59 (emphasis added) (internal citation omitted). In the sentence preceding this passage, the court also references a third rule—restrictions on the duration during which trust income can be accumulated:

> Under the English common law as evolved from the early case of Thellusson v. Woodford, 11 Vesey, Jr., 112 (1805), and followed by the American courts, where the beneficial interests are vested but the trust instrument provides for the accumulation of the net income, generally such accumulation can't extend beyond the period specified in the rule against perpetuities.

Id. (additional citations omitted). Thus, it may in fact be more accurate to talk of the Rule Against Perpetuities—as well as the rules against perpetuities. There is more than one rule concerned with marketability and dead hand control, and the courts not uncommonly blend them, confuse them, and, unfortunately, contradict themselves from time to time.

D. RAP IN CONTEXT: PARALLEL AND OCCASIONALLY OVERLAPPING RULES

RAP does not stand alone in rules aimed at ensuring the free alienability of property free from the dreaded dead hand control. As mentioned above, there are also rules like the Doctrine of Worthier Title, the destructibility of contingent remainders, and the rule in Shelley's case which likewise attempt to chip away at dead hand control in the name of marketability.[301] There is also a common law rule addressing excessive income accumulations in trust.[302] There is an English case which invalidated a contingent life estate to an unborn person followed by a remainder to that person's child irrespective of whether vesting occurred outside the RAP perpetuities period.[303] It is not even clear at times which rule a court is applying.[304] These rules form a cluster which includes RAP but—not uncommonly—are also muddled up with RAP. Judicial perplexity complicates the ability to distinguish one rule from the next.

RAP itself is difficult enough. Even how it should be articulated is unsettled. The First Restatement of Property, for example, attempts to codify RAP with five separate rules, not just one.[305] Professor Maureen Markey, in attempting to simplify RAP, supplies a step-by-step process to conduct a RAP analysis; it is comprised of not less than two dozen separate steps.[306] That is quite an involved flowchart.

Alongside RAP and the other pro-alienation anti-intent doctrines, there appears to be a separate and distinct rule which does in fact limit the duration of trusts. The rule appears occasionally framed with the term "indestructibility"—that is, the rule imposes time limitations upon the indestructibility of non-charitable trusts, especially trusts designed to care for an animal or to maintain a tombstone; purpose trusts.[307] It occasionally escapes from its purpose trust

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301. *See* SIMES & SMITH, *supra* note 16, §§ 1601-13 (explaining the Doctrine of Worthier Title); *id.* §§ 193-209 (describing the destructibility of contingent remainders); *id.* §§ 1541-72 (dissecting The Rule in Shelley's Case). The Rule in Shelley's Case is significantly older than RAP, with roots traceable to 1326. Hampton L. Carson, *The Rule in Shelley's Case in Pennsylvania*, 64 U. PA. L. REV. 141, 141 (1915). That rule, as later articulated by Lord Coke, is this:

> That when the ancestor by any gift or conveyance takes an estate of *freehold*, and in the *same* gift or conveyance an estate is limited either *mediately or immediately* to his heirs in fee, or in tail, *always* in such cases *heirs* are words of *limitation* of the estate, and *not* words of *purchase*.

Id.

302. Thellusson v. Woodford (1805) 32 Eng. Rep. 1030.

303. Whitby v. Mitchell, (1889) 42 Ch D 494, *aff'd*, (1890) 44 Ch D 85, CA.

304. *See, e.g.*, William A. Reppy, Jr., *Judicial Overkill in Applying the Rule in Shelley's Case*, 73 NOTRE DAME L. REV. 83, 93 (1997) (summarizing "cases where it *appears* that the court must have had Shelley's Rule in mind") (emphasis added).

