

STATE CONSTITUTION PERPETUITIES PROVISIONS: Derivation, Meaning, and Application

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I. INTRODUCTION

The Rule Against Perpetuities, over the last decade or so, has attracted greater attention within areas of the estate planning bar. There are interrelated factors that are the primary reasons for this attention. One is the marketing of trusts that are designed to better protect against the ability of creditors of the beneficiaries of a trust to reach assets of the trust to satisfy their claims. Lengthening the period that such assets may remain unvested in beneficiaries in the trusts is touted as enhancing their value and usefulness. The longer period to defer vesting also has beneficial estate tax consequences. If trust property can be held for generations in a trust not subject to the common-law rule requiring the vesting of interests of the trust in the beneficiaries of the trust within a period ending twenty-one years after the death of the last to survive of those living when the trust became irrevocable, then inclusion of trust assets in the gross estates of beneficiaries for federal estate tax purposes is avoided to a greater extent.

Another less considered estate and income tax consequence is the ability to cause inclusion of trust property in the gross estate of a decedent by means of the decedent springing the Delaware Tax Trap (“DTT”) in order to cause the basis of the property to be “stepped up” to its fair market value at the date of the decedent’s death when no estate tax would arise.¹ The DTT occurs when a person holding a power of appointment over property in trust appoints the property in further trust effective upon the person’s death and grants another a power to thereafter appoint the property, which second power may be exercised to postpone vesting over a perpetuities period determined from a different date than the date of the perpetuities period applicable to the first power.² The intentional triggering of the DTT is a new planning device that arose from the substantial increase in the federal estate tax exemption. If the beginning date applicable to the perpetuities period in which the property

1. See Les Raatz, “*Delaware Tax Trap*” Opens Door to Higher Basis for Trust Assets, 41 EST. PLAN. 3 (2014).

2. I.R.C. § 2041(a)(3) (2012) (gift tax inclusion is imposed by I.R.C. § 2514(d) (2012)).

must vest pursuant to exercise of the second power would otherwise violate the common-law rule, then state legislation must permit the variance.

However, legislation alone might not assure the abrogation of the common-law Rule Against Perpetuities. Some states' constitutions contain clauses that at least raise the issue of whether such legislation may be prohibited.³ This Article discusses the proper interpretation of many of those constitutional provisions. The proper interpretation is dependent upon examination of the history of the early development of the constitutional provisions. This author concludes that the meaning of the states' constitutional prohibitions against perpetuities was not to address remoteness in vesting, but to address the historic meaning of "perpetuities," that of restraints against alienation of title.

This Article has many extensive quotations. There is a reason. Much of this Article is devoted to determining the intent of the constitutions' drafters. The intent is evidenced by the meaning of terms used in the constitutions. It is the determination of the meaning of terms at the relevant times—earlier, and in certain cases well earlier, than one hundred years ago—that is a goal of this Article. To establish the meanings, we must read the writings of those times. The proper understanding of those writings is dependent upon the context of the words used. The context should be provided to the reader with as little bias as is reasonable. To do that, the relevant quotes should include at least the minimum essential contextual background. Even with that said, some corners were cut and no doubt some relevant evidence left unrepresented.

II. ORIGIN OF THE STATES' CONSTITUTIONS' PERPETUITIES PROVISIONS

To set the stage, I will begin with my state's constitution. As stated above, Arizona is one of nine states that have constitutional provisions prohibiting perpetuities. In relevant part, it is typical. Article II, Section 29 of the Constitution⁴ of Arizona provides: "No hereditary emoluments, privileges, or powers shall be granted or conferred, and no law shall be enacted permitting any perpetuity or entailment in this state."⁵

3. There are nine such states: Arkansas, Arizona, Nevada, North Carolina, Montana, Oklahoma, Tennessee, Texas, and Wyoming.

4. The present Arizona Constitution is commonly referred to as the 1910 Constitution, although it was not ratified by voters until early 1911. See John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L.J. 1, 100 (1988). Thanks much to Holly Zoe, at the time a law clerk at my firm, who provided a review of the development of the 1910 Constitution's perpetuities provision, with comparison to other states' provisions.

5. ARIZ. CONST. art. II, § 29.

Article II, Section 29, it is said, has its origins from the 1836 Republic of Texas Constitution, and, it is said, was adopted by the Territory of New Mexico, further incorporated into Arizona Territory laws, and finally into its present constitution.⁶ The Texas Constitution in turn was derived from that of Florida, North Carolina, and Tennessee.⁷ “[T]he North Carolina Constitution was the first place, apparently, in which such a [perpetuities] clause occurred, and it has served as a model for the rest. It has been said to refer only to estates tail”⁸ However, an earlier place in which the perpetuities clause appeared was in Chapter II, Section 37 of the Pennsylvania Constitution, enacted September 28, 1776:⁹ “The future legislature of this state, shall regulate entails in such manner as to prevent perpetuities.”¹⁰ There is no record of the proceeding regarding the perpetuities provision running up to the adoption of the 1776 Pennsylvania Constitution.¹¹

It is an accepted judicial maxim that when a state enacts law from another jurisdiction, it will also adopt the meaning and interpretation at least to the date of its adoption.

It is a sound rule in Arizona and elsewhere that when a statute has been borrowed from another state, the borrowed statute is normally interpreted as it had been interpreted in the state of origin. This was stressed in the *Shattuck* case . . . with respect to a borrowing [by Arizona] from California, and in *O'Malley Lumber Co. v. Martin* with respect to a borrowing successively from Texas and California. It was applied [by the Arizona Supreme Court] in the *Lowell*

6. Richard R. Powell, *Perpetuities in Arizona*, 1 ARIZ. L. REV. 225, 233 (1959); see also, Robert H. Gerdes, *Perpetuities and the California Rule Against Suspension of the Absolute Power of Alienation*, 16 CAL. L. REV. 81, 90–91 (1928).

7. Powell, *supra* note 6; Gerdes, *supra* note 6. I could find no reference to perpetuities in the New Mexico Territory organic documents. As was also discovered by Holly Zoe, Arizona had an 1864 Bill of Rights that permitted the ultimate form of perpetuity, an entailment. But Arizona’s unique territorial beginning should not distract from the story of many of the nine states’ constitutions’ development.

8. JOHN C. GRAY, *THE RULE AGAINST PERPETUITIES* § 731 (4th ed. 1942).

9. The 1776 North Carolina Constitution was adopted December 18, 1776.

10. *THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790*, at 63 (John S. Wiestling & Francis Shunk eds., 1825).

11. *Id.* at 53 (stating that on September 17, 18, 19, 20, 21, 23 and 24, 1776 “[t]he convention was engaged in legislative and executive business, and in considering the frame of government,” and “[n]o details are given of the proceedings of the convention in relation to the constitution. The journal only states on the several days, ‘[t]hat the House resumed the consideration of the frame of government, and after some time adjourned.’”).

case . . . to the statutory Rule Against Perpetuities borrowed in 1913 by Arizona from Wisconsin.¹²

If the essence of a provision of law or statute leads back to a source from which it is established the language arose, it is natural to apply this interpretative rule to the source jurisdiction at the time of the borrowing, and its meaning to its drafters when that is so established, unless it can be shown that the drafters intended it to mean otherwise.

