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Toward a Model Law of Estates and Future Interests

D. Benjamin Barros

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Toward a Model Law of Estates and Future Interests

D. Benjamin Barros*

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I. Introduction

The American law of estates and future interests is tremendously complex, as anyone who has struggled to learn the difference between a contingent remainder and an executory interest in a first-year property course can attest. This complexity is unjustifiable because it has no modern purpose. Many of the distinctions between types of interests in the current system of ownership are vestiges of ancient English feudal concepts and owe their place in the law solely to historical accident.¹

Complaints about the needless complexity of the system of ownership are not new. Reform efforts in the United States date back at least to the early nineteenth century.² The failure of the first *Restatement of Property* to simplify the system provoked Myres McDougal to observe that "[t]o make a superb inventory of Augean stables is not to cleanse them."³ One eminent commentator hopefully wrote in 1937 that the United States was "on the eve of a movement looking toward the improvement and simplification of the law of

1. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 24.1 cmt. a, 24.2 cmt. a (Preliminary Draft No. 12, 2007) (commenting on the history of estate terms and their ties with the development of the feudal land system of England).

2. See Lawrence W. Waggoner, *Reformulating the Structure of Estates: A Proposal for Legislative Action*, 85 HARV. L. REV. 729, 733 (1972) (describing various historical efforts to reform the deficiencies in the ownership system).

3. Myres S. McDougal, *Future Interests Restated: Tradition Versus Clarification and Reform*, 55 HARV. L. REV. 1077, 1115 (1942).

Future Interests by legislation."⁴ Proposals for legislative reform have since cropped up with some regularity.⁵

Until recently, actual reform has not made any substantial progress in any forum. The first two *Restatements of Property* failed to make any meaningful changes to the law of estates and future interests. Neither the National Conference of Commissioners on Uniform State Laws (NCCUSL) nor the American Law Institute (ALI) has made any institutional effort to propose legislative reforms in this area, and state legislatures have not been inclined to make changes on their own.

The recent release of a preliminary draft of Division VII of the *Restatement (Third) of Property: Wills and Other Donative Transfers*, represents a radical departure from this tradition of much complaint but little progress in the effort to modernize and rationalize the basic system of property ownership.⁶ The *Restatement (Third)* is unabashedly reformist and represents the first major institutional effort to clear the unnecessary vestiges of feudalism from this fundamental area of property law. Although subject to criticism in certain respects, the *Restatement (Third)* presents a cogent and elegant simplification of the system of estates and future interests.

The emergence of the *Restatement (Third)* suggests that the time is right for NCCUSL and/or the ALI to begin an institutional effort to develop a model law of estates and future interests. Though it is an impressive intellectual achievement, it is doubtful that the *Restatement (Third)* will achieve substantive reform of estates and future interests law on its own. Courts historically have been hesitant to make major changes in property law, in part because making broad, systemic changes like those proposed in the *Restatement (Third)* are better suited to the institutional competence of the legislatures.⁷ State legislatures, in turn, are unlikely to make systemic changes to the basic law of ownership unless and until those changes have been approved by a major law reform institution.

4. Lewis M. Simes, *Fifty Years of Future Interests*, 50 HARV. L. REV. 749, 783 (1937).

5. See generally T. P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513 (2003) (proposing solutions to the "medieval" problem of complexity in the law of future interests); Waggoner, *supra* note 2 (discussing historical reform efforts of the ownership system).

6. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS Scope of Division VII (Preliminary Draft No. 12, 2007) (identifying the problem of unnecessarily complex and illogical classification, and promising that the Restatement will provide a simplified system in response to the needs of today).

7. See *infra* notes 89–93 and accompanying text (providing examples of court decisions that decline to follow the Restatement because the matter is better left to the legislature and or existing statutes).

This Article seeks to kick-start this process by developing a proposed model law of estates and future interests. With a few notable exceptions, the proposed model law is substantively consistent with the *Restatement (Third)*. The approach taken in the proposed model law is informed by problems that have beset prior proposals for legislative property law reform. It intentionally avoids controversial issues, such as substantive reform of the Rule Against Perpetuities,⁸ that could derail legislative approval.⁹ It is also relatively modest in its scope. It does not attempt to create a uniform and comprehensive code of estates and future interests. Rather, it is designed to act as a patch that updates, but fits within, the existing common law system of ownership.

Part II makes the case for reform of the estates and future interests system. It begins with a basic primer on the characteristics of the current system. It then analyzes the system's unnecessary complexity and explains why simplification is needed to make the system work properly. Part III discusses the advantages and disadvantages of Restatements and model laws as mechanisms to achieve legal reform, and argues that while Restatements may have a role to play in reforming property law, change to the estates and future interests system is best done legislatively. Part III also considers the difficulties that have led to the relative failure of previous model laws of property. These issues, which have been neglected in prior academic work on estates and future interest reform, inform many of the substantive decisions reflected in the proposed model law. Part III also considers the relevance of uniformity to property reform efforts and notes the differences in institutional focus between NCCUSL and the ALI, without expressing an opinion about which of the two would be better suited to formally develop a model law of estates and future interests.

Part IV discusses the substance of the proposed model law, the text of which is included as an appendix to this Article. Part IV first discusses a number of preliminary issues, including the alienability of present and future interests in property and the abolition of feudal distinctions between types of estates. It then comprehensively discusses the simplified systems of present and future interests reflected in the proposed model law. It also discusses a number of important collateral issues, including rules of construction and the abolition of the Doctrine of Worthier Title,¹⁰ the Rule in Shelley's

8. See STOEBUCK & WHITMAN, *infra* note 13, § 3.17 ("[C]ommon law rule limit[s] the creation of non-reversionary future interests.").

9. See *infra* note 306 and accompanying text (discussing how previous proposed model legislation failed to reform current property law).

10. See STOEBUCK & WHITMAN, *infra* note 13, § 3.15 ("[It] precluded the creation of a

Case,¹¹ and the Rule of Destructibility of Contingent Remainders.¹² Part IV additionally highlights the differences between the proposals presented in this Article and proposals made in prior academic work and in the *Restatement (Third)*. Part V then briefly discusses issues concerning the retroactive application of many of the reforms included in the proposed model law.

The Article concludes by highlighting some of the major differences between the proposals made here and those that have been made before, and by arguing that the time is right for NCCUSL and/or the ALI to begin the formal institutional process to promulgate a model law of estates and future interests.

II. The Case for Reform

This Part begins with a basic overview of the current system of estates and future interests. It then explains why the current system is unnecessarily complex and why reform is necessary to ensure that the basic system of ownership functions properly.

A. The Bestiary of Estates and Future Interests

This section provides a brief overview of the basic system of property ownership that exists today in the United States.¹³ Readers who are already familiar with the system may want to skip to the next section, which discusses the modern irrelevance of many of the common law distinctions discussed here.

The forms of ownership recognized in American common law jurisdictions are typically divided between present possessory interests

contingent remainder in favor of the heirs of a grantor or testator.").

11. See *id.* § 3.16 ("[It] prescribed that when a deed or will purported to give a remainder to the heirs . . . of a person who received a prior freehold . . . by the same instrument, that person also took the remainder.").

12. See *id.* § 3.10 ("[A] contingent remainder would be destroyed if it failed to vest at or before the termination of the last preceding estate created by the same instrument.").

13. Many of the citations in this introductory section are to two widely-available single-volume treatises: JOSEPH WILLIAM SINGER, *INTRODUCTION TO PROPERTY* (2d ed. 2005) and WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* (3d ed. 2000). Another useful introductory source, written by two of the leading scholars in the area, is LAWRENCE W. WAGGONER & THOMAS P. GALLANIS, *ESTATES AND FUTURE INTERESTS IN A NUTSHELL* (3d ed. 2005). Comprehensive analysis of the system of estates and future interest can be found in the following multi-volume references: THOMAS E. ATKINSON ET AL., *AMERICAN LAW OF PROPERTY* (A. James Casner ed., 1952); JOHN A. BORRON, JR. ET AL., *THE LAW OF FUTURE INTERESTS* (3d ed. 2003); JOHN MAKDISI & DAVID A. THOMAS, *THOMPSON ON REAL PROPERTY* (2d Thomas ed. 1994); RICHARD R. POWELL, *POWELL ON REAL PROPERTY* (Michael Allan Wolf ed., 2000).

(commonly referred to as estates in land when real property is involved) and future interests. The owner of a present possessory interest has the present right to possession and enjoyment of the property.¹⁴ The owner of the future interest does not have the present right to possession and enjoyment of the property, but may obtain those rights at some point in the future.¹⁵ A future interest exists as soon as it is created—it is the right of possession, not the existence of the interest itself, that may come in the future.¹⁶

As typically taught in law school, a list of the estates in land would look something like this:

- Fee Simple Absolute
- Fee Tail
- Fee Simple Determinable
- Fee Simple Subject to Condition Subsequent
- Fee Simple Subject to Executory Limitation
- Life Estate
- Term of Years
- Periodic Tenancy
- Tenancy at Will

The forms of personal property ownership are largely the same as those of real property.¹⁷ The list of estates in land reflects some arbitrary choices. The fee tail, for example, is largely extinct in American law, and could be

14. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 24.1 (Preliminary Draft No. 12, 2007) ("A present interest is an ownership interest in property in which the owner has a current right to possession or enjoyment of the subject property.")

15. *See id.* § 25.1 ("A future interest is an ownership interest in property in which the owner has no current right to possession or enjoyment of the subject property. The owner's right to possession or enjoyment is postponed until some time in the future and may be either certain or uncertain."); BORRON ET AL., *supra* note 13, § 1 ("A future interest may be described as an interest in land or other things in which the privilege of possession or of enjoyment is future and not present.")

16. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 25.1 cmt. a ("[F]uture interest is a present ownership interest in property, even though the right to possession or enjoyment is postponed until . . . the future and may be either certain or uncertain. . . . [It arises when] created, not in the future when and if the right to possession or enjoyment matures."); BORRON ET AL., *supra* note 13, § 1 ("It should be emphasized that the interest is an existing interest from the time of its creation, and is looked upon as part of the total ownership of the land or other thing which is its subject matter.")

17. The most prominent difference is that "absolute ownership" usually replaces "fee simple absolute" in the personal property context. Jeffrey G. Sherman, *'Tis a Gift to Be Simple: The Need for a New Definition of 'Future Interest' for Gift Tax Purposes*, 55 U. CIN. L. REV. 585, 666 (1987) ("[F]ee simple absolute' [is used] in the case of real property and 'absolute ownership' in the case of personal property.")

excluded.¹⁸ The fee simple determinable, fee simple subject to condition subsequent, and fee simple subject to executory limitation are each created with a condition that has the potential to terminate the present possessory interest, and are therefore known as defeasible estates.¹⁹ Life estates and tenancies also can be created with similar conditions, but defeasible life estates and tenancies are, by convention, left off of the basic list of estates in land.²⁰

Many of the details of the estates in land are discussed in later sections. For now, it is sufficient to focus on their defining characteristics. The *fee simple absolute* is unlimited in duration and is the closest thing that the American legal system has to absolute ownership of land.²¹ At common law, it was created by the language "to *A* and his or her heirs."²² The "and his or her heirs" language required at common law was language of conveyance, and did not create any interest in those individuals who at some point might become *A*'s heirs.²³ Today, a conveyance "to *A*" is sufficient to create a fee simple absolute.²⁴

Example 1: *O* grants Blackacre "to *A*." *A* owns Blackacre in fee simple absolute.²⁵

Because the fee simple absolute is of unlimited duration, it is not accompanied by a future interest. In this sense, the fee simple absolute is unique. All other estates in land are of at least potentially limited duration, and so are accompanied by a future interest.

18. See *infra* notes 145–48 and accompanying text (noting that in many states a fee simple conditional can no longer be created).

19. See STOEBCUK & WHITMAN, *supra* note 13, § 2.3 (describing the recognized defeasible fee simple estates).

20. See *id.* (indicating that defeasible life estates and tenancies are not considered estates in land by omitting them from the list of other conditional estates); SINGER, *supra* note 13, § 7.4 (describing conditional language of life estates); *id.* § 10.3.2 (describing conditional language for tenancies).

21. See STOEBCUK & WHITMAN, *supra* note 13, § 2.2 (describing a fee simple absolute and comparing it to full ownership of the land).

22. *Id.* ("[A] grant to '*A* and his heirs' . . . defin[ed] *A*'s estate as a fee simple [absolute].").

23. *Id.* ("[T]he words 'and his heirs' were . . . not words . . . creating an estate in favor of *A*'s heirs.").

24. See SINGER, *supra* note 13, § 7.2 ("[C]onveyance of property from '*O* to *A*' conveys a fee simple."); STOEBCUK & WHITMAN, *supra* note 13, § 2.2 ("[C]ourts refused to apply the rigid common law rule requiring use of the word 'heirs'.").

25. The examples in this article follow the convention of typically referring to the original owner of the property as *O*, and the initial recipient as *A*. Blackacre, Whiteacre, Greenacre, and variants are commonly used to refer to hypothetical parcels of property.

The *fee tail* is a common law estate intended to keep land in a particular family.²⁶ Having been abolished in most U.S. jurisdictions, it is of largely historical interest.²⁷ It was created by language in the form of "to *A* and the heirs of her body."²⁸

Example 2: *O* grants Blackacre "to *A* and the heirs of her body." At common law, *A* would own Blackacre in fee tail.