305. *See* RESTATEMENT (FIRST) OF PROPERTY § 370 cmt. c (1944) (explaining that "there are five different types of 'potentially inconvenient fetterings of property' [which] are separately described in this Section and in §§ 371, 379, 380 and 394."). The First Restatement also attempted to distinguish between inconvenient fetterings and convenient ones. *Id.*

306. Markey, *supra* note 104, at 390-91.

307. 6 ALP, *supra* note 14, at 162-63. "'Honorary trusts' . . . must not exceed the period of perpetuities in duration." *Id*. at 163; *see also* George Downing, *The Duration and Indestructibility of Private Trusts*, 16 CASE WESTERN L. REV. 350, 354 n.17 (1965) (clarifying: "Although it has been said

application, however, and visits itself upon ordinary private trusts for ascertainable beneficiaries.[308] Elsewhere, I have termed this trust duration rule RAP's "shadowy twin" and suggested the acronym P-TRAP (for "Purpose Trust Rule against Perpetuities").[309] In South Dakota and the Uniform Trust Code, the P-TRAP rule, despite—or perhaps because of—its shadowy reputation, has been legislatively jettisoned.[310] But it and other kith and kin to RAP continue to complicate historical and legal analyses.

III. CONCLUSION

Common law RAP thus can be seen for what it is (or—in the case of South Dakota—*was*): notoriously difficult, often unpredictable, and frequently destructive. The primary premise of private law is to give effect to the intent of the donor or parties, so long as basic guardrails are observed. Most of what is contained in the Uniform Commercial Code, the Uniform Trust Code, the Uniform Probate Code, and the Model Business Corporation Act, for example, are default rules to fill in gaps that the parties omitted and rules of construction intended to better approximate what the parties desired. Of course, there are always limitations such as shareholder preemptive rights, the elective share, unconscionability, illegality, and so on. But RAP is more than a guardrail. It takes a slash and burn approach to destroying donor intent without corresponding benefits to societal concerns. If only because it is unnecessarily complicated and difficult to apply, RAP is at its best when it is the subject of outright repeal.

In part II of this article—tentatively titled *R.I.P. RAP (1889-1983)* and scheduled for publication in the next volume of the *South Dakota Law Review*—the shape of RAP as it existed in South Dakota will be sketched, followed by the narrative of its repeal in 1983 and the consequences which followed. The significance of the statutory repeal of RAP in 1983 dawned quite gradually. At the time, it was far from a watershed moment. Indeed, it was all but ignored. But

by some authors that private trusts may go on forever in the absence of restraints on termination, it has also been said that there are rules, independent of the Rule Against Perpetuities, prohibiting the creation of a trust for an indefinite succession of lives or for an estate of inheritance.") (internal citations omitted).

308. *See supra* note 300 (quoting from *Brown v. Saake*).

309. *See* Thomas E. Simmons, *A Trust for Ted's Head*, 88 MISS. L.J. SUPRA 20, 39 (2019) (describing RAP's "shadowy twin"—"the Purpose Trust Rule against Perpetuities (or, to coin an acronym, 'P-TRAP')."). Professor Adam Hirsch has excavated P-TRAP more effectively than any other modern scholar. *See* Adam J. Hirsch, *Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws*, 26 FLA. ST. U. L. REV. 913, 931 (1999) (explaining: "Courts unanimously require trusts for definite noncharitable purposes to terminate (rather than vest) within some life in being and twenty-one years.") *Id.* Professor Hirsch describes this as "the parallel rule requiring that trusts for noncharitable purposes *terminate* within the perpetuities period . . . ." *Id.* at 933.

310. *See* SDCL § 55-1-20 (2012) (providing: "Neither the common law rule against perpetuities, nor any rule restricting the accumulation of income, nor any common law rule limiting the duration of noncharitable purpose trusts is in force in this state."); UNIF. TR. CODE § 408(a) (UNIF. L. COMM'N. 2010) (providing that pet trusts terminate "upon the death of the animal or, . . . last surviving animal"); § 409(1) (providing that other purpose trusts "may not be enforced for more than [21] years").

over time, the planning possibilities opened by the repeal began to be noticed.[311] It may even be that the 1983 repeal was superfluous; that South Dakota *never* had a Rule Against Perpetuities as such.

Stay tuned.