Since the 1776 North Carolina Constitution is believed to be the lineage from which Arizona's and other states' constitutions' perpetuities rule came, it is important to review the historical development and the law of North Carolina relating to its constitutional perpetuities provisions. In the Declaration of Rights, considered part of the North Carolina Constitution, section 23 provides: "[P]erpetuities and monopolies are contrary to the genius of a free state, and ought not to be allowed."¹³ Further on, section 43 of the 1776 Constitution reads: "That the future Legislature of this State shall regulate entails, in such a manner as to prevent perpetuities."¹⁴

The North Carolina Constitution was restated twice, in 1868 and 1971, and since 1971 the perpetuities provision has read, "[p]erpetuities and monopolies are contrary to the genius of a free state and shall not be allowed."¹⁵

An important North Carolina case concerning the constitutional perpetuities clause was *Griffin v. Graham*, summarized as follows:

The first [North Carolina] case [considering the meaning of the perpetuities provision] was the 1820 case of *Griffin v. Graham* . . . In *Griffin*, the North Carolina Supreme Court held that a perpetual charitable trust was not a perpetuity because the trustee of the trust had the power to alienate trust property. The Supreme Court stated:

"The meaning which the law annexes to this term, is that of an estate tail so settled that it cannot be undone or made void. As when, if all the parties who have interest, join, they cannot bar or pass the estate; but if by the concurrence of all having the estate tail, that the word is used in the Bill of Rights [A] perpetuity which the Law

12. Powell, *supra* note 6, at 242.

13. N.C. CONST. OF 1776 art. 1, § 23.

14. N.C. CONST. OF 1776 art. 2, § 43. This was almost verbatim the language from the 1776 Pennsylvania Constitution, Chapter II, Section 37, as stated above.

15. N.C. CONST. art. 1, § 34. Article I, Section 31 of the 1868 Constitution reads, "Perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed." N.C. CONST. OF 1868 art. 1, § 31.

would deem void, must be an estate so settled for private uses that by the very terms of its creating there is no potestas alienandi in the owner.”¹⁶

III. COMMENTATORS

In addition to ascertaining the lending jurisdiction’s law, there is further evidence that can be gleaned from the commentators of the time and the relative period thereafter.

A. Gray

John Chipman Gray was emphatic regarding the scope of such constitutional provisions. In his treatise discussing the constitutional provisions of Texas, Arkansas, Nevada, Wyoming, Tennessee, and, last but not least, North Carolina, he was unambiguous, “[t]hese provisions seem to be simply pieces of declamation, without juristic value, at least on any question of remoteness.”¹⁷

The above statement by Professor Gray and its meaning did not go unnoticed by certain members of the North Carolina Bar: “In other words, the father of the common law rule against perpetuities felt that [the North Carolina Constitution’s perpetuities provision] did not have any application

16. William R. Culp, Jr. & N. Lucille Siler, *U.S. Supreme Court Case Supports Constitutionality of Perpetuities Repeal*, THE WILL & THE WAY (N.C. Bar Ass’n), May 13, 2011, at 2 (citing *Griffin v. Graham*, 8 N.C. 96, 130–32 (1820)).

17. Gray, *supra* note 8, at § 730 (emphasis added). Regarding California Constitution, article 11, section 16 (“No perpetuities shall be allowed, except for eleemosynary purposes.”), he goes on to state:

The Constitution of California (1849) provides that “no perpetuities shall be allowed except for eleemosynary purposes.” Whether a limitation is too remote under the common-law Rule against Perpetuities, but does not suspend the power of alienation, as void in California, appears to be doubtful.

Id. at § 752. In *In re McCray’s Estate*, the Supreme Court of California intimated that the common-law Rule against Perpetuities might be “engrafted upon our system by the Constitution” and remain in force after enactment of the Statutes against suspension of alienation, with the result that remote interests, although alienable, would be void. 268 P. 647, 650 (Cal. 1928). The proposition thus advanced as to the effect of the constitutional provision has met with much adverse criticism, and the questions raised thereby, as well as the general question concerning remote alienable interests, continue to be highly debatable.

to a rule against perpetuities based on vesting such as the common law rule against perpetuities.”¹⁸

B. Gerdes

Robert H. Gerdes¹⁹ explained why the term “perpetuities” in state constitutions did not include in its meaning remoteness in vesting that implicates the modern Rule Against Perpetuities:

A perpetuity is the settlement of an estate or interest in tail, with such remainders expectant upon it, as are in no sort in the power of the tenant in tail in possession, to dock by recovery or assignment, but such remainders must continue as perpetual clogs upon the estate. The reports show that this was the meaning in which this word was used down until the eighteenth century. Fearne, writing in the latter part of the eighteenth century, used the word “perpetuity” with that same meaning. [n39].

[n39] “For every executory devise, so far as it goes, creates a perpetuity; that is, an estate unalienable till the contingency be determined one way or another.” Fearne, *Contingent Remainders and Executory Devises*, 10 ed., 430 (1844). See discussion of this language by C. Sweet, “Limitations of Land to Unborn Generations,” 29 *Law Quarterly Rev.* 304, 316 (1913). For cases in the English courts of the eighteenth century using the word perpetuities as an estate tail, see Sweet, *supra*, 316, n.7.

It should be remembered that at the time Fearne wrote (1776) the constitutions of Vermont and North Carolina had been enacted prohibiting “perpetuities.” *When the constitution framers used that word they presumably meant not the Rule against Remoteness but the concept as expressed by Fearne.*²⁰

C. Orth

John V. Orth is the William Rand Kenan Jr. Professor of Law at University of North Carolina. He provides further confirmation of the historical

18. Culp & Siler, *supra* note 16.

19. Gerdes went on to become general counsel, president, chairman of the board, and chief executive officer of Pacific Gas & Electric Company, and president of the Edison Electric Institute.

20. Gerdes, *supra* note 6, at 88–89, 89 n.39 (emphasis added).

development of the North Carolina Constitution's perpetuities rule.²¹ Although in the 2009 article he questions the wisdom of the legislature in repealing the common-law rule, in an earlier work Mr. Orth correctly anticipated that the legislature in North Carolina has the power to determine the application of the common-law Rule of Remoteness.²²

D. Priest

Claire Priest, the Simeon E. Baldwin Professor at Yale Law School, reviewed in depth the entail in early America.²³ As part of her article, she cites Thomas Jefferson's work *Autobiography*, in which Jefferson takes credit for the abolition of the entail in Virginia to avoid unhealthy concentrations of economic and political power in order to bolster republican government.²⁴ To the extent of a hostility toward the fettering of power to alienate property rights manifests itself, it was concerned with concepts of title to real property, and not to remoteness in vesting.

E. Sweet

Charles Sweet was a prolific and testy English legal scholar. He wrote a harsh rebuke to another noted legal commentator who conflated the traditional Rule Against Perpetuities with the Rule of Remoteness.²⁵ Mr. Sweet does not hold back:

Mr. W. D. Lewis seems to have been the first writer who had the courage to deny the existence of the Rule in *Whitby v. Mitchell* as a rule independent of the modern Rule against Remoteness. He started with the assumption that there was no definite Rule against Perpetuities in English law until the Rule against Remoteness was invented; and when after "two centuries of doubt and argumentation," the latter Rule was finally established by "judicial wisdom (unaided by legislative interposition)," Mr. Lewis thought that it ought "to be treated as embodying a grand and fundamental

21. See generally John V. Orth, *Allowing Perpetuities in North Carolina*, 31 CAMPBELL L. REV. 399 (2009).

22. JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE* 75–76 (1993).

23. Claire Priest, *The End of Entail: Information, Institutions, and Slavery in the American Revolutionary Period*, 33 LAW & HIST. REV. 277, 277–79 (2015).

24. *Id.*

25. See generally Charles Sweet, *The Rule in Whitby vs. Mitchell*, 12 COLUM. L. REV. 199 (1912).

principle of our jurisprudential code,” [n36] applying to all future interests in property, including those which, by the rules of the common law, could be created without any restriction in point of time. There is in truth no foundation for this assumption, and however grateful we may be to Mr. Lewis for his laborious investigation of the subject, it is impossible to deny that his conclusion is based on a failure to distinguish between “perpetuity” and “remoteness.” Whenever he found in an old case or text-book, a reference to “perpetuity,” he assumed that this meant “remoteness,” [n37] and as “perpetuity” was seldom, if ever, used in the sense of “remoteness” before the end of the eighteenth century, the confusion which this mistake produced in Mr. Lewis’ mind may be easily conceived. This mental confusion is responsible for two of Mr. Lewis’ most cherished delusions, namely, that legal contingent remainders are subject to the modern Rule against Remoteness, and that the doctrine of *cy-près* is an exception to the same Rule. [n38]

[n36] Lewis, *Perpetuities* 162, 620.