The fee tail was intended to keep ownership of the property within *A*'s lineal descendants.²⁹ Because *A*'s line could eventually die out, the fee tail was of potentially limited duration. It was therefore accompanied by a future interest.³⁰ In the example given, *O*, the original grantor, has a reversion.³¹

The three defeasible estates have similar characteristics. Each is created by a conveyance that includes a condition that, if broken, will lead to the termination of the present possessory estate.³² A *fee simple determinable* is created if the conditional language is phrased in terms of duration.³³

Example 3: *O* grants Blackacre "to the School Board, *so long as* the property is used for school purposes."

The School Board owns Blackacre in fee simple determinable. All of the defeasible fee simple estates are of potentially unlimited duration. The School Board could use Blackacre for school purposes in perpetuity, and never violate the condition. On the other hand, the School Board could violate the condition tomorrow, ending the fee simple determinable. Because of their conditionality, all of the defeasible estates are accompanied by a future interest. In the case of

26. See STOEBUCK & WHITMAN, *supra* note 13, § 2.10 (describing a fee simple absolute and fee tail).

27. See *id.* (noting that while a fee tail estate was recognized in the past, it is currently out of favor in most states).

28. See STOEBUCK & WHITMAN, *supra* note 13, § 2.10 (indicating that a fee tail was created using words "to *A* and the heirs of her body").

29. See *id.* (describing a fee simple absolute's intention to keep ownership of property within *A*'s lineal descendants).

30. See *id.* (indicating that a future interest accompanied fee tails).

31. See *infra* note 56 and accompanying text (describing a reversion). More accurately, *O* has a reversion in fee simple absolute. Here and elsewhere in this summary, I omit the estate portion of the future interest description for simplicity's sake.

32. See STOEBUCK & WHITMAN, *supra* note 13, § 2.3 (describing the termination of the present possessory estate if the conditions are broken).

33. See SINGER, *supra* note 13, § 7.3.1 ("[F]ee simple determinable is created by words indicating that the ownership is to last only for a certain time period."); STOEBUCK & WHITMAN, *supra* note 13, § 2.4 ("[It is] subject to a qualifying limitation that the estate shall last only 'so long as' a designated state of affairs shall continue or only 'until' the occurrence of a designated event were recognized.").

a fee simple determinable, the accompanying interest is a *possibility of reverter*.³⁴ So in Example 3, *O* retains a possibility of reverter.

A *fee simple subject to condition subsequent* is created if the conditional language is phrased in terms of condition.³⁵

Example 4: *O* grants Blackacre "to the School Board, *but if* the property is not used for school purposes, then grantor may re-enter and retake the property."

The School Board owns Blackacre in fee simple subject to condition subsequent. The future interest that accompanies a fee simple subject to condition subsequent is called a *right of entry*.³⁶ This future interest goes by various other names, including *power of termination*.³⁷ In Example 4, *O* retains a right of entry. The distinction between a fee simple determinable and a fee simple subject to a condition subsequent is highly technical, but under the current system of estates the difference can have a legal impact.³⁸

A defining characteristic of the fee simple determinable and fee simple subject to condition subsequent is that the accompanying future interest is created in the grantor of the property.³⁹ A *fee simple subject to executory limitation* is created when the accompanying future interest is created in someone other than the original grantor.⁴⁰

Example 5: *O* grants Blackacre "to the School Board so long as it is used for school purposes, then to the State College."

34. See *infra* note 53 and accompanying text (describing a possibility of reverter and its relation to a fee simple determinable).

35. See SINGER, *supra* note 13, § 7.3.2 ("[L]anguage . . . associated with the fee simple subject to condition subsequent are the phrases 'on condition that' and 'provided that' . . . when an owner . . . violates the condition . . . [the] title . . . shifts.").

36. See *infra* note 54 and accompanying text (remarking that a right of entry must be claimed for a fee simple subject to condition subsequent).

37. See STOEUBUCK & WHITMAN, *supra* note 13, § 3.5 ("[G]rantor's retained interest . . . is a power rather than a right . . . [so] the term 'power of termination' . . . will be used.").

38. See *infra* notes 187–206 and accompanying text (noting various instances where the technical difference between fee simple determinable and fee simple subject to a condition subsequent have played a role in both court decisions as well as reform of the estate system).

39. See STOEUBUCK & WHITMAN, *supra* note 13, § 2.4 (indicating that the future interest is created in the grantor of the property for a fee simple determinable); *id.* § 2.5 (indicating that the future interest is created in the grantor of the property for a fee simple subject to a condition subsequent).

40. See SINGER, *supra* note 13, § 7.3.3 ("[A] future interest belongs to a third party rather than the grantor."); STOEUBUCK & WHITMAN, *supra* note 13, § 2.8 ("[E]state . . . will . . . pass to a designated person other than the person who created the defeasible estate.").

Example 6: *O* grants Blackacre "to the School Board, but if the property is not used for school purposes, then the State College may enter and take the property."

In both Examples 5 and 6, the School Board owns Blackacre in fee simple subject to executory limitation. In classifying the estate, no distinction is made between durational language ("so long as") and conditional language ("but if") if the future interest is created in someone other than the grantor.⁴¹ In Examples 5 and 6, the accompanying future interest held by the State College is called an executory interest.⁴²

The *life estate* is an interest in land that has a duration measured by a human life.⁴³

Example 7: *O* grants Blackacre "to *A* for life."

Example 8: *O* grants Blackacre "to *A* for life, then to *B*."

In both Examples 7 and 8, *A* owns a life estate in Blackacre. The owner of a life estate is commonly called a "life tenant." *A*'s life estate will end at her death, and a life estate is of obviously limited duration. A life estate is always accompanied by a future interest.⁴⁴ If the future interest is created in the grantor, it will be a reversion.⁴⁵ In Example 7, *O* has a reversion. If the future interest is created in someone other than the grantor, it will be a remainder.⁴⁶ In Example 8, *B* has a remainder.⁴⁷

The term of years, periodic tenancy, and tenancy at will are leasehold estates. Historically, leaseholds were inferior in status to the freehold estates

41. See SINGER, *supra* note 13, § 7.3.3 (showing a lack of distinction being made between durational language and conditional language if the future interest is created in someone other than the grantor); STOEBUCK & WHITMAN, *supra* note 13, § 2.8 (same).

42. See *infra* notes 57–64 and accompanying text (describing an executory interest).

43. See SINGER, *supra* note 13, § 7.4 ("[It] lasts for the life of the present holder."); STOEBUCK & WHITMAN, *supra* note 13, § 2.11 ("[They are] estates with a duration measured by the life of a designated person.").

44. See STOEBUCK & WHITMAN, *supra* note 13, § 2.11 (indicating that a life estate is always accompanied by a future interest).

45. See *infra* note 56 and accompanying text (defining a reversion).

46. See *infra* note 57 and accompanying text (defining a remainder).

47. *A* may sell her life estate to another person. If she does so, the life estate will continue to be measured by *A*'s life. For example, if *A* sells her life estate to *C*, *C*'s interest will expire on *A*'s death. When, as in *C*'s case, a life estate is measured by the life of a person other than the owner, it is called *pur autre vie*, from the law French meaning for the life of another. See STOEBUCK & WHITMAN, *supra* note 13, § 2.11 ("[They are] estates with a duration measured by the life of a designated person."). A life estate may also be measured by more than one person's life. For example, a conveyance "to *D* and *E* for their lives" creates a joint life estate.

(the fee simple, fee tail, and life estate), but the freehold-leasehold distinction no longer has any legal significance.⁴⁸ To avoid the feudal connotations of the term "leasehold," this article uses the term "tenancy" in its place. The *term of years* is created by language that establishes the duration of the tenancy by reference to a fixed period of time or to calendar dates for its beginning or ending time.⁴⁹

Example 9: *O* grants Blackacre "to *A* for one year."

A owns a term of years in Blackacre. Most often, *O* and *A* are referred to as the landlord and tenant, respectively. All of the tenancies are of limited duration, and are accompanied by a future interest. In Example 9, *O* retains a reversion in Blackacre.

The *periodic tenancy* is created by language that is measured by a fixed period of time, and automatically continues for successive periods of time until either the landlord or tenant gives notice of termination.⁵⁰

Example 10: *O* grants Blackacre "to *A* from year to year."

A owns a periodic tenancy in Blackacre. *O* has a reversion. The *tenancy at will* is created by language that sets no fixed period for the duration of the tenancy.⁵¹

Example 11: *O* grants Blackacre "to *A* so long as we mutually agree to continue the tenancy."

A owns a tenancy at will in Blackacre. A tenancy at will terminates at the latest on the death of the landlord or tenant, and therefore is of limited duration.⁵² *O* has a reversion.

48. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 24.1 cmt. a (Preliminary Draft No. 12, 2007) ("[T]he distinction between freehold and nonfreehold estates is archaic."); *id.* § 24.6 cmt. a ("[T]oday the distinction between freehold and nonfreehold estates has little continuing importance."); SINGER, *supra* note 13, § 7.1 ("[F]reehold estates . . . [are] protected by the royal crown courts . . . nonfreehold estates . . . were [] granted common law protection . . . much later."); STOEBUCK & WHITMAN, *supra* note 13, § 6.11 ("[F]reehold-chattel real distinction has lost most of its significance.").

49. See SINGER, *supra* note 13, § 10.3.1 ("[T]erm of years is a leasehold for a specific term."); STOEBUCK & WHITMAN, *supra* note 13, § 6.14 ("[T]enancy for years is . . . for a definite period, fixed in advance.").

50. See SINGER, *supra* note 13, § 10.3.2 ("[It is] for a period that is renewed automatically unless either party terminates the arrangement."); STOEBUCK & WHITMAN, *supra* note 13, § 6.16 ("[It] is of indefinite duration . . . [has] a definite commencement, but . . . continue[s] on . . . till one of the parties terminates it.").

51. See SINGER, *supra* note 13, § 10.3.3 ("[It is] terminable at any time by either party."); STOEBUCK & WHITMAN, *supra* note 13, § 6.18 (same).

52. See SINGER, *supra* note 13, § 10.3.3 (describing the duration limits of a tenancy at

Future interests are commonly divided into two categories, those created in the grantor and those created in a grantee. There are three future interests that can be created in a grantor:

- Reversion
- Possibility of Reverter
- Right of Entry (a.k.a. Power of Termination)

The *possibility of reverter* by definition is the future interest that accompanies a fee simple determinable.⁵³ The *right of entry* by definition is the future interest that accompanies a fee simple subject to condition subsequent.⁵⁴ A *reversion* by definition is any other future interest created in a grantor.⁵⁵ A reversion can be conceptualized as the portion of the estate that the grantor retains after granting an estate of limited or potentially limited duration.⁵⁶

Future interests created in grantees are categorized as follows:

- Remainders
 - Indefeasibly Vested Remainder
 - Vested Remainder Subject to Open
 - Vested Remainder Subject to Divestment
 - Contingent Remainder
- Executory Interests (springing or shifting)

The first important distinction between these future interests is that between remainders and executory interests. A *remainder* is a future interest in a grantee that may become possessory on the natural end of the preceding

will).

53. See *id.* § 7.3.1 (describing the future interest for a fee simple determinable/possibility of reverter).

54. See *id.* § 7.3.2 ("[F]ee simple subject to condition subsequent allows grantor to reclaim the property . . . [but] grantor . . . must claim a *right of entry*."); STOEBUCK & WHITMAN, *supra* note 13, § 3.5 ("[O]wner of an estate subject to a stated condition subsequent . . . retained a right of entry.").

55. See *infra* note 56 and accompanying text (defining a reversion).

56. See STOEBUCK & WHITMAN, *supra* note 13, § 3.3 ("[R]eversion is the future estate left in a transferor . . . when the transfer is of less than the entire estate."). As a result, reversions often arise by implication. Professor Tim Iglesias has suggested that the proposed model law state that future interests can arise by implication. E-mail from Tim Iglesias, Professor of Law, University of San Francisco School of Law, to D. Benjamin Barros, Associate Professor of Law, Widener University School of Law (Sept. 3, 2008, 2:56 p.m. EDT) (on file with author). Because I think that this point would be better made in an official comment, rather than in the text of the law, it is not directly incorporated into the model law proposed here. I agree completely, however, with the substance of Professor Iglesias's suggestion.

estate.⁵⁷ Consider the conveyance in Example 8, above. *O* granted Blackacre "to *A* for life, then to *B*." *B*'s future interest is a remainder because it becomes possessory at the natural end of *A*'s life estate. An *executory interest*, in contrast, is a future interest in a grantee that divests another interest before its natural end.⁵⁸ Consider the conveyance in Example 6 above. *O* granted Blackacre "to the School Board, but if the property is not used for school purposes, then the State College may enter and take the property." The State College's future interest is an executory interest because it divests the School Board's fee simple subject to executory limitation.⁵⁹ Here is another example:

Example 12: *O* grants Blackacre "to *A* for life, but if *A* is ever convicted of drunk driving, then to *B* for the duration of *A*'s life."

A has a life estate subject to executory limitation. *B* has an executory interest. *B*'s interest is executory because it may divest *A*'s life estate prior to its natural end. *O*, it should be noted, has a reversion that will become possessory on *A*'s death. An example of an executory interest that divests a future interest is provided below.⁶⁰ Executory interests are often further categorized as springing or shifting. A springing executory interest divests an interest retained by the grantor,⁶¹ while a shifting executory interest divests an interest held by a transferee.⁶² The executory interests in Examples 5 and 6 are shifting executory interests,⁶³ which are more common than springing executory interests.⁶⁴

57. See *id.* § 3.6 ("[R]emainder [is when] . . . it is possible for the future interest to become a present estate as soon as all the prior interests created by the transfer have expired.").

58. See *id.* ("[A]n executory interest . . . will become either a present or a vested future interest automatically upon the defeasance of a present estate or a vested remainder by the operation of an executory limitation.").