IV. APPENDIX: *THE DUKE OF NORFOLK'S CASE (1682)*: A POEM

NO INTEREST IS GOOD UNLESS IT MUST VEST (IF AT ALL)
NOT LATER THAN TWENTY-ONE YEARS AFTER THE DEATH
OF SOME LIFE-IN-BEING AT THE CREATION OF THE INTEREST

This proclamation is solemnly known as
the "Rule against Perpetuities" –
a rule insisted upon widely
a rule inscribed upon slyly
until recently

Interests which vested
within lives pleased us

such a pleasing as to *validate* them –
and not snatch them ruthlessly away

a pleasing so as to not *abrogate* them –
and the interests not fade, but live but

on one condition:
punctuality

insofar as vesting was concerned

(i.e., so long as they
did so promptly)

(and by promptly we
meant no later than
twenty-one years

311. *See* Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 U. KAN. L. REV. 595, 596 (2005) (observing: "The perpetual dynasty trust gives unprecedented freedom to the settlor, who can now extend a dead hand far into the future.").

there
after
such
a
life

or
lives

as
the
case
may
be)

though – as of late –
a little lateness bothers us a little
less

The traditional panoply of
urgent legal promptings
to get a move-on

(vesting-
wise I mean)

has been softened

- Thomas E. Simmons

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PROFESSOR THOMAS J. HORTON

The Board of Editors of the *South Dakota Law Review* is pleased to dedicate Issue III of Volume 68 to the late Thomas J. Horton.

Professor Thomas J. Horton was born in New York City in May 1955. Surrounded by his family, he passed away in November of 2022.

Professor Thomas J. Horton was a nationally recognized antitrust litigator and complex trial lawyer with more than forty years of active experience at the highest levels of antitrust and complex litigation. Professor Horton was recognized by The American Registry as one of the "Top 1% of America's Most Honored Lawyers." For the past twenty-five years, Professor Horton received Martindale-Hubbell's "Highest Possible Rating in Both Legal Ability and Ethical Standards." He was a "Top Rated Lawyer in Litigation" (Martindale-Hubbell – 2015) and a recipient of the Albert Nelson Marquis Lifetime Achievement Award, as well as both a Marquis Industry Leader and a Who's Who Innovator and Achiever in the field of Law and Education.

From its inception, Professor Horton served as a member of the advisory board for the American Antitrust Institute. In 2016, Professor Horton served as the Organizing Committee Chair for the American Antitrust Institute's 2016 Annual Symposium at the National Press Club in Washington, DC. For five years,

he served as one of ten judges who selected the American Antitrust Institute's Annual Awards for Outstanding Antitrust Litigation Achievement in Economics, Outstanding Antitrust Litigation Achievement in Private Practice, and Outstanding Antitrust Litigation Achievement by a Young or Newly Admitted Attorney. Professor Horton was also a member of the advisory board of the Capitol Forum and a member of the Society for Evolutionary Analysis in Law (SEAL).

Professor Horton was an esteemed scholar and leader addressing issues at the intersection of antitrust and agriculture. In October 2021, R-Calf USA awarded its annual Sentinel Award to Professor Horton for his "distinguished service, dedication, and perseverance keeping watch over the U.S. Cattle Industry." In January of 2022, Professor Horton was appointed to serve as one of twenty-five national academic professors to participate in the United States Department of Agriculture's Workshop on Consolidation in Agriculture.

Professor Horton actively studied China's Anti-Monopoly Law and its enforcement. During the summer of 2012, Professor Horton taught Comparative Antitrust and Competition Law to Chinese and American law students at the Chinese Youth University for Political Science in Beijing, China. During the summer of 2014, he taught the same course to students at the Shanghai International Studies University (SISU). On June 7, 2016, Professor Horton testified before the Subcommittee on Regulatory Reform, Commercial, and Antitrust Law of the Committee on the Judiciary of the United States House of Representatives about China's enforcement of its Anti-Monopoly Law.