[n37] See Mr. Lewis’ remarks in support of his theory that contingent remainders are subject to the modern Rule against Remoteness, (involving an almost incredible misapprehension of Mr. Fearn’s views) and with reference to the doctrine of *cy-près*. *Perpetuities* 412, *Suppl.* 140. See also his remarks on “the vague, general and undefined notion of a perpetuity” which, according to him, prevailed before the introduction of executory limitations made it necessary to formulate the modern Rule against Remoteness. *Perpetuities* 130 *et seq.* Mr. Lewis was obviously quite unaware that “perpetuity” had a definite meaning before it was unfortunately confused with “remoteness.”

[n38] Space does not permit an examination of Mr. Lewis’ erroneous notions on these two points; the student will find the subject discussed in 15 *Law Q. R.* 71; 25 *id.* 385; 18 *Juridical Review* 143 *et seq.*; Jarman, *Wills* (6th ed.) 288, 368 and preface; Challis, *Real Property* (3rd ed.) 205 *et seq.*, 472 *et seq.* As to the point decided in *Re Frost* see 27 *Law Q. R.* 168 *et seq.*²⁶

F. Horowitz and Sitkoff

Steven J. Horowitz is an attorney in private practice, who previously clerked for both U.S. Supreme Court Justice Anthony M. Kennedy and U.S.

26. *Id.* at 208–09 (1912).

Court of Appeals Judge Richard A. Posner. Robert H. Sitkoff is John L. Gray Professor of Law at Harvard University and a Fellow of the American College of Trust and Estate Counsel (“ACTEC”). They wrote a comprehensive article published in 2014 in the *Vanderbilt Law Review*.²⁷ It is a writing of importance, and it is sometimes referred to herein as the “Article.” In the Article they advocate the position that provisions in state constitutions that prohibit perpetuities be construed to prohibit not only laws that suspend restraints on alienation of property beyond a permissible period, but also should prohibit laws permitting interests in equitable estates to remain unvested without limitation or for very long periods.

The Article details history of the development of the two rules. As part of the Article the authors discuss the *North Carolina Brown Brothers Harriman Trust Co.* appellate case.²⁸ *The New York Times*, in a 2014 piece about the Article, reported that it was the only case addressing the state constitutionality issue.²⁹ As discussed further below, the court held that the North Carolina legislature’s repeal of its common-law Rule Against Perpetuities was constitutional. Professor Sitkoff and Mr. Horowitz posit that the reach of the prohibition should extend to remoteness of vesting (the current meaning of the term Rule Against Perpetuities) for reasons of policy and accordingly criticize the North Carolina court’s decision. Secondly, they conclude that the legislatures of states that have the constitutional provisions can modestly reform both rules. Finally, they caution that if the validity of a perpetual trust is litigated in a state having a strong public policy against such trusts (such as a state with a constitutional ban that would so apply), then it may well be within forum court’s power to deny recognition in contravention to the forum state’s law. In this article, I address their first two contentions, but do not discuss the last.

Horowitz and Sitkoff have carefully built the scaffolding to support their conclusion. Is it sturdy enough to withstand critical examination? This author sees the foundation of the conclusion of the authors that the constitutional provisions may be interpreted to preclude abrogation of the so-called Rule Against Remoteness or lengthened rule resting on two main supports described below.

27. Stephen Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769, 1771 (2014).

28. *Brown Bros. Harriman Tr. Co. v. Benson*, 688 S.E.2d 752 (N.C. Ct. App. 2010), *appeal dismissed, cert. denied* 698 S.E.2d 391 (N.C. 2010).

29. Paul Sullivan, *The Ins and Outs of Trusts that Last Forever*, N.Y. TIMES (Dec. 5, 2014), http://www.nytimes.com/2014/12/06/your-money/estate-planning/the-ins-and-outs-of-perpetual-trusts.html?_r=0. It turns out there are many other cases.

1. Support #1

One support espoused by Horowitz and Sitkoff can be described in their short quotation of A.W.B. Simpson, regarding the guise under which perpetuities can show itself:

[T]here were many expressions of hostility to perpetuities, and a perpetuity meant an unbarrable entail, in whatever guise it appeared. This hostility found expression in . . . the celebrated “rule against perpetuities” This doctrine . . . prevented the evolution, under some newer guise, of any form of perpetual unbarrable entail, but permitted unbarrable entails of limited duration.³⁰

The quotation from Mr. Simpson is the keystone of the Article. The authors embrace the term “perpetuities . . . in whatever guise it appeared.”³¹ This expansive interpretation of the term is then ascribed to the framers of the respective state constitutions at or near in time to the American Revolution as the driving force for the inclusion of the constitutional provisions. Horowitz and Sitkoff speculate that this interpretation should prevail because of the three reasons articulated below, which is the other leg of support. None of this is established as motivating the framers, or that it was considered by them. Simpson, later in the paragraph partially quoted above, provides evidence that at the time of the American Revolution, and adoption of the original state constitutional provisions prohibiting perpetuities, the state of mind of those who drafted the provisions were concerned with restraints against powers of alienation of property, and not remoteness in vesting. For purposes of clarifying the written thoughts of Mr. Simpson, the entire text is reprinted. He notes that in the times surrounding the American Revolution and the adoption of the Pennsylvania and North Carolina Constitutions, the Rule Against Perpetuities was concerned with the fettering of the power of alienation, and not the Rule of Remoteness:

Now in England, as in Scotland, there were many expressions of hostility to perpetuities, and a perpetuity meant an unbarrable entail, in whatever legal guise it appeared. This hostility found expression in one of the incomprehensible bodies of dogma which English lawyers ever produced—the celebrated “rule against perpetuities,” which Scotland has been spared, and somehow manages without to this day, to the amazement of those who enjoy its bizarre complexities. This doctrine, together with what is variously known

30. Horowitz & Sitkoff, *supra* note 27, at 1778 (quoting A.W.B. Simpson, *Entails and Perpetuities*, 24 JURID. REV. 1, 17 (1979)).

31. *Id.* The importance to the authors of Mr. Simpson’s reference to “guise” cannot be overstated. The word appears a dozen times in the article.

as the old rule against perpetuities or rule in *Whitby v. Mitchell*,” prevented the evolution, under some newer guise, of any form of perpetual unbarrable entail, but permitted (and this needs emphasis) unbarrable entails of limited duration. The rule against perpetuities, to be comprehended, must be understood as permitting them within limits, and most modern discussion of the rule in England is distorted by a failure to appreciate that the contemporary oddity of the rule lies not in what it prevents, but in how much it allows. In its developed form, as expounders of the doctrine continually emphasise [sic], the rule is not in form concerned at all with the fettering of the power of alienation; originally in the seventeenth and eighteenth centuries it was, and its development historically into a rule against remoteness of vesting is a classic example of the progressive divorce of a legal dogma from its rationale. The attitude of the English courts to attempts to tie up land in families expressed originally an entirely comprehensible policy, which modern accounts of the rule studiously fail to appreciate.³²

Black’s Law Dictionary weighs in on the definition of “perpetuity,” and confirms its historic meaning and purpose:

Any limitation or condition which may take away or suspend the power of alienation for a period beyond to life of lives in being and 21 years thereafter. Any limitation intending to take the subject out of commerce for a longer period than a life or lives in being, and twenty-one years beyond, and in the case of a posthumous child, a few months more, allowing for a period of gestation. Such a limitation of property as renders it unalienable beyond the period allowed by law.³³

In short, there is abundant, if not overwhelming, evidence that the term “perpetuities” used in the revolutionary state constitutions was intended to address restraints on alienation of title and not the Rule of Remoteness. This is so noted in the Article as well. Where the divergence in conclusions between Horowitz and Sitkoff and this author arises is due to (i) the differing analyses of the cases from the prohibition states cited and other cases not cited in the Article and (ii) the differing views of the desirability of judicial activism.