59. There are a number of exceptions to this seemingly clean definition of executory interests. For example, in Example 5, above, *O* conveyed Blackacre "to the School Board so long as it is used for school purposes, then to the State College." The State College's future interest is classified as an executory interest even though it becomes possessory on the natural end of the School Board's fee simple determinable.

60. See *infra* note 64 and accompanying text (offering an example of an executory interest that divests a future interest).

61. See STOEUCK & WHITMAN, *supra* note 13, § 3.12 ("[T]ransferor retains a fee simple subject to a springing executory interest.").

62. See *id.* § 3.11 ("[W]hen a present interest or a vested remainder created in a transferee is subject to complete defeasance . . . the future interest which will displace the defeated interest is a 'shifting' executory interest.").

63. See *supra* notes 40–42 and accompanying text (providing examples of shifting executory interests).

64. Here is an example of a conveyance that creates a springing executory interest: *O* conveys Blackacre "to *A* if and when she marries *B*." *A*'s executory interest may divest *O* of

The second important distinction in categorizing future interests in transferees is that between vested and contingent remainders. A remainder is vested if it is *both* in an ascertained person *and* not subject to a condition precedent other than the natural end of the preceding estate.⁶⁵ Conversely, a remainder is contingent if it is *either* in an unascertained person *or* subject to a condition precedent other than the natural end of the preceding estate.⁶⁶ An interest is in an ascertained person if it is possible to point to a person who holds the interest. Again consider the conveyance in Example 8, above, where *O* granted Blackacre "to *A* for life, then to *B*." *B*'s remainder is vested because it is in an ascertained person, *B*, and not subject to a condition precedent. *B*'s interest will not become possessory until *A* dies and the preceding estate naturally terminates, but this fact does not make *B*'s interest contingent. The remainders in the following two examples are contingent:

Example 13: *O* conveys Blackacre "to *A* for life, then to *A*'s first child." *A* does not yet have any children.

Example 14: *O* conveys Blackacre "to *A* for life, then to *B* if *B* reaches the age of 21." *B* is not yet 21.

The remainder in Example 13 is contingent because it is in an unascertained person—*A* has no children, so there is no person who can be identified as *A*'s first child. The remainder in Example 14 is in an ascertained person, *B*, but is contingent because it is subject to a condition precedent—*B* must reach the age of 21. In Examples 13 and 14, *O* also has a reversion that will become possessory if the contingent remainder fails.

The third, and final, important distinction in interests in transferees is that between the different types of vested remainders. *B*'s remainder in Example 8, created by the language "to *A* for life, then to *B*," is *indefeasibly vested*. An indefeasibly vested remainder is one that is certain to become possessory in the future.⁶⁷ *B*'s remainder will become possessory on *A*'s death. This would be so even if *B* died before *A*—in this circumstance, *B*'s remainder would be held by whomever inherited at *B*'s death.

ownership of Blackacre.

65. See STOEUBUCK & WHITMAN, *supra* note 13, § 3.7 (defining vested remainders).

66. See *id.* § 3.9 ("[A] remainder is 'contingent' if it is . . . created in favor of . . . unidentifiable persons . . . [or] is subject to an express condition precedent . . . other than the expiration of all prior interests created by the same transfer.").

67. See *id.* § 3.7 (defining an indefeasibly vested remainder as a "remainder which is . . . not subject to . . . [a] condition precedent, and . . . not subject to any condition subsequent . . . [or limitations] . . . or [subject to a] power of appointment that may cause the remainder to be completely or partially defeated").

A *vested remainder subject to open* is a remainder that is given to an open class of persons where the interest of at least one member of that class is vested.⁶⁸

Example 15: *O* grants Blackacre "to *A* for life, then to *A*'s children."
A is alive and has one child, *B*.

The remainder following *A*'s life estate is in a class of people—"A's children." *B* is a member of that class, and her interest is vested. But *A* might have more children, who would become members of the class. *B*'s vested remainder is subject to open because of the possibility of the entry of these new members to the class. Vested remainders subject to open are sometimes called vested remainders subject to partial divestment, because when later class members take their shares, they partially divest the shares from the earlier class members.⁶⁹

A *vested remainder subject to divestment* is a vested remainder that may be divested by an executory interest before it becomes possessory.⁷⁰

Example 16: *O* grants Blackacre "to *A* for life, then to *B*, but if *B* ever becomes a lawyer, then to *C*."

B's remainder is vested, but may be divested by *C*'s executory interest if *B* violates the condition and becomes a lawyer. If *A* dies and *B* still has not become a lawyer, then *B* will have a possessory fee simple subject to executory limitation; *C* will still have an executory interest.

B. The Unnecessary Complexity of the Current System

As the summary provided in the prior section shows, the current system of land ownership in the United States is inordinately complex. It features nine present possessory estates and eight future interests. The summary, however, was intentionally cursory, and does not fully capture the extent of the system's complexity. Entire treatise volumes are devoted to the detailed characteristics of the system of estates and future interests.⁷¹

68. See *id.* § 3.8 ("[It is] created in favor of a class . . . one member of the class has already satisfied the requirements for having a vested interest.").

69. See *id.* (defining vested remainders subject to open).

70. See *id.* § 3.7 ("[It is a] remainder not subject to a condition precedent, but subject to a condition subsequent, . . . executory limitation, or power of appointment that may cause the remainder to be completely defeated.").

71. See generally BORRON ET AL., *supra* note 13 (describing the detailed characteristics of the system of estates and future interests); MAKDISI & THOMAS, *supra* note 13 (same); POWELL, *supra* note 13 (same).

This complexity is unnecessary.⁷² Many of the distinctions between the types of interests are based on accidents of English legal history that are not relevant to modern law. Five steps—the first two of which are relatively trivial—could be taken to drastically simplify the system of estates and future interests while having a negligible impact on real-world legal issues.

First, the abolition of the fee tail could be extended to the handful of jurisdictions that still purport to recognize it, and the estate relegated to a deserved status of historical footnote.⁷³

Second, the distinction between shifting and springing executory interests, which is generally acknowledged to have no legal significance, could be abandoned.⁷⁴

Third, the distinctions between the types of defeasible estates could be abolished. Most of the differences between the fee simple determinable, the fee simple subject to condition subsequent, and fee simple subject to executory limitation are marginal and unnecessary.⁷⁵ The three could therefore be merged into a single Fee Simple Defeasible. The only major difference between the three estates under the current system is related to the future interests that accompany them, rather than the estates themselves.⁷⁶ This issue is addressed in the next point.

Fourth, the distinction between future interests created in a grantor and those created in a grantee could be abolished. The practical differences between vested future interests created in a grantor and grantee (reversions and vested remainders, respectively) are nonexistent.⁷⁷ There is one major

72. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS, Statement of Scope (Preliminary Draft No. 12, 2007) ("For modern purposes, the system of classification based on English law is unnecessarily complex and illogical.").

73. See *infra* notes 145–50 and accompanying text (discussing the history of the fee tail and its continued use in some U.S. jurisdictions).

74. The leading Property casebook notes: "We differentiate here between a shifting executory interest and a springing executory interest because we think it helps the student better understand what an executory interest is, but there is no difference in legal consequences between the two." JESSE DUKEMINIER ET AL., PROPERTY 233 n.3 (6th ed. 2006). Although I have tremendous respect for the authors of this book, I disagree that the distinction between shifting and springing interests has any pedagogical value. Using illustrations of different types of executory interests is helpful to students, but adding more labels to an already unnecessarily complex area strikes me as counterproductive.

75. See *infra* notes 187–207 and accompanying text (explaining the common law differences between fee simple determinable and fee simple subject to condition subsequent and the practical difficulties that arise in distinguishing between the types of estates and future interests they create).

76. See DUKEMINIER ET AL., *supra* note 74, at 206–08 (defining fee simple determinable, fee simple subject to condition subsequent, and executory interests).

77. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 25.2

difference between the contingent future interests created in grantors (the possibility of reverter and right of entry) and grantees (contingent remainders and executory interests). The former are immune from the Rule Against Perpetuities, while the latter are subject to it.⁷⁸ I argue below that this disparate treatment should be discontinued, and that a contingent interest in a grantor should be made subject to the Rule Against Perpetuities.⁷⁹ Even if this proposal is rejected, there is no need to maintain the distinction in classification between future interests created in grantors and grantees. Instead, the immunity of future interests created in a grantor from the Rule Against Perpetuities could be stated in terms of the applicability of the rule, rather than in terms of the classification of the future interest involved.⁸⁰

Fifth, the distinction between contingent remainders and executory interests could be abolished. The legal significance of the distinction between the two is derived from the Rule of Destructibility of Contingent Remainders and the Rule in Shelley's Case, both of which have been widely abrogated in the United States.⁸¹ Fifty years ago, Jesse Dukeminier made a convincing case that there was no meaningful distinction between contingent remainders and executory interests in modern law.⁸² Nothing has changed in the interim to undercut his analysis.

These five steps collectively require only modest legal change. Taking them would lead to a significant simplification of the American system of land

cmt. e (Preliminary Draft No. 12, 2007) (stating that there is no persuasive reason to continue distinguishing between reversionary and nonreversionary future interests).

78. See *infra* notes 210–17 and accompanying text (illustrating that the only difference between future interests retained by the grantor and those held by third parties is the applicability of the Rule Against Perpetuities).

79. See *infra* notes 210–17 and accompanying text (explaining why the distinction between future interests should be discarded).

80. See *infra* notes 210–17 and accompanying text (stating that the Rule Against Perpetuities could continue to function as it currently does, even if the names of future interests created in grantors and grantees were unified).

81. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 25.2 cmt. c (Preliminary Draft No. 12, 2007) (stating that the Rule in Shelley's Case and the Destructibility Rule have both been largely abolished); Waggoner, *supra* note 2, at 739–40 (same); *infra* notes 312–30 and accompanying text (outlining the Rule in Shelley's Case and the destructibility doctrine, including their abolition in a majority of U.S. jurisdictions). Executory interests have been merged into the category of remainders in New York and Wisconsin. See Waggoner, *supra* note 2, at 733–34 (describing the New York and Wisconsin laws simplifying the common law estate structure).

82. See J.J. Dukeminier, Jr., *Contingent Remainders and Executory Interests: A Requiem for the Distinction*, 43 MINN. L. REV. 13, 13–14 (1958) (advocating a reappraisal of the utility of distinguishing between contingent remainders and executory interests in light of the fact that they are functionally equivalent).

ownership. Rather than nine estates in land, a simplified system would have six:

Old System:	New System:
Fee Simple Absolute	Fee Simple Absolute
Fee Tail	Life Estate
Fee Simple Determinable	Term of Years
Fee Simple Subject to Condition Subsequent	Periodic Tenancy
Fee Simple Subject to Executory Limitation	Tenancy at Will
Life Estate	Defeasible Interests
Term of Years	
Periodic Tenancy	
Tenancy at Will	

And rather than eight future interests, there would be four:

Old System:	New System:
Reversion	Vested Future Interests
Possibility of Reverter	Indefeasible Vested Future Interest
Right of Entry	Defeasibly Vested Future Interest
Remainders	Vested Future Interest In an Open Class
Indefeasibly Vested Remainder	Contingent Future Interests
Vested Remainder Subject To Open	
Vested Remainder Subject To Divestment	
Contingent Remainder	
Executory Interests (springing or shifting)	

C. If It Ain't (Completely) Broke, Why Fix It?

The existing system of estates and future interests is ugly, ancient, and absurdly complicated. Despite its flaws, however, it works, at least to a degree. It could be argued that lawyers are able to use it to get their jobs done, and that we should not monkey around with a system that has served us well for hundreds of years. If it ain't (completely) broke, why fix it?

The most direct answer to this question is that the system is in fact broken. It is so complex that lawyers and judges frequently make basic and fundamental errors when analyzing issues involving estates and future interests. Professor

Dukeminier observed that because of a lack of understanding of the basic terms,

arguments in future interest cases are often remarkable for their vacuity and for their failure to come to grips with the fundamental problem. Many of the cases cannot be read without writhing. Here, more than in any other field, there is a tendency to collect familiar quotations, glue them together and by sheer humbug make them applicable to the problem.⁸³

It is unquestionably true that some lawyers and judges do understand the system. In an environment where some professionals understand the rules but many do not, the complexity of the system creates traps for the unwary. As Professor Waggoner has observed, the rules of estates and future interests "serve only to trap those unsophisticated in the available ways of manipulation."⁸⁴

Simplification would be a worthwhile endeavor even if the system works on a practical level. As Hernando de Soto has observed, one of the important functions of a property system is to convey information.⁸⁵ Needless complexity in the basic system of land ownership inhibits the easy and accurate transmittal of some of the most basic information about a given piece of property. Interested parties should be able to figure out who owns various interests in property without resorting to litigation. Further, simplification would have the salutary effect of sparing first-year law students the pain of having to learn the useless complexities of the existing system. Explanation of the basics of land ownership should not require study aids and multivolume treatises. As Professor Dukeminier asked, "of what value are the hours after hours spent teaching students to use labels properly, when they are functional equivalents?"⁸⁶

A final argument against reform could be that the current system incorporates the collective wisdom of centuries of common law decisionmaking, and that it should therefore not be disturbed. The response to this argument is twofold. First, the proposed reforms focus on clearing out unnecessary underbrush that has accumulated in the system over the past eight hundred years, but leaves the underlying structure of the system intact. The best features of the system, which can plausibly be said to reflect centuries of

83. Dukeminier, *supra* note 82, at 54.

84. Waggoner, *supra* note 2, at 732.

85. See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* 52–54 (2000) (describing the functions of property systems).