Professor Horton spent fifteen years in the private sector, including partnerships in the Washington, DC offices of major international law firms Howrey & Simon and Orrick, Herrington & Sutcliffe. His representations included a diverse array of corporations and states, including Insignia Systems, General Mills, Quaker Oats, PepsiCo, Hershey Foods, Nestle, Prudential Insurance, Cyprus Amax Minerals, Texaco, Uniroyal Goodrich, Moore McCormack, Schering-Plough, Johnson & Johnson, Franklin Electric, Pacific Gas & Electric, Nippon Soda, Noor (Egyptian) Telephone, Foundry Networks, Affymetrix, Watchguard, Onyx, Arvesta Corp., and the states of Rhode Island and Idaho. He appeared in complex cases in courtrooms throughout the United States and was an active member of the bars of Ohio (1981), the District of Columbia (1987), and South Dakota (2013). Professor Horton was widely quoted on antitrust and complex cases in both national and international media, including the New York Times, USA Today, the Capitol Forum, Bloomberg, Reuters, WirtschaftsWoche, and the Dakota Farmer.

In 1990, Professor Horton was appointed by Rhode Island's Governor as an Assistant Special Counsel to investigate the failure of Rhode Island's RISDIC-insured financial institutions. The investigation and televised hearings uncovered a web of political and economic corruption and organized crime activity in the state's banking system. During the televised hearings, his tough questioning earned him the public nickname "The Barracuda."

In his thirteen years of public service, Professor Horton served stints as a trial attorney at the Federal Trade Commission and the Antitrust Division of the Department of Justice. He successfully represented the United States as a lead trial attorney in major antitrust cases and investigations. From 1981-83, he served as a law clerk for United States District Judge William K. Thomas in the Northern District of Ohio. In 1996, he ran as the Democratic candidate for the United States House of Representatives in Virginia's Eleventh District.

Professor Horton was also active in pro bono service throughout his career, including an appointment to represent a triple murderer in Georgia habeas proceedings and handling prisoners' rights cases in the United States District Court in the District of Columbia. In 2000, he received the United States Attorney General's Volunteer Service Award.

Following a distinguished career in both private practice and public serve, Professor Horton transitioned to academia, serving as Professor of Law at the University of South Dakota ("USD") Knudson School of Law. Professor Horton made a deep and lasting impact on his students, colleagues, and academic community, receiving numerous teaching awards recognizing his outstanding teaching. In 2011, Professor Horton received the John Wesley Jackson Outstanding Faculty Award at USD's School of Law. In 2012, he was named the first Johnson, Heidepriem & Abdallah Trial Advocacy Fellow at USD. In 2013, he received USD's highest teaching award for tenure track faculty—the Belbas-Larson Award for Excellence in Teaching. He received the John Wesley Jackson Outstanding Faculty Award again in both 2016 and in 2019. In 2018, he was recognized by USD's Academic Affairs Committee as "Professor of the Game" at one of USD's basketball games. In 2021, the USD Honors Department recognized Professor Horton with their Outstanding Faculty Award. He also was invited by the 2021 USD Knudson School of Law graduates to appear as their guest graduation keynote speaker.

Professor Horton was widely published and wrote several articles applying evolutionary models and theories to structural and behavioral competition and antitrust analyses. His 2018 article "Rediscovering Antitrust's Lost Values" was a finalist for the Best Antitrust Article of 2018, selected by an international judging panel through Concurrences.com. Most recently, in 2021, Professor Horton published "Innovation and Antitrust: An Evolutionary and Historical Perspective in Concurrences Institute of Competition Law's Liber Amicorum to Herbert Hovenkamp—The Dean of American Antitrust Law." Professor Horton was invited to deliver the paper to an international audience as one of the top peer-reviewed antitrust papers of 2021 by Concurrences.

Professor Horton earned his A.B. from Harvard University (cum laude) in 1977, majoring in the biological sciences. He earned his J.D. from the Case Western Reserve University School of Law (Order of the Coif; Law Review member) in 1981, and a MALS (American Studies) (Scholae Studiorum Superiorum; Class Marshal) from Georgetown University in 2007.

When not at work or school, Professor Horton was an avid nature lover, dedicated Cleveland sports fan, patron of the arts, and active member of the local

community. He attended movies, plays, musicals, concerts, sporting events, museums, and historical places of interest with his family. He enjoyed reading history books, running, and playing the drums. His favorite memory was taking drum lessons with the legendary Joe Morello. Professor Horton's greatest love was spending time with his family and pets. He was an ardent supporter of his children's artistic, educational, and athletic pursuits. He especially loved their summer vacations to Montauk, New York, and traveling by train to explore new destinations.