32. A.W.B. SIMPSON, *Entails and Perpetuities*, in LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 143, 159 (1987).

33. *Perpetuity*, BLACK’S LAW DICTIONARY (4th ed. 1968). Later editions have broadened the definition to include deferred vesting of interests. *Perpetuity*, BLACK’S LAW DICTIONARY (9th ed. 2009).

It can be correctly pointed out that the specific intent of the drafters of the constitutional provisions is not necessarily dispositive of the issue. It is reasonable to then posit: regardless of what those drafters intended, drafters of later constitutions could or did have different intent. And it is also not unreasonable to assert that, regardless of the intent of the drafters at the time, the courts of the state could exercise their inherent power to interpret the provision in the light of changed circumstances.

The first position requires a weighing of factors: What did the drafters intend? Is there any evidence, whether direct or from other enactments? Did they just incorporate language from other constitutions without further thought? Does the adopting state's applicable rule of law favor incorporating the adopted state's judicial gloss to borrowed law, including constitutional law? This fractures the battle into state by state skirmishes, which is entirely appropriate. This author has enough on his hands reviewing the history of Arizona's adoption of its constitutional perpetuities provision.

2. Support #2

The second position joins the eternal battle: the appropriate role of courts to interpret language of the law. Is it to exercise judicial restraint, in that the original intent of the drafters is followed? Is it activist, in that courts may reinterpret or provide additional meaning to provisions for the better good? And if so, whose good? In my view, this activist approach is more or less the second support for Horowitz's and Sitkoff's conclusions.

The second support is the three pronged purposes for the constitutional provision the authors propound. They are: (1) encouraging marketable title, (2) reacting to changed circumstances, and (3) discouraging concentrations of wealth and power.³⁴ They provide support for each as a purpose. However, only the nature of one of them is set forth in the constitutions, that of marketable title. The prohibitions against perpetuities objectively relate the power to transfer title, which is the power of alienation. The provisions do not address changed circumstances, nor is there persuasive evidence that the provisions were intended to invite a self-executing expansion of prohibited activity to address concentrations of wealth. At most they do so only through the express prohibition against impermissibly long restraints against alienation of title.

34. See Horowitz & Sitkoff, *supra* note 27, at 1796.

3. An Analogy Is Instructive

Assume a legislature wants to prohibit an action that results in taking the driver's eyes off the road that causes traffic accidents. So it drafts legislation to prohibit texting with a "hand operated device while driving." Subsequently, a new device permits one to merely think and the messages are transmitted and received. The new device was not contemplated by the legislature. It is asserted by some that the device is a distraction to driving that causes traffic accidents. Others think it does not. Many others have no opinion about regulating the device. Some advocate that courts should interpret the law to make use of the device unlawful, because they believe it would be good to so do, and it should not be left to the legislative process to decide whether regulation is implemented.

This is in essence the same rationale applied by Mr. Horowitz and Professor Sitkoff. The acknowledged prohibited activity contemplated by the framers of the constitutions was that of the suspension of the power of alienation, but Horowitz and Sitkoff assert that a purpose of prohibiting the activity was to prevent excessive accumulations of wealth. They therefore advocate that other legislative activity that some believe may cause excessive accumulations of wealth be determined to be illegal as well, although that prohibition was not so constitutionally proscribed.³⁵ A prohibition against one action is not a prohibition against a distinctly different action. A prohibition against suspension of the power of alienation of title is not the prohibition against the delay in the time of vesting of interests not involving title. The fact that the names of these different concepts are similar or the same has no bearing on the issue, although it can, and has, lead to confusion. It is generally agreed that the constitutional provision was not contemplated, nor was it considered, by the framers to prohibit delays in vesting of interests not involving title. It was to specifically deal with unreasonably long periods of the suspension of the power of alienation of title.

Within this subjective construct, and then applying their judgment, the authors proceed to reason that the Uniform Statutory Rule Against Perpetuities, although permitting deferred vesting beyond that permitted by the Rule Against Remoteness, is acceptable, because it does not violate the

35. *See id.* at 1803.

rule too much.³⁶ Horowitz and Sitkoff conclude the legislature has the power to regulate to rule, if it is, as they see it, “modest reform.”³⁷

IV. CASES REGARDING THE MEANING OF CONSTITUTIONAL PROVISIONS

The Article cites numerous cases from states having one form or another of constitutional prohibitions against perpetuities in support of its authors’ position. Cases are reported from Florida, Arkansas, Oklahoma, Texas, Tennessee, and a significant number of cases from California. Florida and California have since removed perpetuities provisions from their constitutions.³⁸

Some of these are discussed briefly. Unless otherwise stated, the following are cases cited by Horowitz and Sitkoff as being supportive of the proposition for which they were referenced.

A. *Franklin v. Armfield* (Tennessee Supreme Court)

*Franklin v. Armfield*³⁹ was cited for the proposition that the common law is the source of the meaning of the Tennessee constitutional perpetuities provision. The case dealt with the validity of charitable trusts, which were found not subject to perpetuities rules.⁴⁰ Furthermore, it did not address the definition of perpetuities in the Tennessee Constitution.⁴¹ Nonetheless, the case is actually supportive of the position that the constitution did not address remoteness of vesting. The Tennessee Supreme Court assumed that the

36. In addition to the alternative ninety-year period permitted under the Uniform Statutory Rule Against Perpetuities (“USRAP”), USRAP has three perpetuities saving provisions not provided by the rule of remoteness. UNIF. STATUTORY RULE AGAINST PERPETUITIES, §§ 1(e), 3, 5(b) (UNIF. LAW COMM’N 1990); see UNIF. PROBATE CODE §§ 2-901(e), 2-903, 2-905(b) (UNIF. LAW COMM’N 2010). For administrative simplification, USRAP also provides that a transfer of trust assets to a previously funded irrevocable trust causes the perpetuities period for required vesting of the transferred assets to change to the period applicable to the transferee trust. That rule of convenience permits planned avoidance of the applicable rule and potentially repeated long term extensions of the permissible period to defer vesting. UNIF. STATUTORY RULE AGAINST PERPETUITIES § 2(c); see UNIF. PROBATE CODE § 2-902(c); Les Raatz, *USRAP Surprise Trigger of Delaware Tax Trap*, 43 EST. PLAN. 22, 23 (2016).

37. Horowitz & Sitkoff, *supra* note 27, at 1806. In the footnote at that declaration they cite an article by Lynn Foster that, if anything, appears to negate such limitation, at least regarding Arkansas. See *infra* note 75 and accompanying text.

38. Horowitz & Sitkoff, *supra* note 27, at 1789, 1793–95.

39. *Franklin v. Armfield*, 34 Tenn. (2 Sneed) 305, 353 (1854).

40. *Id.* at 308–09.