86. Dukeminier, *supra* note 82, at 52. Simplification of the estates and future interests system would have the pedagogical benefit of allowing students to spend their time learning more useful material.

accumulated wisdom, are therefore preserved. Second, there is particularly good reason not to reify the common law in this area. As discussed further below, the English abandoned the common system of estates and future interests in 1925 in a reform far more radical than that proposed here.⁸⁷ If the original source of the rules has abandoned them, we should strongly consider doing the same.

III. Two Mechanisms of Reform: Restatements v. Model Laws

Even assuming that reform of estates and future interest law is desirable, an open question remains about how best to achieve that reform. The legal academy has two major institutional mechanisms of reform available to it: Restatements and model (or uniform) laws.⁸⁸ Controversy exists, of course, over whether the Restatements should restate the law as it is or should restate the law as it should be. Assuming that the Restatements should have at least some reformist role, the question becomes which mechanism is best suited for achieving property law reform.

At first blush, it seems that model laws should win hands down. Model laws can achieve systemic change through legislative enactment, which is particularly important when changes are being made to the overall architecture of an area of law. Restatements, in contrast, achieve incremental change through piecemeal judicial adoption. Legislatures are institutionally better suited to consider systemic change, because they can consider the interests of all affected parties, rather than the narrow interests of the parties that bring a case to court. Courts tend to be unwilling to make even incremental changes to property law, preferring to defer to the legislature.⁸⁹ Barton Leach quoted a friend who was a judge on his state's highest court: "In reference to property law I am a conservative. In reference to public law my inclinations would be quite the contrary."⁹⁰ Courts are particularly, and appropriately, hesitant to

87. See *infra* notes 167–69 and accompanying text (discussing the English reforms to the common law system of estates).

88. See Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT'L L. 435, 517–19 (2000) (describing Restatements and uniform acts and their role in reforming the law).

89. See, e.g., *Ortega v. Flaim*, 902 P.2d 199, 204 (Wyo. 1995) (declining to follow the Restatement position on landlord liability in part because "[i]n our opinion this is a matter for the legislature"); *Jeruzal v. Jeruzal*, 130 N.W.2d 473, 481 (Minn. 1964) (declining to follow the Restatement approach to Totten trusts before the legislature had an opportunity to consider the issue).

90. W. Barton Leach, *The Rule Against Perpetuities and Gifts to Classes*, 51 HARV. L. REV. 1329, 1353 n.67 (1938).

change the law when a legislature has spoken on a particular issue,⁹¹ and there are a surprising number of state statutes dealing with estates and future interests subjects.⁹² Courts also have declined to adopt Restatement positions on various property issues.⁹³

There are two potential problems with this simple picture. First, some of the most significant changes in property law have been made by the courts. Significant portions of the revolution in landlord-tenant law were achieved through judicial decision.⁹⁴ In the land transactions arena, courts have played an important role in the death of caveat emptor and the substantial modifications that have been made to the implied warranty of workmanlike quality.⁹⁵ Legislatures also played important roles in some of these areas,⁹⁶ but courts have been willing to make certain changes on their own, and in some circumstances have acted well in advance of the legislatures. This willingness of the courts suggests that Restatements may have an important role to play in reforming property law in at least some circumstances.

91. See, e.g., *Bongaards v. Millen*, 793 N.E.2d 335, 349 (Mass. 2003) (declining to follow the Restatement position contrary to existing statutory position on elective shares); *Hillcrest Family Servs. v. Worldwide Church of God*, No. 01-0879, 2002 WL 1447482, at *1 (Iowa Ct. App. July 3, 2002) (declining to follow the Restatement position on donative transfer because the issue was covered by existing statute); *Kezer v. Mark Stimson Assocs.*, 742 A.2d 898, 903 (Me. 1999) (declining to follow the Restatement position on real estate agent disclosure when the legislature had already spoken on the issue); *Symphony Space, Inc. v. Pergola Props., Inc.*, 669 N.E.2d 799, 808 (N.Y. 1996) (declining to adopt the wait-and-see approach to the Rule Against Perpetuities when a state statute codified the common law rule).

92. Many states, for example, have abolished the need to use the traditional words "and her heirs" to create a fee simple absolute. See MAKDISI & THOMAS, *supra* note 13, § 17.06(d) (stating that the common law requirement of the use of words of limitation to create a fee simple absolute has been done away with in every state except South Carolina, Connecticut, and Hawaii).

93. See, e.g., *Sweezy v. Neel*, 904 A.2d 1050, 1057 (Vt. 2006) (declining to adopt the *Restatement (Third) of Servitudes* rule on relocation of easements, noting that "[t]he drafters of the Restatement acknowledged that this section rejects the rule espoused by most jurisdictions in this country"); cases cited *supra* notes 89 and 91 (deferring to legislature instead of following the Restatement).

94. See generally Edward H. Rabin, *The Revolution in Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984).

95. See, e.g., *Lempke v. Dagenais*, 547 A.2d 290, 296 (N.H. 1988) (changing the rule on whether subsequent purchasers could make a claim for economic damage under an implied warranty of quality); *Johnson v. Davis*, 480 So. 2d 625, 628-29 (Fla. 1985) (going beyond the facts of the case to abolish the common law doctrine of caveat emptor); Marion W. Benfield, Jr., *Wasted Days and Wasted Nights: Why the Land Acts Failed*, 20 NOVA L. REV. 1037, 1055 (1996) (noting that the movement away from caveat emptor was in large part done by the courts).

96. See, e.g., Rabin, *supra* note 94, at 531, 533-36 (discussing statutory changes to landlord-tenant law).

Second, many model or uniform laws that have been proposed in the property area have been abject failures.⁹⁷ The most notable failure was the attempt to remake land transactions law in the 1970s. This effort was made through three uniform acts: The Uniform Land Transactions Act (ULTA), The Uniform Simplification of Land Transfers Act (USLTA), and the Uniform Condominium Act (UCA).⁹⁸ The UCA was modestly successful, having been adopted in all or in part in fifteen jurisdictions.⁹⁹ The ULTA and USLTA (together, the "Land Acts"), which intended to remake the land transactions process in the image of the Uniform Commercial Code, failed completely.¹⁰⁰ With the exception of some provisions of these Acts regarding construction liens that were spun off into separate Uniform Acts, the Land Acts were not adopted in any jurisdiction.¹⁰¹

The failure of the land transactions acts does not mean that model laws cannot be successful in the property area. Some property related uniform laws, such as the Uniform Residential Landlord and Tenant Act and the Uniform Statutory Rule Against Perpetuities, have been at least moderately successful,¹⁰² as have a number of uniform laws in the closely related fields of wills and trusts.¹⁰³ Proposals for model laws of property, however, must at least take the skeptical reception to proposed acts like the Land Acts into account, and try to address the reasons for their failure.

It is impossible to pin down with certainty the reasons for the failure of the Land Acts, but a handful of candidates suggest themselves. First, the Land

97. See MAKDISI & THOMAS, *supra* note 13, §§ 9.01–9.07 (outlining the rationale, history, content, and adoption of property-related uniform laws); Jon W. Bruce, *The Role Uniform Real Property Acts Have Played in the Development of American Land Law: Some General Observations*, 27 WAKE FOREST L. REV. 331, 331–33 (1992) (describing the various uniform real property acts proposed over the years and their failure to garner widespread support).

98. See Benfield, *supra* note 95, at 1037–38 (describing the genesis of the three major uniform land transfer laws).

99. See MAKDISI & THOMAS, *supra* note 13, § 9.03(a)(5) & supp. (listing the states that have adopted the UCA in all or in part).

100. See *id.* §§ 9.03(a)(21), (32) (stating that neither the ULTA, nor the USLTA was adopted in any state).

101. See Benfield, *supra* note 95, at 1038–39 (stating that the Uniform Construction Lien Act and other related acts based on the USLTA have been adopted in fourteen states).

102. See MAKDISI & THOMAS, *supra* note 13, §§ 9.03(a)(31), (35) (noting that the Uniform Residential Landlord and Tenant Act has been adopted in fifteen states, and the Uniform Statutory Rule Against Perpetuities has been adopted in twenty-five states).

103. See *id.* § 903(a)(28) (noting that the Uniform Probate Code has been adopted in sixteen states); Uniform Law Commissioners, Uniform Trust Code, http://nccusl.org/Update/uniformact_factsheets/uniformacts-fs-utc2000.asp (last visited Nov. 12, 2008) (listing the twenty-one states that have adopted the Uniform Trust Code) (on file with the Washington and Lee Law Review).

Acts were simply too radical. Many real estate practitioners disagreed with the fundamental policy choices made in the acts, including the decision to use the UCC as a model.¹⁰⁴ The acts were aimed at wholesale revision of the law of real estate transactions, rather than making adjustments to the existing system. Second, the Land Acts tried to resolve hotly contested policy issues, which undercut their support. For example, the Land Acts tried to reform foreclosure law at a time when the effectiveness of various foreclosure procedures was widely disputed.¹⁰⁵ Third, the Land Acts had no constituency to support them and push for their enactment.¹⁰⁶ Lawyers, who might be expected to support improvements to property law, either disagreed with many of the provisions of the law or thought "that the costs of changing the legal rules outweigh[ed] any benefits."¹⁰⁷

The failure of the Land Acts therefore suggests a number of lessons for model laws of property. First, it is risky to try to make sweeping and radical changes that depart too much from existing law. Second, it is risky to use model laws to resolve hotly contested policy issues.¹⁰⁸ Third, if there is no constituency for the reform other than lawyers, a good case needs to be made to lawyers that any problems that might be caused by changing the rules will be outweighed by the benefits that the changes will provide.

A fourth lesson that can be derived from the failure of ULTA and USLTA is that, at least in the property area, uniformity does not in and of itself justify changes in the law.¹⁰⁹ The abstract desirability of uniformity in law is the subject of much academic discussion,¹¹⁰ and this Article does not take a stand

104. See Benfield, *supra* note 95, at 1054 (suggesting that lawyers' disagreement with the policy choices exemplified in the ULTA contributed to its failure).

105. See *id.* at 1057 (discussing how controversies over foreclosure undercut enactment of the ULTA and related spin-offs).

106. See *id.* at 1061 (explaining that there is no natural constituency to support certain parts of the ULTA because buyers and sellers act too infrequently in those capacities to develop views about the desirability of change in the law).

107. *Id.*

108. This is not to say that model laws should never make radical or controversial changes. Rather, if those sorts of changes are being proposed, careful attention must be paid to enactment strategies. A radical change with strong interest-group support may very well be enacted.

109. See Benfield, *supra* note 95, at 1053 (discussing the lack of support for uniformity in land transactions law); see also David A. Thomas, *Restatements Relating to Property: Why Lawyers Don't Really Care*, 38 REAL PROP. PROB. & TR. J. 655, 687-93 (2004) (expressing skepticism about the desirability of uniformity in property law).

110. See Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 473 (2004) (discussing how adoption of Restatements by courts, without analyzing their substantive merit, can lead to undesirable results); Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 187 (1996) (arguing that more competition among state laws may address the

on this general issue. In property law, uniformity might be desirable in some contexts but not others. On the one hand, land is quintessentially local, and some areas of property law (particularly conveyancing) often reflect local conditions and customs. In areas of property law where there is a lack of consensus on the best approach to a particular issue, having different states follow different approaches also may provide a laboratory of ideas to provide data on their effects. On the other hand, uniformity is useful in areas like mortgage law where interstate transactions are common.¹¹¹ In the estates and future interests area, a case can be made for uniformity because standardization in forms of ownership can better convey information and reduce transaction costs.¹¹² Whatever the level of desirability of uniformity in a particular area, however, the failure of the Land Acts suggests that any proposal for property law reform should be supported by justifications beyond uniformity.

The proposals made in this Article attempt to take these concerns into account. Rather than making sweeping, radical changes, the proposals target a specific problem—unnecessary complexity—with narrow solutions. The proposals also do not attempt to address every conceivable issue in the law of estates and future interests, and instead cover only those issues related to the very basic structure of the system of ownership. The discussion that follows also mentions a number of radical changes to the system of ownership that have a great deal of merit, but that are not incorporated into the proposed model law because of its narrow and modest focus.¹¹³

problems of inefficiency and inconsistency better than increased uniformity would); Larry E. Ribstein, *Uniform Model Laws and Limited Liability Companies*, 66 U. COLO. L. REV. 947, 947–48 (1995) (explaining that there are situations in which there is no clear public interest in uniformity, and that some attempts at uniformity are likely to make laws less efficient).

111. See Ann M. Burkhart, *Real Estate Practice in the Twenty-First Century*, 72 MO. L. REV. 1031, 1035–47 (2007) (discussing how congressional and administrative efforts, as well as market forces, lead to standardization in the mortgage market). *But see* Benfield, *supra* note 95, at 1061 (noting that "a strong national secondary market for mortgages has developed without the benefit of uniform mortgage laws").

112. See Ribstein & Kobayashi, *supra* note 110, at 138 (discussing the potential for uniform laws to reduce information and inconstancy costs). The common law *numerus clausus* principle already imposes a degree of uniformity on estates and future interests law. See *infra* notes 234–35 (discussing *numerus clausus*). Transactional efficiency is a classic explanation for the *numerus clausus* principle. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 24 (2000) (arguing that fragmentation of property rights would lead to unacceptable restraints on alienation by increasing transaction costs); Carol Rose, *What Government Can Do for Property (and Vice Versa)*, in THE FUNDAMENTAL INTERRELATIONSHIPS BETWEEN GOVERNMENT AND PROPERTY 209, 213–14 (Nicholas Mercurio & Warren J. Samuels eds., 1999) (describing how standardized property devices can reduce transaction costs among multiple parties over time, especially among strangers who are not familiar with a given property or its history).

113. See *infra* notes 169, 226–32 and accompanying text (discussing possible reforms in

The proposals do not attempt to resolve hotly contested issues. The vast majority of the proposals reflect a strong academic consensus on the obsolescence of the complexities inherited from the common law. The proposals made here consciously avoid making wholesale changes to the operation of the Rule Against Perpetuities in part because perpetuities reform is a hotly contested policy issue. The trust lobby, which may be expected to support simplification of the law of estates and future interests, could be expected to oppose reform that would undercut the ability to create dynasty trusts.¹¹⁴ In sidestepping controversial perpetuities issues, this Article departs from the approach taken by Professor Gallanis in his proposed reform of estates and future interest laws, which incorporated abolition of the Rule Against Perpetuities.¹¹⁵ It also consciously seeks consistency with existing model laws, such as the Uniform Probate Code, that have addressed certain issues related to estates and future interests.¹¹⁶ In proposing model legislation, it is important for academics to focus on enactability, even if this means making some proposals that qualify as second-best in some abstract sense.

To make the changes more attractive to lawyers as a lobby, the proposals wherever possible use existing terminology rather than using new terminology that might better meet academic standards of elegance.¹¹⁷ The overall goal of the proposed model law is to retain the best aspects of the current system while clearing away obsolete underbrush.

Finally, the proposed legislation is referred to as a model law, rather than a uniform law, to make clear that is not intended to seek reform solely for uniformity's sake. NCCUSL's website has a useful description of the practical differences between uniform and model laws:

A uniform act is one in which uniformity of the provisions of the act among the various jurisdictions is a principal and compelling objective. An act may be designated as "model" if the principal purposes of the act can be

the area of defeasible estates).

114. See Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 *CARDOZO L. REV.* 2465, 2474–75 (2005) (describing how modern reform of the Rule Against Perpetuities has been largely motivated by a desire to facilitate the formation of dynasty trusts).

115. See Gallanis, *supra* note 5, at 565 (advocating for estate law reform, including abolishment of the Rule Against Perpetuities).

116. See *infra* notes 157–62 and accompanying text (discussing why the author has declined to address the issue of acceleration of future interests in the proposed model law).

117. See *infra* notes 120–22 and accompanying text (discussing why retention of original terminology is desirable in Restatements and model laws).

substantially achieved even though it is not adopted in its entirety by every state.¹¹⁸

As noted above, a reasonable case for uniformity can be made in the estates and future interests area.¹¹⁹ The overarching reasons for the reforms proposed here, however, are simplification and modernization of the basic system of property ownership. The proposed model law would substantially achieve its purpose even if it was not adopted in every state. It might be convenient for lawyers and law professors if property law was uniform throughout the United States, but the world will not end if New Jersey has one rule and Arizona has another. It also would achieve its goals, although to a lesser extent, if some states only enacted certain parts of the proposed model law. To be sure, reforms of the type in the proposed model law would be best done in a comprehensive manner, and it would be risky to make piecemeal changes to the system of estates and future interests. But it would represent a step in the right direction if a state, for example, wished to draw on parts of the proposed model law to more cleanly abolish the fee tail or the Rule in Shelley's Case without enacting the rest of the provisions.

IV. Crafting a Model Law

This Part explains the simplified system of ownership reflected in the proposed model law. It begins with some initial considerations relevant to the overall structure of the system. It then discusses the present and future interests and related issues.

A. Initial Considerations

This Section considers three issues central to the reform of the system of estates and future interest: naming conventions, the elimination of the vestiges of feudalism, and the free alienability of estates and future interests. It also

118. Frequently Asked Questions About the Uniform Law Commission, <http://www.nccusl.org/Update/> (follow "About NCCUSL" hyperlink; then follow "FAQ's" hyperlink) (last visited Nov. 4, 2008) (on file with the Washington and Lee Law Review); see also James J. Brudney, *Mediation and Some Lessons from the Uniform State Law Experience*, 13 OHIO ST. J. ON DISP. RESOL. 795, 799 (1998) (discussing the distinction between uniform and model laws).

119. See *supra* note 112 and accompanying text (stating that standardizing the system of future estates would better convey information and reduce transaction costs).

provides basic definitions of present and future interests, and discusses issues of scope.

1. Naming Issues

One possible approach to reforming estates and future interests law would replace the traditional terminology with names that are more descriptive of the property interests' characteristics. As suggested in the statement of scope of the *Restatement (Third)*'s provisions on present and future interests, Fee Simple Absolute could become Unlimited Ownership; the Fee Simple Defeasible could become Potentially Limited Ownership; the Life Estate and leaseholds could become Limited Ownership.¹²⁰ The drafters of the *Restatement (Third)* have wisely decided to retain the traditional language wherever possible.¹²¹ Enactability considerations make retention of traditional language whenever possible even more important in the model law context.¹²²

When changes to various interests are recommended, an effort is made to retain familiar terminology. For example, the proposed model law developed below merges the fee simple determinable, fee simple subject to condition subsequent, and fee simple subject to executory limitation into one new present property interest. Following the *Restatement (Third)*, the proposed model law calls this merged interest a fee simple defeasible, using the familiar term for this traditional category of estates.¹²³ This said, in one instance traditional language is tweaked to make it more descriptive: The traditional description of a vested future interest as "subject to open" is replaced with "in an open class," terminology that is now used to a limited extent and should be familiar to practitioners.¹²⁴

120. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS, Ch. 24 Introductory Note (Preliminary Draft No. 12, 2007) (outlining the different types of present interests).

121. See *id.* ("For the present, however, it seems too radical a step to shift to an entire new set of labels, and so this *Restatement* continues to use the labels that are familiar to the profession.").

122. See *supra* notes 97–117 and accompanying text (discussing the failure of past attempts to enact model property laws).

123. See *infra* notes 182–84 and accompanying text (explaining that under the proposed model law, the fee simple determinable, fee simple subject to condition subsequent, and fee simple subject to executory limitation would be merged into the single category of fee simple defeasible).

124. See *infra* note 287 and accompanying text (defining vested future interest in an open class).

2. Elimination of the Vestiges of Feudalism

The current system of estates and future interests owes its form to the system of landholding in feudal England. Many of the distinctions between interests have feudal origins. These distinctions and their feudal origins have no place in modern law.¹²⁵ The proposed model law therefore explicitly abolishes the relevance of feudal doctrines from the law of present and future interests. Included in this abolition is the distinction between freehold and leasehold estates and the concept of seisin.¹²⁶

3. Alienability of Present and Future Interests

At common law, the alienability of contingent future interests was doubtful. At various times, contingent remainders, executory interests, possibilities of reverter, and rights of entry were fully inalienable, or were alienable either during life or at death, but not both.¹²⁷ As Professor Waggoner observed, the questionable alienability of these future interests "derived from the now-rejected notion that contingent future interests are not present interests in which possession is postponed and uncertain, but rather interests which arise in the future."¹²⁸

The modern trend is to make these interests fully alienable.¹²⁹ The proposed model law follows this modern trend, and explicitly makes all present and future interests fully transferrable during life and at death.¹³⁰ Although the proposed model law makes all interests freely transferrable as a matter of their

125. See generally HERBERT HOVENKAMP ET AL., *THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY* 86 (2001) (discussing the feudal origins of the modern estate system).

126. See generally *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS* §§ 24.1 cmt. a, 24.6 cmt. a (Preliminary Draft No. 12, 2007) (commenting on the anachronistic nature of the freehold/leasehold distinction and the concept of seisin).

127. See MAKDISI & THOMAS, *supra* note 13, §§ 24.07(b), 25.06 (discussing the alienability at common law of possibilities of reverter and rights of entry); POWELL, *supra* note 13, §§ 21.01–25.05 (discussing generally the creation, protection, alienability, and failure of future interests).

128. Waggoner, *supra* note 2, at 756.

129. See *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS* § 25.2 cmt. g (Preliminary Draft No. 12, 2007) ("All future interests are alienable."); MAKDISI & THOMAS, *supra* note 13, §§ 24.07, 25.06 (noting that the modern rule with respect to possibilities of reverter and rights of entry permits alienation of these interests); POWELL, *supra* note 13, §§ 21.01–21.05 (discussing generally the creation, protection, alienability, and failure of future interests); Gallanis, *supra* note 5, at 516–20 (surveying the status of state laws and concluding that contingent interests are now fully alienable).

130. *Infra* App. § 1.3.

legal characteristics, certain contingent future interests in unascertained persons present practical difficulties in alienability because there is no person in existence to make the transfer. Consider the conveyance in Example 13, above: *O* conveys Blackacre "to *A* for life, then to *A*'s first child." Because *A* does not yet have any children, the interest in *A*'s first child is contingent because it is in an unascertained person. As a practical matter, this contingent interest cannot be alienated because there is no person in existence to agree to a transfer. In various circumstances, such as partition or foreclosure, it is necessary to use judicial action to bind the unascertained holders of future interests.¹³¹ The proposed model law also clarifies that "[t]he alienability of interests in property may be restricted by contract to the limited extent permitted by common law."¹³² For example, although a term of years tenancy is alienable as a matter of its legal nature, the alienability of that interest may be restricted to a certain extent by permissible limitations on the assignment or sublease of the interest.¹³³

4. *Scope and Definitions of Present and Future Interests*

The proposed model law "provides the basic system of ownership of both real and personal property."¹³⁴ Following custom, the personal property equivalent of a fee simple absolute is called "absolute ownership."¹³⁵ This basic system applies to interests held in both law and equity.¹³⁶ The beneficial ownership of property held in trust therefore must conform to the basic system of present and future interests.¹³⁷

The proposed model law follows the *Restatement (Third)*'s definitions of present and future interests. A present interest is defined as "an ownership interest in property in which the owner has a current right to possession or

131. See POWELL, *supra* note 13, § 22.04[1] ("The reasonable protection of these interests frequently requires some procedure by which their owners can secure judicial action which will bind the total ownership of the affected property. This necessity can become very pressing in cases of partition[] [and] in foreclosure proceedings.").

132. *Infra* App. § 1.3.

133. See STOEBCUK & WHITMAN, *supra* note 13, § 6.71 (noting that the general policy against restraints on alienation may be defeated in some cases of subleasing or assignment by the landlord's legitimate interests in preventing such transactions).

134. *Infra* App. § 1.1.

135. *Infra* App. § 2.2.

136. *Infra* App. § 1.1.

137. See *infra* App. § 1.1 (applying the proposed model law to property held in equity, thus bringing property held in trust within its scope).

enjoyment of the subject property."¹³⁸ A future interest is defined as "an ownership interest in property in which the owner has no current right to possession or enjoyment of the subject property. The owner's right to possession or enjoyment is postponed until some time in the future and may be either certain or uncertain."¹³⁹ The definition further clarifies:

A future interest is a present ownership interest in property, even though the right to possession or enjoyment is postponed until some time in the future and may be either certain or uncertain. A future interest arises when it is created, not in the future when and if the right to possession or enjoyment matures.¹⁴⁰

B. Present Possessory Interests

This Section discusses each of the present possessory interests in turn. It then discusses the concept of defeasibility and rules of construction related to present interests.

1. The Fee Simple Absolute

The proposed model law follows the *Restatement (Third)* and defines a fee simple absolute as "a present interest in real property that is unlimited in duration."¹⁴¹ It also defines absolute ownership as "the personal-property counterpart of the fee simple absolute."¹⁴² The proposed model law notes that because it is of unlimited duration, the fee simple absolute is not followed by a future interest.¹⁴³ Finally, the proposed model law notes that the traditional language of inheritance is not necessary to create a fee simple absolute or absolute ownership, and that these interests are created by language in the form

138. *Infra* App. § 2.1; RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 24.1 (Preliminary Draft No. 12, 2007).

139. *Infra* App. § 3.1; RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 25.1 (Preliminary Draft No. 12, 2007).

140. *Infra* App. § 3.1; RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 25.1 cmt. a (Preliminary Draft No. 12, 2007).

141. *Infra* App. § 2.2; see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 24.2 (Preliminary Draft No. 12, 2007) ("The estate in 'fee simple absolute' is a present interest in land that is unlimited in duration.").

142. *Infra* App. § 2.2; RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 24.2 (Preliminary Draft No. 12, 2007).

143. *Infra* App. § 2.2. The language used in the model law tracks that of comment b to Section 24.2 of the *Restatement (Third)*.

of "to A," "to A and her heirs," or any other language that evinces an intent to create these interests in property.¹⁴⁴

2. Nonrecognition of Fee Tail and Fee Simple Conditional

As discussed above, the fee tail was a present interest intended to keep property within a family, and was created by language in the form of "to A and the heirs of her body."¹⁴⁵ Prior to 1285, in England this language would have created a fee simple conditional.¹⁴⁶ Due to historical accident, a handful of American jurisdictions continue to recognize the fee simple conditional.¹⁴⁷ The fee tail has already been abolished in most jurisdictions.¹⁴⁸ The proposed model law clearly states that the fee tail and fee simple conditional are not recognized estates, and abolishes them to the extent that they are still recognized in a particular jurisdiction.¹⁴⁹ Following the approach that a majority of states took in abolishing the fee tail, it also provides that language that at common law would have created a fee tail or fee simple conditional now creates a fee simple absolute.¹⁵⁰

144. *Infra* App. § 2.2.

145. *See supra* notes 26–31 and accompanying text (introducing the concept of the fee tail).