41. *Id.* at 314.

provision was intended to prohibit entailments, consistent with the historic Rule Against Perpetuities.⁴² It is clear that the court viewed perpetuities for purposes of the Tennessee Constitution as a prohibition against alienation of title:

It is of the essence of a perpetuity that the property is incapable, beyond the period prescribed by law, of being sold freed from all limitations and trusts, by the use of all the means known to the law for effecting sales.⁴³

B. McLeod v. Dell (Florida Supreme Court)

*McLeod v. Dell*⁴⁴ is an antebellum South probate case with everything: land, slaves, the looming Civil War, fee tail issues, and Florida's Declaration of Rights, which, based on my understanding, was appended to its constitution.⁴⁵ The case did not involve trusts, but title to land, and whether there was a prohibited fee tail.⁴⁶ The brief reference—you would miss it if you were not looking for it—to the rule respecting perpetuities and the Declaration of Rights appears to mean what the rule meant then: the rule against restraint on alienation, not what we call the Rule Against Perpetuities today.⁴⁷ In any event the Florida Supreme Court doesn't deal with it. This is the totality of the language in the opinion dealing with this issue:

It is objected, however, that by our recognition of the *rule* respecting perpetuities, we come in conflict with the 24th item of our "declaration of rights," which declares "that perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed." We are at a loss to comprehend the force of the objection, and do not appreciate its logic. It is a sufficient reply that the convention which ordained that declaration, are to be presumed to have understood the full import of the term used.⁴⁸

42. *Id.* at 314–15.

43. *Id.* at 355.

44. *McLeod v. Dell*, 9 Fla. 427 (1861).

45. *Id.* at 427–34.

46. *Id.* at 440.

47. *Id.* at 446.

48. *Id.* at 447.

C. *In re Micheletti's Estate (California Supreme Court)*

California case law has more often than not held that its constitutional rule prohibiting perpetuities encompassed the Rule Against Remoteness.⁴⁹ However, the cases also establish the power of the legislature to interpret the provision.⁵⁰

In re Michelletti's Estate,⁵¹ the last California Supreme Court opinion concerning this issue, left the meaning of the California constitution perpetuities provision in doubt (although two subsequent appellate cases⁵² determined that the perpetuities provision encompassed the Rule Against Remoteness):

Appellant contends that the interests created in the issue of Arturo and Manlio by the terms of the trust in article X and the limitations placed thereon by articles XI and XII violate the rule against perpetuities and the prohibitions against restraints on alienation in the Civil Code. It is appellant's position that the rule against perpetuities is in force in this state by reason of article XX, section 9, of the California Constitution prohibiting perpetuities except for eleemosynary purposes and section 4468 of the Political Code, which makes the common law of England the rule of decisions in the courts of this state insofar as it is consistent with the laws and Constitution of the state. There is considerable uncertainty as to the soundness of this position, but it is unnecessary to determine that question in this case, for the executory interests created by the will in favor of the issue of the minor sons must vest, if at all, within lives in being and are therefore not within the operation of the rule against perpetuities, which applies solely to remoteness of vesting.⁵³

49. See, e.g., *In re Gay's Estate*, 71 P. 707, 708 (Cal. 1903).

50. See generally *Victory Oil Co. v. Hancock Oil Co.*, 270 P.2d 604 (Cal. Dist. Ct. App. 1954); *In re Sahlender's Estate*, 201 P.2d 69 (Cal. Dist. Ct. App. 1948). Note that these cases acknowledge that the legislature may modify the rule. In fact, in 1872 the California legislature extended the period for which property interests could be subject to restraint against alienation to twenty-five years, instead of the common-law period of twenty-one years. *Victory Oil Co.*, 270 P.2d at 610.

51. *In re Michelletti's Estate*, 151 P.2d 833, 835 (1944). This case was not cited in the Horowitz and Sitkoff article. Justice Roger John Traynor wrote the opinion for a unanimous court, sitting en banc with six other justices. "Traynor was often called one of the greatest judicial talents never to sit on the United States Supreme Court." Les Ledbetter, *Roger J. Traynor, California Justice*, N.Y. TIMES, May 17, 1983, <http://www.nytimes.com/1983/05/17/obituaries/roger-j-traynor-california-justice.html> (reporting his death on May 14, 1983).

52. *Victory Oil Co.*, 270 P.2d 604; *In re Sahlender's Estate*, 201 P.2d 69.

53. *Micheletti*, 151 P.2d at 835 (citation omitted).

D. Broach v. City of Hampton (Arkansas Supreme Court)

In *Broach v. City of Hampton*,⁵⁴ the Arkansas Supreme Court references the State's constitutional provision prohibiting perpetuities. However, the court determines that the common law applies, not implicating the constitution, because there is no statute providing otherwise:

Arkansas does not have a statute stating the rule against perpetuities, but follows the common law rule which prohibits the creation of future interests or estates which by possibility may not become vested within the life or lives in being at the time . . . of the effective date of the instrument and 21 years thereafter.⁵⁵

E. Brown Bros. Harriman Trust Co. v. Benson (North Carolina Court of Appeals)

In 2007 North Carolina abolished the common law Rule Against Perpetuities, but confirmed the rule against restraint on alienation of property by prohibiting any such suspension beyond the period of lives in being plus twenty-one years.⁵⁶ In 2010 a North Carolina appellate court found that the North Carolina Constitution's perpetuities provision did not impose the common law Rule Against Perpetuities to invalidate the legislation.⁵⁷ It reviewed relevant North Carolina history and its supreme court cases. The North Carolina Supreme Court declined to hear the appeal, which it has discretion to do if it does not see a substantial state or federal constitutional question.⁵⁸

Addressing the defendant's assertion that the plain meaning of the term applies to remote vesting, the court made the following findings:

First, the presence of multiple definitions for the word "perpetuity" suggests that the word's meaning is not plain. Second, because the controlling standard for constitutional interpretation is intent of the framers . . . , the historical definition of the term is the most relevant. In this case, the historical definition of "perpetuity" is consistent with our historical analysis of the meaning of the term as it is used in the State Constitution Thus, we hold that the North Carolina Constitution's prohibition of perpetuities prohibits

54. *Broach v. City of Hampton*, 677 S.W.2d 851, 854 (Ark. 1984).

55. *Id.*

56. *Brown Bros. Harriman Tr. Co. v. Benson*, 688 S.E.2d 752, 757 (N.C. Ct. App. 2010).

57. *Id.*

58. *Brown Bros. Harriman Tr. Co. v. Benson*, 698 S.E.2d 391, 391 (N.C. 2010).

unreasonable restraints on alienation without requiring a rule specifying a time period within which a future interest must vest.⁵⁹

The essential holding of the appellate court was that the common-law Rule Against Remoteness may be applied or negated by the legislature as it determines. The historic purpose of the perpetuities provisions in the various state constitutions is not to require vesting of interests; it is to avoid excessive restraints that hamper the marketability of property, which is fully satisfied if there is a present or soon to be acquired power of sale or conveyance, within the permissible period. There was no intent to address prohibitions against remoteness of vesting of wealth not associated with issues of title.

In 2013 two North Carolina lawyers examined *Brown Bros.*⁶⁰ They conclude that the North Carolina Supreme Court dismissal of appeal of the case was a decision on the merits, under principles articulated in a U.S. Supreme Court opinion.⁶¹

F. In re Mildred Louise Hanigan Living Trust of 1995 (Arizona Superior Court).

This is not a case cited by Horowitz and Sitkoff, but is included because the court's ruling directly addresses the issues presented in this article. In *In re Mildred Louise Hanigan Living Trust of 1995*, an Arizona trial court issued a final nonappealable order directly addressing the meaning of the Arizona Constitution perpetuities provision.⁶² The trust agreement that is the subject of the proceeding did not contain language that would ultimately vest certain interests in property held by the trust. The petitioner asserted that, therefore, the trust violated, among other things, the Arizona Constitution. Comprehensive memoranda regarding this and other issues were filed by the opposing parties, referencing *Brown Bros.* (which at that time was a trial court decision), *Broach v. City of Hampton*, and John Chipman Gray's treatise, all discussed above. At the time of the ruling, the Arizona perpetuities statutes had supplanted the statutory adopted common law perpetuities rules and permitted an unlimited vesting period, so long as the trustee had the power to sell trust assets and after the interest is created

59. *Brown Bros. Harriman Tr. Co.*, 688 S.E.2d at 757.