146. *See* RESTATEMENT (FIRST) OF PROP. § 17 cmt. a (1936) (noting that conveyance "to B and heirs of her body" created fee simple conditional or fee tail at different times in history); SINGER, *supra* note 13, § 7.7.1 (same); STOEBUCK & WHITMAN, *supra* note 13, § 2.10 (noting that fee simple conditional could not be created after 1285).

147. South Carolina and Iowa continue to recognize the fee simple conditional. POWELL, *supra* note 13, § 14.04. When the estate was abolished in Oregon, the abolition was not made retroactive, so it continues to exist there for estates created prior to September 9, 1971. OR. REV. STAT. § 93.250 (2007); POWELL, *supra* note 13, § 14.04 n.4. The fee simple conditional was also recognized at one time in Nebraska. *See* STOEBUCK & WHITMAN, *supra* note 13, § 2.10 (noting that Nebraska recognized the fee simple conditional until 1941).

148. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 24.4 n.3 (Preliminary Draft No. 12, 2007); POWELL, *supra* note 13, § 14.06; STOEBUCK & WHITMAN, *supra* note 13, § 2.10. The "fee tail survives in modified form in Delaware, Maine, Massachusetts, and Rhode Island." POWELL, *supra* note 13, § 14.05.

149. *Infra* App. § 2.3.

150. *Infra* App. § 2.3. *See also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 24.4 (Preliminary Draft No. 12, 2007) ("A disposition 'to A and the heir's of A's body' or the like creates a fee simple absolute in A."); POWELL, *supra* note 13, § 14.07[3] (noting that the majority rule is that estates in fee tail are automatically turned into estates in fee simple absolute).

3. *The Life Estate*

Drawing on language from the *Restatement (Third)*, the proposed model law defines a life estate as "a present interest in property that terminates on the death of one or more human measuring lives."¹⁵¹ It also draws from a comment to the *Restatement (Third)* to clarify that "[t]he measuring life (or lives) must be a human life, and cannot be the life of a corporation, an animal, or any other nonhuman entity."¹⁵² Further, the proposed model law notes that a life estate can be measured by "the life (or lives) of a person other than the owner of the life estate," and that this type of life estate was known at common law as a life estate *pur autre vie*.¹⁵³ Finally, the proposed model law states that "[a] life estate may be created by language in the form of 'to A for life' or other language that evinces a clear intention to create a present interest measured in duration by one or more human lives."¹⁵⁴

Life estates present a number of complicated issues that are not addressed by the model law. One broad issue (also presented to varying degrees by the other present interests that are accompanied by future interests) is the complex relationship between the holder(s) of the present interest and the holder(s) of the future interest(s). The tensions in this relationship are reflected in the law of waste.¹⁵⁵ Waste and other problems of balancing the interests of present and

151. *Infra* App. § 2.4; see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 24.5 (Preliminary Draft No. 12, 2007) (adopting the same definition without the language "in property" and substituting "a" for "one or more"). The proposed model law added the language "one or more" to reflect the fact that a life estate can be created that is measured by more than one person's life. See *infra* App. § 2.4 (defining the concept of the life estate).

152. *Infra* App. § 2.4; see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 24.5 cmt. a (Preliminary Draft No. 12, 2007) (adopting the same definition without the language "(or lives)").

153. *Infra* App. § 2.4; see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 24.5 cmt. b (Preliminary Draft No. 12, 2007) (describing the life estate *pur autre vie* as a life estate "measured by the life of another or others").

154. *Infra* App. § 2.4. As the *Restatement (Third)* notes, a wide range of language has been found to create a life estate, including:

"to A so long as A lives," "to A until A's death," "to A during A's lifetime," "to A to have and to hold during her natural life," "to A for her use and benefit during her natural life," "to A during his life and the life of his wife," "to A during the lifetime of A," [and] "to A until she dies."

RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 24.5 cmt. a (Preliminary Draft No. 12, 2007) (emphasis omitted) (citing RESTATEMENT (FIRST) OF PROP. §§ 16 cmt. b, 107 cmt. e (1936)).

155. See STOEBUCK & WHITMAN, *supra* note 13, § 4.1 (noting that the law of waste requires "courts to determine the extent to which the holder of a limited interest in the land should be restricted in use and enjoyment in order to protect the holders of [future] interests in the same

future interest holders are not addressed because they fall outside of the scope of the proposed model law. As suggested above, the proposed model law is intended to address only the needless complexity in the basic structure of property ownership, not to provide a comprehensive code of property ownership.¹⁵⁶

Another difficult issue presented by life estates is early termination and the acceleration of future interests. This issue typically arises when a life tenant disclaims a life interest or conveys it to the holder of the future interest in the property.¹⁵⁷ What happens next is an issue of great controversy. In some circumstances, the future interest accelerates and becomes possessory, while in others it does not.¹⁵⁸ Professor Gallanis made the resolution of this issue one of the major components of his proposed Uniform Future Interests Act,¹⁵⁹ and it plausibly fits within the subject matter of the model law proposed in this Article. I omit it here for two reasons: First, it is a hotly-contested issue within the legal academy.¹⁶⁰ Second, it has been addressed for scenarios involving disclaimer by the Uniform Probate Code (UPC) and the Uniform Disclaimer of Property Interests Act (UDPIA).¹⁶¹ Following the principles of enactability discussed in the previous section, it seems unwise to take sides on the

land").

156. See *supra* notes 97–117 and accompanying text (describing earlier failed attempts to make more sweeping and comprehensive model property acts, the lessons learned from these failures, and how the present proposed model law avoids these problems).

157. See BORRON ET AL., *supra* note 13, § 791 (defining acceleration as the "hastening of the owner of the future interest toward a status of present possession or enjoyment by reason of the failure of the preceding estate" and stating that this occurs when the present estate, though not terminated, is found by the law to have ended); POWELL, *supra* note 13, § 23.03 (discussing generally the circumstances that give rise to early termination and acceleration and how the law responds to these occurrences); Gallanis, *supra* note 5, at 523 ("[A]cceleration typically occurs when the holder of the prior interest executes a disclaimer or a release or conveys the interest to the holder(s) of the succeeding interest.").

158. See Gallanis, *supra* note 5, at 523–24 (describing how courts' interpretations of grantors' intent yields different acceleration results under different circumstances).

159. See *id.* at 524–29 (describing the inconsistency of results in cases involving acceleration and the need for reforms that apply acceleration irrespective of the formal classification of the interest in question); *id.* at 568–69 (codifying this reform in his proposed Uniform Future Interests Act).

160. See *id.* at 525–29 (discussing academic criticism of the rules of acceleration premised on the view that such rules often produce results inconsistent with the original intentions of grantors).

161. See *id.* at 524 (noting that the UPC and UDPIA regulate acceleration following disclaimers). The UDPIA has been incorporated into the UPC. *Id.*

acceleration issue, particularly if the approach taken is contrary to that taken in the uniform laws that have already addressed acceleration.¹⁶²

Finally, life estates raise a possible reform that has a great deal of merit but that is not included in the proposed model law presented here. The idea is simple: Abolish the legal life estate, and allow life interests only in equity (i.e., allow life interests only for property that is held in trust). This idea was enacted in England in 1925 as part of a comprehensive reform of the common law system of estates and future interests.¹⁶³ The English reform was intended to promote the alienability of property.¹⁶⁴ Property that is held in a legal life estate presents an alienability problem. Imagine that *C* wants to buy Blackacre. *A* owns a life estate in Blackacre, and *B* owns the accompanying future interest. *C* must negotiate with both *A* and *B* to obtain Blackacre in fee simple absolute, making *C*'s acquisition of the property far more difficult than it would have been if there was only one owner. The alienability problem is compounded when there are multiple future interest holders. Property held under a conveyance "to *X* for life, then to *X*'s children" would have ten owners of present and future interests if *X* had nine children.

These alienability problems are absent if the present and future interests are held in equity, rather than in law. Going back to the example of *C* wanting to buy Blackacre, imagine now that Blackacre is owned in trust, with *T* being the trustee, *A* having an equitable life interest, and *B* having an equitable future interest. *T*, the trustee, is the legal owner of Blackacre, and as such has the power to sell the property.¹⁶⁵ If *C* wanted to purchase Blackacre, *C* would now only have to negotiate with one party, *T*, rather than two parties, *B* and *C*. *T*, of course, would be bound by fiduciary duty to act in *A* and *B*'s best interests.¹⁶⁶

162. See *supra* notes 97–117 and accompanying text (discussing the enactability lessons learned from the failures of other proposed uniform laws, including the need to avoid hotly-contested issues and the desirability of achieving consistency with other uniform laws).

163. See C. Dent Bostick, *Land Title Registration: An English Solution to an American Problem*, 63 IND. L.J. 55, 78 (1987) (noting that the 1925 reforms abolished all estates at law except the fee simple absolute and the term of years, allowing the other estates to be recognized only at equity).

164. See *id.* at 77 (discussing that the reforms sought to "reduce the number of legal estates" so that purchasers would have an easier time "securing good legal title").

165. See MAKDISI & THOMAS, *supra* note 13, § 27.05(a) ("A power of sale in the trustee is usually found in the instrument creating the trust or inferred from the circumstances or given by statute. . . . If no explicit power of sale is given for a trust, equity may imply a power of sale if [needed].").

166. See SINGER, *supra* note 13, § 7.5 ("Trustees have fiduciary obligations to manage the trust funds in the interests of the beneficiar[ies].").

The English reform solved the alienability problem by forcing these types of interests out of law and into equity.¹⁶⁷ After 1925, England recognized only two legal estates in land—the fee simple absolute and the term of years.¹⁶⁸ All other interests were converted to equitable interests by legislative fiat.¹⁶⁹

The English approach has a great deal of merit, and Professor Bostick has suggested that it be considered for adoption in the United States.¹⁷⁰ It is not followed here because it may be too radical to be enacted. It is ironic, of course, to be concerned about the excessive radicalism of a reform that was enacted in England in 1925. Although it is not incorporated into the model law that is proposed in this article, the English approach should be seriously considered in any formal institutional process that is started to develop a model law of estates and future interests for enactment by the states.

4. *The Tenancies*

The proposed model law defines a tenancy generally as "a present possessory interest in property that is of limited duration but is not defined in terms of a natural person's life."¹⁷¹ It then defines the three specific types of tenancies in terms that draw from the *Restatement (First) of Property*.¹⁷² The

167. See Bostick, *supra* note 163, at 77 (describing how moving most of the estates to equity reduced the number of transactions, and thus the overall transaction costs, of the purchaser).

168. See *id.* at 78 (indicating that the 1925 reforms "reduced the number of legal estates to two: the fee simple absolute and the legal term of years").

169. See C. Dent Bostick, *Loosening the Grip of the Dead Hand: Shall We Abolish Legal Future Interests in Land?*, 32 VAND. L. REV. 1061, 1093 (1979) ("[A]ll future interests in land . . . were deemed equitable estates by legislative fiat."); Francis R. Crane, *The Law of Real Property in England and the United States: Some Comparisons*, 36 IND. L.J. 282, 285 (1961) (discussing how the English reform legislation made all estates in land except for the fee simple absolute and the term of years cognizable only in equity); Ronald Maudsley, *Escaping the Tyranny of Common Law Estates*, 42 MO. L. REV. 355, 359 (1977) (same).

170. See Bostick, *supra* note 169, at 1090–95 (discussing the need for American reform of its future interest system and the ways in which following the English approach could provide that reform).

171. *Infra* App. § 2.5.

172. Professor Gallanis's proposed Uniform Future Interests Act similarly draws on the *Restatement (First)* definitions. Compare Gallanis, *supra* note 5, at 564 (defining "interests for years" as "interests the duration of which is described in units of a year or in multiples or divisions thereof"), with RESTATEMENT (FIRST) OF PROP. § 19 (1936) ("An estate for years is an estate, the duration of which is fixed in units of a year or multiples or divisions thereof").

"term of years is a tenancy the duration of which is fixed in calendar dates or units of a year or multiples or divisions thereof."¹⁷³ The "periodic tenancy is a tenancy the duration of which will continue for successive periods of time unless it is terminated."¹⁷⁴ "A tenancy at will is a tenancy that is terminable at the will of the transferor and also at the will of the transferee and that has no other designated period of duration."¹⁷⁵ Following the modern trend, the proposed model law requires a notice period of thirty days or the interval between rental payments, whichever is greater (subject to a six-month maximum), before a tenancy at will is terminated unilaterally by one party.¹⁷⁶

The proposed model law does not include the tenancy at sufferance. This so-called tenancy arises when a person wrongfully maintains possession of property after the termination of a prior interest.¹⁷⁷ This scenario is better treated as a remedies problem than as a distinct interest in property. As Professors Stoebuck and Whitman observe, the "[t]enancy at sufferance is as illusory as the rings of Saturn viewed edge-on."¹⁷⁸

5. Defeasible Interests

Under the traditional approach, the term "defeasible" was typically used only for fee simple estates. If a life estate was subject to a defeasance condition, it was called a life estate on special limitation to differentiate the condition from the natural end of the life estate.¹⁷⁹ Following the modern trend, the proposed model law takes the approach that all present interests in property

173. *Infra* App. § 2.5(a); see also RESTATEMENT (FIRST) OF PROP. § 19 (1936) (adopting a nearly identical definition); STOEBUCK & WHITMAN, *supra* note 13, § 6.14 (describing the tenancy for years as being "for a definite period" that "need not be literally for a year or a multiple of a year," but can be for any fixed term).

174. *Infra* App. § 2.5(b); see also RESTATEMENT (FIRST) OF PROP. § 20 (1936) (adopting a similar definition for its concept of "estate from period to period"); STOEBUCK & WHITMAN, *supra* note 13, § 6.16 ("A periodic tenancy is one of indefinite duration. It must have a definite commencement, but after that it continues on and on till one of the parties terminates it.").

175. *Infra* App. § 2.5(c); see also RESTATEMENT (FIRST) OF PROP. § 21 (1936) (adopting the same definition with "estate" substituted for "tenancy"); STOEBUCK & WHITMAN, *supra* note 13, § 6.18 (defining a tenancy at will as being "terminable at any time by either party").

176. See ATKINSON ET AL., *supra* note 13, § 3.31 (describing the statutes that require notice prior to termination of a tenancy at will as "usually [requiring] thirty days or a period equal to the interval between rent payments").

177. RESTATEMENT (FIRST) OF PROP. § 22 (1936).

178. STOEBUCK & WHITMAN, *supra* note 13, § 6.20.

179. See Waggoner, *supra* note 2, at 736 (describing a life estate with a defeasance condition as a "life estate on a special limitation" and further explaining that "the word 'special' differentiates it from a normal life estate, which is itself an estate subject to a limitation").

can be defeasible. It therefore defines defeasibility as a separate concept that can be broadly applied, rather than defining specific types of defeasible estates. Drawing from the *Restatement (Third)*, a defeasible interest is defined as "a present interest in land that terminates upon the happening of an uncertain event."¹⁸⁰ When a life estate or tenancy is defeasible, it of course is possible that this uncertain event might not occur before the present interest naturally ends.¹⁸¹

Although life estates and tenancies may be defeasible, the remainder of the discussion here focuses on the fee simple defeasible and its common law predecessors. As discussed above, there are three types of defeasible fees simple at common law: the fee simple determinable, the fee simple subject to condition subsequent, and the fee simple subject to executory limitation.¹⁸² Consistent with the *Restatement (Third)*, the proposed model law abolishes the distinction between the three.¹⁸³ Language that would have created any of these three common law estates would create a fee simple defeasible under the proposed model law.¹⁸⁴ The accompanying future interests are similarly simplified. All defeasible present interests are accompanied by contingent future interests.¹⁸⁵ "The holder of th[e] contingent future interest obtains a power to terminate the present interest" if and when the defeasance condition is broken.¹⁸⁶

To make this merger of the defeasible estates work, the proposed model law addresses two sets of practical issues: (a) the differences in operation

180. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 24.2 (Preliminary Draft No. 12, 2007); *infra* App. § 2.6.

181. *Cf.* Waggoner, *supra* note 2, at 736 (noting that the word "special" needs to be used in the context of defeasible life estates to differentiate the defeasible limitation from the life estate's natural durational limitation).

182. *See supra* notes 32–42 and accompanying text (discussing the three types of defeasible fees, how they are created, and the future interests in which they result).

183. *See infra* App. § 2.6(b) ("The distinctions between the interests historically known as the fee simple determinable, the fee simple subject to condition subsequent, and the fee simple subject to executory limitation . . . are abolished."); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 24.3 (Preliminary Draft No. 12, 2007) ("The subcategories historically known as the fee simple determinable, the fee simple subject to a condition subsequent, and the fee simple subject to an executory limitation are no longer recognized as distinct from one another.").

184. *Infra* App. § 2.6(b); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 24.3 (Preliminary Draft No. 12, 2007) (stating that the three subcategories of fee simple defeasibles are now simply "subsumed under the name fee simple defeasible").

185. *Infra* App. § 2.6(a).

186. *Infra* App. § 2.6(a).

between the common law fee simple determinable and fee simple subject to condition subsequent, and (b) the difference in treatment under the Rule Against Perpetuities between the fee simple determinable and fee simple subject to condition subsequent on the one hand, and the fee simple subject to executory limitation on the other.

In theory, the common law fee simple determinable and fee simple subject to condition subsequent operated in different ways that reflected the language of the underlying conveyance. Recall from Example 3 that a fee simple determinable was created by language of duration: "[T]o the School Board, *so long as* the property is used for school purposes."¹⁸⁷ Following the language of the conveyance, the fee simple determinable was viewed as terminating automatically when the defeasance condition was violated. If the School Board no longer used the property for school purposes, the "so long as" was no longer satisfied, and the estate terminated automatically. As illustrated in Example 4, the fee simple subject to condition subsequent in contrast was created by language of condition: "[T]o the School Board, *but if* the property is not used for school purposes, then grantor may re-enter and retake the property." Following this language, the fee simple subject to condition subsequent was viewed as not terminating automatically when the defeasance condition was violated.¹⁸⁸ Rather, the present interest was terminated when the holder of the future interest exercised her right of entry. Put in terms of the operation of their accompanying future interests, the possibility of reverter accompanying a fee simple determinable operated automatically on the violation of the condition, whereas the right of entry accompanying a fee simple subject to condition subsequent did not operate automatically, and had to be affirmatively exercised by its holder.¹⁸⁹

This difference between the two estates and their accompanying future interests is clear in concept, but has presented serious difficulties in practice. As Professors Stoebuck and Whitman observe, "[D]eeds and wills often fail to employ the appropriate words to create one of the two types of defeasible estate or the other. Instead, deeds and wills often contain a

187. See *supra* note 33 and accompanying text (describing how the fee simple determinable is defined by durational limiting language).

188. See SINGER, *supra* note 13, § 7.3.1 ("A fee simple determinable ends automatically upon the happening of a stated event.")

189. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 13.05[2] (Preliminary Draft No. 12, 2007) (noting that possibilities of reverter operated automatically when a condition was fulfilled, and rights of reentry only operated when exercised by the holder); POWELL, *supra* note 13, § 13.05[2] (same).

confusing mixture of words appropriate for the creation of both types of defeasible estates."¹⁹⁰ As a result, courts often struggle to identify the estate created by ambiguous language in a conveyance.¹⁹¹

At common law, possibilities of reverter and rights of entry were often treated differently when issues of alienability were raised.¹⁹² The modern erosion of this disparate treatment,¹⁹³ combined with the confusion caused by ambiguous conveyances, has led to consistent calls within the legal academy for the merger of the fee simple determinable/possibility of reverter and the fee simple subject to condition subsequent/right of entry.¹⁹⁴

Two states, California and Kentucky, have followed this suggestion and merged the two estates into one.¹⁹⁵

The proposed model law goes even further in merging present and future interests. Even taking the limited step of merging the fee simple determinable and the fee simple subject to condition subsequent, however, leaves a number of loose ends that need to be tied up. The conceptual difference between the operation of the possibility of reverter and the right of entry leads to five potential practical issues for the merged interest.

190. STOEBUCK & WHITMAN, *supra* note 13, § 2.6; *see also* WAGGONER & GALLANIS, *supra* note 13, § 3.3 (discussing practical difficulties in classifying defeasible estates raised by ambiguous language).

191. *See* Mahrenholz v. County Bd. of Sch. Trs., 417 N.E.2d 138, 142–45 (Ill. App. 1981) (interpreting an ambiguous conveyance and discussing similar issues from prior cases); STOEBUCK & WHITMAN, *supra* note 13, § 2.6 (providing examples of confusing conveyances).

192. *See supra* note 127 and accompanying text (describing various future interests as being "fully inalienable" or "alienable either during life or at death, but not both" at different times).

193. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 25.2 cmt. d n.3 (Preliminary Draft No. 12, 2007) (noting that modern case law and legislation has moved in the direction of treating possibilities of reverter and rights of entry similarly). Not all states follow the modern trend towards free alienability and the ability to devise possibilities of reverter and rights of entry. In Illinois and Nebraska, for example, both future interests are made inalienable and undevisable by statute. *Id.*

194. *See* Allison Dunham, *Possibility of Reverter and Power of Termination—Fraternal or Identical Twins?*, 20 U. CHI. L. REV. 215, 215–17 (1953) (arguing that it would be reasonable to conclude that there are no significant differences between the two types of future interests); Gerald Korngold, *For Unifying Servitudes and Defeasible Fees: Property Law's Functional Equivalents*, 66 TEX. L. REV. 533, 534 & n.2 (1988) (citing "convincing arguments" for the abolition of the distinction between the two future interests); Waggoner, *supra* note 2, at 740–43 (arguing for the merger of the two future interests because "supposed difference[s] between the two" are insubstantial).

195. *See* CAL. CIV. CODE § 885.020 (West 2005) ("Fees simple determinable and possibilities of reverter are abolished."); KY. REV. STAT. ANN. § 381.218 (2003) ("The estate known at common law as the fee simple determinable and the interest known as the possibility of reverter are abolished.").

First, should the merged fee simple defeasible end automatically once the condition is broken, like a fee simple determinable, or end only on the exercise of the accompanying future interest, like a fee simple subject to condition subsequent? Because the future interest holder may never seek to enforce its rights, ending the present interest only on the exercise of the future interest helps to avoid forfeitures of property.¹⁹⁶ Courts therefore historically have favored the fee simple subject to condition subsequent over the fee simple determinable.¹⁹⁷ The proposed model law follows this common law policy, and ends the defeasible present interest only when the holder of the accompanying contingent future interest asserts her power to terminate in writing.¹⁹⁸

Second, should the statute of limitations start running on the power to terminate immediately when the condition is broken, or should it not run until an attempt to exercise the power to terminate has been made? Based on their conceptual characteristics, a case could be made at common law that the former approach (clock starts immediately) should be used with a fee simple determinable, while the latter approach (clock starts only on assertion of right by future interest holder) should be used with a fee simple subject to condition subsequent.¹⁹⁹ Some jurisdictions historically have followed this approach.²⁰⁰ Others have by statute or judicial decision made the clock start immediately with both the fee simple determinable and the fee simple subject to condition subsequent.²⁰¹ To encourage the prompt exercise of the power to terminate by the holder of the contingent future interest, the proposed model law follows this later approach, having the statute of limitations clock start as soon as the condition is broken.²⁰²

Third, should the present interest holder be liable to the future interest holder for the fair rental value of the property for the time between when the defeasance condition is broken and when the power to terminate is exercised?

196. See POWELL, *supra* note 13, § 13.05[2] (stating that property is not forfeited until the holder of the future interest elects to exercise his interest).

197. See *id.* ("The courts' concern about forfeiture . . . leads them to prefer the fee simple subject to a condition subsequent.")

198. *Infra* App. § 2.6(a).

199. See STOEBUCK & WHITMAN, *supra* note 13, § 2.7 (citing the common law argument for treating the two interests differently).

200. See *id.* (citing Arkansas, New York, and Washington decisions that have followed this approach).

201. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 25.2 cmt. d (Preliminary Draft No. 12, 2007) (noting that in some states the clock starts running immediately for both types of interests); SINGER, *supra* note 13, § 7.3.2 at 311 (same); STOEBUCK & WHITMAN, *supra* note 13, § 2.7 (same).

202. *Infra* App. § 2.6(a).

At common law, reasonable rental value of the land called mesne profits were used as a remedy for the wrongful possession of property.²⁰³ Consistent with its approach of not ending the present interest until the power to terminate is exercised, the proposed model law does not make the present interest holder liable for the reasonable rental value until after the power to terminate is exercised.²⁰⁴

Fourth, who should be responsible for taxes and other liabilities associated with the property for the period between the breach of the condition and the exercise of the power to terminate? Again following the approach of not ending the present interest until the power to terminate is exercised, the proposed model law places responsibility for these liabilities on the present interest holder.²⁰⁵

Fifth, should defenses such as waiver, election, and estoppel be available to the holder of the present interest when resisting the exercise of the power to terminate by the future interest holder? At common law, these defenses clearly were available when the present interest was a fee simple subject to condition subsequent, but were questionable when the present interest was a fee simple determinable.²⁰⁶ The proposed model law explicitly makes these defenses available to the present interest holder.²⁰⁷

The proposed model law goes a step further beyond the merger of the fee simple determinable and the fee simple subject to condition subsequent by incorporating the fee simple subject to executory limitation into the fee simple defeasible. This additional step requires consideration of the impact of the Rule Against Perpetuities. In the United States, the possibility of reverter and right of entry have generally been held to be immune from the Rule Against Perpetuities as interests created in the grantor.²⁰⁸ The executory interest accompanying the fee simple subject to executory limitation, in contrast, was subject to the Rule Against Perpetuities.²⁰⁹ The practical impact of this disparate treatment is tremendous. A narrow exception to the Rule Against

203. See STOEBUCK & WHITMAN, *supra* note 13, § 2.7 (noting that at common law, a plaintiff could recover mesne profits from a defendant for wrongful possession).

204. *Infra* App. § 2.6(a).

205. *Infra* App. § 2.6(a).

206. See STOEBUCK & WHITMAN, *supra* note 13, § 2.7 (stating that at common law, defenses such as waiver, election, and estoppel were only available under certain conditions when the interest was a fee simple determinable).

207. *Infra* App. § 2.6(a).

208. See WAGGONER & GALLANIS, *supra* note 13, § 5.3 (providing that the Rule Against Perpetuities does not apply to possibility of reverter and right of reentry in the U.S.).

209. *Id.*

Perpetuities protects the executory interests if both the present and future interests are held by charities.²¹⁰ Examples 5 and 6, above,²¹¹ were crafted to fall within this exception. Consider instead the following two examples:

Example 17: *O* grants Blackacre "to the School Board so long as it is used for school purposes, then to *A*."

Example 18: *O* grants Blackacre "to the School Board, but if the property is not used for school purposes, then *A* may enter and take the property."

The executory interests in each of these examples violate the Rule Against Perpetuities, and therefore would be invalid.²¹² The conveyances in Examples 3 and 4,²¹³ illustrating the fee simple determinable and fee simple subject to condition subsequent, were identical to the conveyances in Examples 5 and 6,²¹⁴ except that in the latter two examples the future interests were held by third parties, rather than the original grantor.