60. William R. Culp & Paula A. Kohut, *Constitutionality of Rules Against Perpetuities Repeals Revisited*, THE WILL & THE WAY (N.C. Bar Ass'n), Nov. 2013, at 3.

61. *R. J. Reynolds Tobacco Co. v. Durham Cty.*, 479 U.S. 130, 139 (1986).

62. *In re Mildred Louise Hanigan Living Tr.*, PB-20090432 (Ariz. Super. Ct. Aug. 17, 2009).

someone alive at the time the trust is created has the power to terminate the trust.⁶³ The court ruled that the statutory regime was not violative of the Arizona Constitution:

The issue with respect to Count 1 is whether or not the Trust violates the Rule Against Perpetuities. The purpose of the Rule Against Perpetuities is described in *Lowell v. Lowell* as follows:

“The common law perpetuities in both real and personal estates when devoted to private uses were held to be against public policy, because the effect was to take such property out of commerce and build up gigantic family fortunes.”

The Rule forbids estates to be indefinitely inalienable. But here, neither A.R.S. § 14-2901 nor the common law Rule Against Perpetuities is violated because there is no restraint on alienation. That is, section 6.2 of the Trust confers upon the Trustee all those powers under applicable law and thus the Trustee has, at a minimum, the implied power to sell trust assets. And finally, the Trust does not violate Article 2, Section 29 of the Arizona Constitution for the same reasons.⁶⁴

V. APPLYING TRADITIONAL RULE TO TRUST INTERESTS

For the moment let us operate under the assumption that a court finds that the applicable constitutional provision applies to delay of vesting of equitable beneficial interests in trust in the same manner as restraints against alienation of legal title. As long as one or more persons have the power to appoint trust assets out of trust within the applicable permissible vesting period, then the particular trust does permit alienation under any analysis consistent with the particular legal prohibition articulated. Under the historic meaning of the rule, it is the power to alienate, not the actual alienation, that avoids implication of the ban on perpetuities. In that sense this assumed constitutional prohibition is markedly different than the modern Rule Against Perpetuities.

Under the modern Rule Against Perpetuities (the Rule Against Remoteness), there is an opposite presumption: an interest will fail unless it must vest or becomes impossible to vest within the applicable period. Under

63. ARIZ. REV. STAT. § 14-2901(A)(3) (2012). The perpetuities statutes are derived from the Uniform Statutory Rule Against Perpetuities, although modified.

64. *In re Mildred Louise Hanigan Living Tr.*, PB-20090432 (citing *Lowell v. Lowell*, 240 P. 280, 284, 286 (Ariz. 1925)). The court was clear when referring to the common-law Rule Against Perpetuities—that it applied the meaning of the Arizona Supreme Court in its 1925 opinion *Lowell v. Lowell* because that is what the term meant in the era of adoption of the 1910 Arizona Constitution.

the historic rule, an interest will fail unless one or more collectively may vest title within the applicable period. The point to remember is the purpose of this assumed constitutional prohibition: it is to require one or more collectively to have the power to transfer, not that there be a transfer. That purpose is met in the trust context by insuring that one or more have the power to vest a beneficial interest, not that it is so exercised. Appointing interests outright to a descendant is both actual and practical alienation. It is just as much a power to alienate in a practical sense as it is asserted that any constitutional ban reaches to prohibit the perpetual remoteness.

If interest holders can collectively act to alienate, the required power of alienation is present to save the interest. As stated above, it is the power alone to alienate that saves the interest, and it is the power to grant the power to alienate that is the essence of the rule. Many multigenerational trusts grant descendants or trust protectors the absolute power to vest interests within the applicable perpetuities period. Such trusts would not violate the constitutional perpetuities provision interpreted to apply to equitable trust interests in the same manner as applied to legal interests in property.

From their article, I conclude that Horowitz and Sitkoff believe a trust that grants each generation a power to vest outright property to the next generation nonetheless fails to achieve state constitutionality as they see it. They point out that no person has the power to require another to appoint to them and no appointor has the power to take the trust property for themselves. They conclude, “[t]he contemporary perpetual trust is, in other words, a modern fee tail.”⁶⁵ However, this is not within Blackstone’s definition of a perpetuity that they quote:

Recall Blackstone’s description of a perpetuity: “[T]he settlement of an interest, which shall go in the succession prescribed, without any power of alienation.” By enabling a donor to create an inalienable string of beneficial life estates “to which the device of common recovery [cannot] be applied,” the perpetual trust statutes have resurrected the entail in a new guise.⁶⁶

The device of common recovery required the holder of the current fee tail interest to purport to convey the entailed property to another, and the transferee would then bring an action to start a convoluted judicial process that ended in the property owned in fee by the “demandant” (the ostensible grantee).⁶⁷ Horowitz’s and Sitkoff’s article provided an example of a common

65. Horowitz & Sitkoff, *supra* note 27, at 1787.

66. *Id.* at 1808 (footnotes omitted).

67. See GRAY, *supra* note 8, at 139, 150.

trust provision that grants a descendant of the settlor a power to vest trust corpus in descendants other than the power holder.⁶⁸ In their example, the exercise of the power of appointment outright by only the current beneficiary of the trust will cause the same result that common recovery would have provided. In other words, there is in fact no more than, and typically fewer than, the number of parties necessary to vest the property in the example than would by necessity be required to participate in a common recovery. Furthermore, in both instances, by exercise of a special power of appointment or through common recovery, the party currently in possession must determine to act, or in neither case will alienation be affected.

Using Blackstone's description as related by Horowitz and Sitkoff, there is no impermissible perpetuity if one or more persons have a power to appoint trust property outright within the permissible period, whether or not the power is exercised. The practical equivalent to common recovery is available to the current beneficiary who is a power holder with respect to a trust in which each generation possesses a power to appoint outright to an individual, whether the power is special or general.

Conceptually, an equitable "fee tail" (meaning an equitable fee tail of wealth) is created if no power to appoint trust property outright is granted to someone, and the trust does not otherwise fully vest in one or more persons. In that particular case, in which there is no power of appointment, if the applicable state constitutional perpetuities provision is somehow interpreted to apply to trust interests in the manner as would apply to legal title under the historic rule, then alienation of the interest would not be correctable by the common recovery equivalent of exercising a power of appointment, and it would be reasonable for a court to find a constitutionally prohibited perpetuity. Correlatively, if a state has abolished the Rule Against Remoteness, when there is a periodic power to completely vest trust property (such as a typical special power of appointment that could be exercised to distribute the trust estate outright to an individual), then the court should find that the trust is not violative of the constitutional provision in applying the legislation.

For example, assume a trust is settled irrevocably in a constitutional perpetuities state that has statutorily abolished the Rule Against Remoteness (the modern Rule Against Perpetuities), but has retained the Rule Against Suspension of the Power of Alienation (the historic Rule Against Perpetuities). The trust provides that the sole child of the settlor shall be distributed an amount for the child's health, education, maintenance and support. In addition, the child has the testamentary power to appoint the trust

68. Horowitz & Sitkoff, *supra* note 27, at 1786–87.

estate, in whole or in part, in trust or outright, in such form or manner, to or for the benefit of any one or more persons other than the child, the child's estate and the creditors of either, as the child shall determine. Upon the child's death, the trust estate, to the extent not appointed by the child, will be distributed equally to trusts for each of the child's living children. The terms of the trusts for each child of the child are the same as the trust terms for the child. The historic rule as applied to trust interests is satisfied, since one or more persons (in this case the child) has the power to vest the trust estate outright to a person within the period ending within twenty-one years after the death of person living when the trust interest is created (the person whose life is the measuring life is also the child). Furthermore, in absence of appointment, then the historic rule will be satisfied anew with respect to the succeeding trust interests created for the next generation, since each beneficiary of his or her respective trust will have the power to vest the interest within his or her respective lifetime (which was in being at the time the parent died last holding the power to so vest).

VI. POWER OF THE LEGISLATURE TO INTERPRET THE CONSTITUTION AND MODIFY THE RULE

There is substantial authority that the legislature may regulate the application of constitutional perpetuities provisions. One consequence of such a constitutional provision is that the legislative interpretation must result in either a prohibition against unlimited restraints against alienation of title or unlimited remoteness in vesting.

A. California

The California appellate court in *In re Sahlender's Estate*⁶⁹ was clear that the legislature has the power to interpret and implement the constitutional perpetuities provision:

Moreover, in 1850, the Legislature made the rule of the common law the "rule of decision" in this state except where such common law was "repugnant" or "inconsistent" with the law of this state. At the very least, the constitutional provision determined that the rules of the common law aimed at preventing "perpetuities" were not "repugnant" or "inconsistent" with the policy of this state. It is quite reasonable to assume that the drafters in 1849 probably had in mind that the then generally accepted method of combatting

69. *In re Sahlender's Estate*, 201 P.2d 69 (Cal. Ct. App. 1948).

“perpetuities” was by the rule against restraints on alienation, but it is equally reasonable to assume that they wanted to prevent the tying up of estates for long periods, however accomplished. The framers were careful not to adopt any specific “rule,” but to provide that “perpetuities” were prohibited. Since one method to accomplish this result then known, but perhaps not fully understood, was to require estates to vest within lives in being and 21 years, it would seem to follow logically that the constitutional provision adopted both rules, implying that the Legislature could regulate the rules as the needs of the times might require.

....

We conclude this phase of the discussion with the holding that in this state we have both the rule against restraints on alienation, with its statutory period of lives in being or 25 years, and the rule against remoteness of vesting, with its common-law period of lives in being and 21 years. While such a holding makes the work of the draftsman of wills a difficult one, such argument should be addressed to the Legislature and not to the courts.⁷⁰

B. Nevada

The reasoning of the court in *In re Sahlender's Estate* is apparently that of the Nevada Supreme Court, gleaned from a recent opinion.⁷¹ The court noted the statutory enactment interpreting the constitutional provision, which provides for a 365-year Rule Against Remoteness period and that the rule does not apply to nondonative transfers. It determined to follow the legislation even though it was not effective at the time of the agreement at issue:

Our Legislature has determined that, as a matter of policy, nondonative transfers should not be subject to the rule against perpetuities. We see no reason to disagree with this policy in our application of the rule.⁷²

70. *Id.* at 75, 79.

71. *Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.*, 345 P.3d 1040 (Nev. 2015).

72. *Id.* at 1044 (citations omitted) (citing *Juliano & Sons Enters. v. Chevron, U.S.A., Inc.*, 593 A.2d 814, 819 (N.J. Super. Ct. App. Div. 1991) (“Neither the Legislature nor this court can perceive any danger . . . requiring continued application of the rule to nondonative commercial transactions even where they occurred prior to the effective date of the Act.”)).

Elsewhere in the opinion, the Nevada Supreme Court further quoted a New Jersey appellate court, which decision was referenced in the above quotation, favorably: “The court acknowledged that the ‘Legislature, as the authoritative source of public policy, has now decided the types of transactions which should be subject to the rule against perpetuities and which should not.’”⁷³ A fair reading of the opinion leads to the conclusion that the Nevada Supreme Court accepts its legislature’s specific regulation of the rule.

C. Arkansas

As discussed above, the Arkansas Supreme Court has said as much.⁷⁴ Lynn Foster, Arkansas Bar Foundation Professor at University of Arkansas at Little Rock William H. Bowen School of Law, corroborates:

Arkansas statutes are presumed to be constitutional. Before an act will be held unconstitutional, the incompatibility between it and the constitution must be clear. The “heavy burden” as to the constitutionality of a statute is on the party attacking it. In fact, if it is possible to construe a statute as constitutional, the Supreme Court must do so. If the constitutionality of the statute were challenged, the Supreme Court has stated that it will consider whether there is “any rational basis” that demonstrates the “possibility of a deliberate nexus” with state goals proving that the legislation is not a product of “arbitrary and capricious government purposes.”⁷⁵

D. Oklahoma

There is authority that the Oklahoma constitutional provision⁷⁶ may be interpreted to require application of the common law Rule Against Remoteness if a beneficial interest in a trust is “property” and not a “merely

73. *Id.* at 1043.

74. *Broach v. City of Hampton*, 677 S.W.2d 851, 854 (Ark. 1984). For further discussion see *supra* notes 54–55.

75. Lynn Foster, *Fifty-One Flowers: Post-Perpetuities War Law and Arkansas’s Adoption of USRAP*, 29 U. ARK. LITTLE ROCK L. REV. 411, 462 (2007) (internal footnotes omitted). In an appendix, Foster surveys the perpetuities law of the states, and discusses unique provisions of USRAP states’ legislation. See *id.* at 471.

76. OKLA. CONST. art. II, § 32 (“Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this state.”).

personal contract[.]”⁷⁷ Nonetheless, the Oklahoma legislature recently determined to regulate the rule to codify the traditional rule—that of rule against restraints on alienation of title.⁷⁸ Oklahoma legislation provides that “the common law rule against perpetuities shall not apply to a trust subject to the trust laws of this state.”⁷⁹ Reference to the common law rule is to the modern rule—the Rule Against Remoteness.⁸⁰ The act generally confirms the existing law prohibiting absolute suspension of the power of alienation of property beyond a period of the continuance of lives in being at the time of the suspension of the power plus twenty-one years thereafter, but interestingly, now provides that the limitation applies only to real property not held in trust.⁸¹ It statutorily confirms that so long as one or more persons have the power to sell, exchange or convey property, the power of alienation is not suspended with respect to such property. The act specifically provides “[i]f the terms of a trust do not suspend the absolute power of alienation of any trust property beyond the term permitted in this subsection, the trust may exist in perpetuity.”⁸²

E. Arizona

Arizona has adopted the Uniform Statutory Rule Against Perpetuities, with some significant changes. One change is to permit a trust to permit indefinite unvested property interests if “[t]he interest is under a trust whose trustee has the expressed or implied power to sell the trust assets and at one or more times after the creation of the interest one or more persons who are living when the trust is created have an unlimited power to terminate the interest.”⁸³

VII. DISTILLATION

The following both describes the current state of the law as it bears on the topic of this article and recaps certain of the historical discussion and commentary above when it is helpful to bring relevant facts together.

77. *Melcher v. Camp*, 435 P.2d 107, 112 (Okla. 1967).

78. S.B. 774, 55th Leg., 1st Reg. Sess. (Okla. 2015).

79. *Id.*

80. *See id.*

81. OKLA. STAT. tit. 60, §§ 31, 32, 175.47 (2014).

82. *Id.* § 175.47.

83. ARIZ. REV. STAT. § 14-2901(A)(3) (2012). *See generally In re Mildred Louise Hanigan Living Tr.*, PB-20090432 (Ariz. Super. Ct. Aug. 17, 2009) (discussing upholding the statute).

1. Nine states' constitutions have various provisions prohibiting "perpetuities" (Arkansas, Arizona, Montana, Nevada, North Carolina, Oklahoma, Tennessee, Texas, and Wyoming). Six of those states (Arizona, Nevada, North Carolina, Oklahoma, Tennessee, and Wyoming) have statutes that one way or another allow trusts that may continue either perpetually or for hundreds of years.⁸⁴

2. Steven J. Horowitz, Esq. and Professor Robert H. Sitkoff authored a law review article in 2014, *Unconstitutional Perpetual Trusts* (the "Article"),⁸⁵ discussed above with other commentators, which addresses the issue of constitutionality of such statutes. The Article examines many aspects that are salient. The Article takes us through the history and background of those constitutional provisions. Mr. Horowitz and Prof. Sitkoff "conclude that recognition of perpetual trusts is prohibited in states with a constitutional prohibition of perpetuities, but more modest reforms such as reformation and wait-and-see are permissible."⁸⁶ They "suggest that the constitutional prohibitions reflect the kind of strong public policy that would authorize a court in a state with such a provision to refuse to apply another state's law authorizing perpetual trusts."⁸⁷

3. The question of state constitution interpretation is important. Certain commercial fiduciaries and related professionals have marketed their respective states as preferred states for trust administration (the "Go To States").⁸⁸ There are at least a half dozen that are viewed as such.⁸⁹ The positive environment provided by these jurisdictions includes the attributes of (1) no state income or death taxes, (2) above average asset protection laws benefitting trust beneficiaries, (3) lengthy periods that a trust interest can remain unvested to defer federal estate taxation, and (4) ease of administration. It is also important to those involved in the planning, drafting, establishment, and administration of trusts which terms are governed under the laws of the states that have both constitutional perpetuities provisions and

84. Horowitz & Sitkoff, *supra* note 27, at 1795, 1821.

85. *Id.* at 1769. The author notes that the Vanderbilt Law Review issue in which the Horowitz and Sitkoff article appears is replete with articles that may disturb estate planners because they warn of possible development of law that may disrupt the assumed settled law regarding property transfer planning.

86. *Id.* at 1821–22.

87. *Id.* at 1822.

88. See generally Daniel G. Worthington & Mark Merric, *Which Situs Is Best in 2016?*, 155 TR. & EST. 61 (2016).

89. They include, at least, Nevada, Delaware, South Dakota, Alaska, New Hampshire, and Wyoming. Of those, Nevada and Wyoming have constitutional perpetuities provisions.

statutorily lengthened perpetuities periods. One consequence may be application (or attempted application) of the Delaware Tax Trap.

4. If long term trust duration is suspect or uncertain in any of the Go To States, then that is theoretically detrimental in perception of a would-be settlor, trustee, or beneficiary, whether or not it is detrimental as a practical matter.

5. The term “perpetuities” when used in the early state constitutions meant entailment and other excessive restrictions on the power to transfer title (often referred to as Rule Against Suspension of the Power of Alienation). The term did not refer to the modern Rule Against Perpetuities (referred to by John Chipman Gray as the Rule Against Remoteness),⁹⁰ which limits the tying up of access to equitable beneficial interests in wealth held in trust.

6. In the Article, Horowitz and Sitkoff generally acknowledge the above meaning of the constitutional perpetuities provisions, but assert that it nonetheless accommodates and invites a broader interpretation to impose a constitutional Rule Against Remoteness.

7. Horowitz and Sitkoff advocate that for policy reasons, at least, the courts should interpret the constitutional perpetuities provisions beyond the meaning applicable at the time of adoption of the constitution. Their belief is that it is bad to permit excessive concentrations of wealth, and permitting such effectively perpetual trusts exacerbates such result. Therefore, it is good to fix things judicially, and the constitutions should be interpreted in a manner to achieve the better good. In other words, the courts should be judicially activist. The opposite position of the one taken by them is, of course, that courts should not legislate, and leave changing the law to the relevant elected legislative bodies.⁹¹ Those advocating judicial restraint could ask: Who is to say that carefully considered legislative examination may conclude that the perceived bad consequences are nothing but academic handwringing in search of a solution to a nonexistent problem? Self-interest of parties also adds fuel to the fire in this debate.

8. To the extent that a constitutional prohibition against permitting perpetuities applies as a Rule Against Remoteness, many questions follow. One is whether the prohibition of permitting perpetuities with respect to equitable interests is akin to the prohibition against entailments. For example,

90. GRAY, *supra* note 8, §§ 2, 3.

91. Such is what Justice Traynor concluded in his opinion in *In re Micheletti's Estate*, 151 P.2d 833 (Cal. 1944). This California Supreme Court opinion was unanimous and is discussed above. *See supra* notes 50–53 and accompanying text.

the constitutional prohibition, instead of the classic modern Rule Against Perpetuities, which voids interests that could possibly vest in violation of the applicable rule, could mean that there is a prohibited perpetuity only if no persons together had the power to vest interests within the applicable permissible period.⁹² Another is whether the constitutional provision is self-executing or requires legislative action to implement. Yet another question is whether the provision is interpreted to anticipate that, regardless of what a court would determine to be a prohibited perpetuity in absence of legislation, the legislature is free to legislate the definition and application of what is a perpetuity and what constitutes a permissible period. Such appears to be the holding of various courts, including the California Supreme Court in *In re Micheletti's Estate*.⁹³ The latter interpretation would further mitigate concerns in those states with constitutional perpetuities provisions whose legislatures confirmed the historic Rule Against Suspension of the Power of Alienation or a variant thereof, but have either abolished or provided a lengthened permissible period of the Rule Against Perpetuities.

9. The interpretation of a state's constitution may depend, in part, on its own historical record. For example, as evidence of the meaning of Arizona's 1910 Constitution's entailments and perpetuities provision, until 1963 Arizona's statute entitled "Rule against perpetuities" dealt solely with restraints on alienation of title.⁹⁴

10. From case law it appears that, of the states that presently have a constitutional perpetuities provision, courts in two states have applied their constitutions' perpetuities provisions to encompass the Rule Against Remoteness (today's Rule Against Perpetuities): Texas (1904 and 1989)⁹⁵ and Oklahoma (1967).⁹⁶ Two states, Arizona in 2009 and North Carolina in 2010 (the most recent to have a court rule on this point), have determined that the constitutional provision does not apply to include Rule Against Remoteness.⁹⁷ Nevada's Supreme Court has addressed a narrow issue in response to a question certified from the Ninth Circuit Court of Appeals to confirm that the Nevada constitutional prohibition against perpetuities does not apply to void an interest in a certain commercial setting.⁹⁸ A fair reading

92. This is the historic or traditional Rule Against Perpetuities, now known as the Rule Against Suspension of the Power of Alienation as applies to legal interests.

93. See *supra* note 43–47.

94. ARIZ. REV. STAT. § 33-261 (2012).

95. See generally *Ball v. Knox*, 768 S.W.2d 829 (Tex. App. 1989); *McIlvain v. Hockaday*, 81 S.W. 54 (Tex. Civ. App. 1904).

96. *Melcher v. Camp*, 435 P.2d 107, 112 (Okla. 1967).

97. See *Brown Bros. Harriman Tr. Co. v. Benson*, 688 S.E.2d 752, 757 (N.C. 2010).

98. *Bullion Monarch Mining, Inc. v. Barrick Goldstrike Mines, Inc.*, 345 P.3d 1040, 1040 (Nev. 2015). For further discussion of the opinion, see *supra* notes 71–73 and accompanying text.

of the opinion leads to the conclusion that the Nevada Supreme Court accepts its legislature's specific regulation of the rule.

VIII. CONCLUSION

This topic combines the early history of this nation, a confused and often misunderstood area of law (even by the experts of the time), a confused and forgotten fundamental meaning of terms, and the bias of the present looking back on the past. Once the fog is lifted, the meaning and limited purpose of the state constitutional perpetuities provisions is shown. Case law has evidenced courts' recognition of the legislature's prerogative to interpret and modify the reach and application of the law regulating perpetuities in a state having such constitutional provisions.

The main conclusions made in this article are summarized as follows:

1. The states' constitutional prohibitions against perpetuities that are derived from Pennsylvania's or North Carolina's constitutions are intended to prohibit excessive restraints on alienation of title, not to prohibit excessive remoteness in vesting.

2. Regardless of the determination of whether a state's constitution's perpetuities provision prohibits excessive restraints on alienation of title or remoteness of vesting, or both, the legislature can regulate the rules.