The merger of the fee simple subject to executory limitation into the fee simple defeasible does not require a substantive change in the Rule Against Perpetuities—the present rule that future interests created in a grantor are immune from the rule could be maintained, even if the names of the interests involved are unified. But a substantive change to the rule seems warranted in this circumstance. There is no principled reason why the future interests in these sets of conveyances should be treated differently. The immunity of the possibility of reverter and the right of entry from the Rule Against Perpetuities appears to be a historical accident, and in England both are subject to the rule.²¹⁵ The disparate treatment is also easily sidestepped in many jurisdictions by a sophisticated lawyer, and as a matter of practice amounts to little more than a trap for the unwary.²¹⁶

210. See MAKDISI & THOMAS, *supra* note 13, § 28.05 (explaining that the Rule Against Perpetuities does not apply to conveyances where the present interest and future interest are both held by charities).

211. See *supra* Part II.A (discussing Examples 5 and 6).

212. The executory interests violate the Rule Against Perpetuities because the condition could be violated, if at all, five hundred years in the future. The executory interests, therefore, could vest or fail well outside of the perpetuities period.

213. See *supra* Part II.A (discussing Examples 3 and 4).

214. See *supra* Part II.A (discussing Examples 5 and 6).

215. See Bostick, *supra* note 169, at 1098 (stating that in England, both interests are subject to the rule).

216. See Waggoner, *supra* note 2, at 749. Professor Waggoner explains that a defeasible estate with a future interest in a third party can be created by conveying the property as a fee simple determinable or fee simple subject to condition subsequent one day, then conveying the

The proposed model law therefore subjects the contingent future interests that accompany a defeasible present interest to the Rule Against Perpetuities, regardless of whether they are created in a grantor or a grantee. This change is not explicit. Rather, the proposed model law defines the future interests that accompany a defeasible present interest as contingent, then subjects all contingent future interests to the Rule Against Perpetuities.²¹⁷ This change is the only provision in the proposed model law that is not made retroactive.²¹⁸ While a retroactive change of this nature may be constitutional,²¹⁹ it would have the effect of voiding a large number of future interests that were created in grantors in reliance on the present immunity of those interests for the Rule Against Perpetuities.²²⁰

The application of the Rule Against Perpetuities to the future interests that accompany defeasible estates can lead to some odd results. Consider the conveyances in Examples 17 and 18. In Example 17, Blackacre was granted "to the School Board so long as it is used for school purposes, then to *A*." Using the common law terminology for the interests involved, the executory interest in *A* violates the Rule Against Perpetuities. Because *A*'s interest was stated in a separate clause, striking that interest out of the conveyance leaves the language "to the School Board so long as it is used for school purposes," which gives the School Board a fee simple determinable; *O*, the grantor, retains a possibility of reverter. In Example 18, Blackacre was granted "to the School Board, but if the property is not used for school purposes, then *A* may enter and take the property." Again, the executory interest violates the Rule Against Perpetuities. Because of the phrasing, it is impossible to strike out the executory interest while retaining the defeasance condition. As a result, the Rule Against Perpetuities voids out the language in the conveyance beginning with "but if." The remaining language grants Blackacre "to the School Board," so the School Board owns Blackacre in fee simple absolute.

This disparate treatment of executory interests by the Rule Against Perpetuities has long concerned property scholars.²²¹ The survival of the

future interest to the third party the next. Because the future interest was *created* in the grantor, it is immune from the Rule Against Perpetuities. *Id.* This process is complicated in jurisdictions that restrict the alienability of possibilities of reverter or rights of entry. *Id.*

217. *Infra* App. §§ 2.6(a), 3.5.

218. *Infra* App. § 1.5(a).

219. See *infra* note 354 and accompanying text (citing cases that have found retroactive application of these types of statutes constitutional).

220. See *infra* note 352 and accompanying text (stating that many interests that would have been valid at common law would be undermined if the proposed model law made the change retroactive).

221. See Gallanis, *supra* note 5, at 521–22 (discussing problems with the disparate

condition in Example 17, but not in Example 18, is an accident in language, and there appears to be no substantive reason to treat the two conveyances differently. The *Restatement (Second) of Property* asserted that the two conveyances should be treated in the same way, and that in each the entire condition should be voided, leaving a fee simple absolute in the School Board.²²² Professor Gallanis argued in support of the Restatement position.²²³ The proposed model law follows the Restatement approach. If the contingent future interest accompanying a defeasible present interest is void because of the Rule Against Perpetuities, or any other reason, the entire condition is voided and the present interest holder owns the property unencumbered.²²⁴ If the present interest is a fee simple defeasible, then after the future interest is voided, the present interest holder owns the property in fee simple absolute.²²⁵

Defeasible interests present three possible reforms that are not followed in the proposed model law. First, the conditions attached to the defeasible interests could be limited in duration. Illinois, Nebraska, and North Carolina have placed durational limits on possibilities of reverter and rights of entry.²²⁶ Defeasible interests present many of the same problems of alienability as are presented by other forms of divided ownership,²²⁷ and the potentially perpetual nature of the common law possibility of reverter and right of entry raise concerns about obsolete conditions burdening the property forever. As Professor Gallanis notes, limiting the duration of these interests more straightforwardly addresses these concerns than making them subject to the Rule Against Perpetuities.²²⁸ This approach has significant merit. The proposed model law takes the alternative approach of making them subject to the Rule Against Perpetuities as part of its overall effort to fit, wherever possible, its reforms within the existing structure of the system of property ownership.²²⁹

treatment of executory interests); see also Waggoner, *supra* note 2, at 737 (criticizing the disparate treatment of executory interest as "wooden").

222. See RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 1.5 cmts. b & c (1983) (asserting that the entire condition should be voided, resulting in a fee simple absolute).

223. See Gallanis, *supra* note 5, at 521–22 (giving four reasons that the *Restatement's* position is the more sensible one).

224. *Infra* App. § 2.6(c).

225. *Infra* App. § 2.6(c).

226. Gallanis, *supra* note 5, at 558–59.

227. See *supra* text following note 164 (giving examples of problems with divided ownership).

228. See Gallanis, *supra* note 5, at 559 ("The use of a direct durational limit on future interests is far preferable to a rule against the remoteness of vesting.").

229. *Infra* App. § 2.6(c); see *supra* notes 97–117 and accompanying text (explaining why

Second, an even more effective reform not followed by the proposed model law would be to prohibit defeasible conditions on legal, as opposed to equitable, interests. Like the proposal discussed above to abolish the legal life estate, this reform would force defeasible interests into equity.²³⁰ As discussed above, this reform has significant merit, but is not followed here because it would be a radical departure from our current system.²³¹

Third, certain aspects of the law of servitudes and the law of defeasible interests could be merged. This reform has been discussed at length by Professor Gerald Korngold.²³² In some circumstances, covenants that run with the land serve the same effective purpose as defeasible estates. Consider these two grants: "To the school board, so long as it is used for school purposes" and "To the school board," accompanied by a covenant that runs with the land restricting use of the property to school purposes. The restrictions have similar effects, though the remedies for breach differ significantly— forfeiture for the defeasible estate versus money damages or an injunction for the covenant (presuming that it meets the requirements of both a real covenant and an equitable servitude).²³³ This reform would be even more radical than abolishing legal defeasible estates, and so is not followed here. The idea has sufficient merit, however, so it should be considered in detail by any formal model law drafting endeavor.

6. Numerus Clausus and Rules of Construction

The common law restricts property ownership to a closed list of standard forms. This restriction is embodied in the *numerus clausus* principle. According to this principle, property owners cannot create new interests of land on their own,

the proposed model law makes them subject to the Rule Against Perpetuities).

230. See *supra* note 165 and accompanying text (noting that the future equitable interests could be held by many individuals, but the legal owner of the land would be a trustee). The grantor could give the grantee a defeasible beneficial interest. For example, *O* could convey Blackacre "in trust to the School Board, so long as it is used for school purposes." Or, more preferably, the grantor could simply give the property in trust for the benefit of the grantee and leave out the defeasance condition. For example, *O* could convey Blackacre "in trust for the benefit of the School Board." In this second scenario, if the School Board no longer needed Blackacre, the property could be sold and the proceeds used by the School Board for school purposes.

231. See *supra* note 170 and accompanying text (discussing the merits of the reform).

232. See Korngold, *supra* note 194, at 533 (arguing that it would be desirable for the law to integrate servitudes and defeasible fees involving land use controls).

233. See STOEBUCK & WHITMAN, *supra* note 13, §§ 10.2–10.3 (stating that money damages or an injunction are proper when a covenant in the contract for the sale of land is breached).

and instead must follow the established forms of ownership in their conveyances.²³⁴ The proposed model law explicitly adopts the *numerus clausus* principle.²³⁵

Consistent with *numerus clausus*, property law requires rules of construction to help courts fit ambiguous conveyances into the limited set of available categories. Courts use a host of common law and statutory rules of construction.²³⁶ The proposed model law includes a handful of rules that are directly related to the issues addressed by the law, but expressly permits courts to consider other consistent rules of construction.²³⁷ Three of these rules of construction are specifically designed to aid the categorization of present interest of property. First, a fee simple absolute is favored over any other interest. A conveyance creates a fee simple absolute unless the language clearly creates a lesser estate.²³⁸ Second, in interpreting ambiguous conveyances of tenancies, a term of years is favored over both a periodic tenancy and a tenancy at will, and a periodic tenancy is favored over a tenancy at will.²³⁹ Third, defeasible estates are disfavored. If conditional language in a conveyance is ambiguous or precatory, that language shall be construed to create a nondefeasible estate.²⁴⁰ The fourth rule of construction included in the proposed model law favors the free alienability of property, consistent with common law precedent.²⁴¹

234. See BORRON ET AL., *supra* note 13, § 61 (providing that no new interests in real property can be created); SINGER, *supra* note 13, § 7.7.2 (same); authorities cited *supra* note 112 (same). The leading *numerus clausus* case in the United States is *Johnson v. Whiton*, 34 N.E. 542, 542 (Mass. 1893) (stating that it is against public policy to create new interests in land).

235. *Infra* App. § 1.4.

236. See MAKDISI & THOMAS, *supra* note 13, § 30.03 (citing over ten doctrinal rules that courts use to interpret conveyances); see also POWELL, *supra* note 13, §§ 24.03–.04 (citing four general rules and many cases for construction of conveyances).

237. *Infra* App. § 4.1.

238. *Infra* App. § 4.1(a). This presumption has been adopted by statute in most states. BORRON ET AL., *supra* note 13, §§ 493–498 (stating that almost all states have statutes that say the law favors creation of a fee simple absolute); POWELL, *supra* note 13, § 13.04[5] (same).

239. *Infra* App. § 4.1(b).

240. *Infra* App. § 4.1(c); see BORRON ET AL., *supra* note 13, §§ 499–502 (stating that ambiguous language will be construed as a nondefeasible estate because defeasible estates are disfavored).

241. *Infra* App. § 4.1(d); see BORRON ET AL., *supra* note 13, §§ 1111–1172, 1851–1866 (stating that restraints on alienability were generally disfavored at common law); MAKDISI & THOMAS, *supra* note 13, § 29.01 (same).

C. Future Interests

This Section recaps some initial considerations related to future interests, then discusses the core characteristics of the simplified system reflected in the proposed model law. It proceeds to discuss the proposed model law's treatment of common law rules that had a great impact on the law of future interests.

1. Initial Considerations

As discussed above, the proposed model law takes language directly from the *Restatement (Third)* and defines future interests as follows:

A future interest is an ownership interest in property in which the owner has no current right to possession or enjoyment of the subject property. The owner's right to possession or enjoyment is postponed until some time in the future and may be either certain or uncertain. A future interest is a present ownership interest in property, even though the right to possession or enjoyment is postponed until some time in the future and may be either certain or uncertain. A future interest arises when it is created, not in the future when and if the right to possession or enjoyment matures.²⁴²

At common law, certain future interests were wholly inalienable or were of only limited alienability.²⁴³ As discussed above, the proposed model law follows the modern trend and makes all interests in property freely alienable as a matter of their legal characteristics.²⁴⁴ In doing so, the proposed model law is consistent with the *Restatement (Third)* and the academic commentary on the issue.²⁴⁵

242. *Infra* App. § 3.1; RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 25.1 cmt. a (Preliminary Draft No. 12, 2007); see also BORRON ET AL., *supra* note 13, § 1 (noting that a future interest "is an existing interest from the time of its creation, and is looked upon as part of the total ownership of the land or other thing which is its subject matter" although "the privilege of possession or of enjoyment is future and not present").

243. See *supra* text accompanying note 127 ("At various times, contingent remainders, executory interests, possibilities of reverter, and rights of entry were fully inalienable, or were alienable either during life or at death, but not both.").

244. *Supra* note 129 and accompanying text; see *infra* App. § 1.3 ("All present and future interests in property as a matter of their legal nature are fully alienable.").

245. See *supra* note 129 and accompanying text (discussing the modern tendency to make all future interests alienable, even those that were not alienable at common law).

2. A Simplified System of Future Interests

As discussed above, most of the common law distinctions between types of future interests are no longer necessary.²⁴⁶ The proposed model law therefore follows the *Restatement (Third)* and abolishes the common law classification system for future interests.²⁴⁷ Interests that at common law would have been reversions, possibilities of reverter, rights of entry, remainders, and executory interests are incorporated into the single broad category of future interests.²⁴⁸

Future interests may be vested or contingent.²⁴⁹ The proposed model law follows the common law and defines a vested interest as one that is *both* in an ascertained person *and* not subject to a condition precedent.²⁵⁰ A contingent interest is one that is *either* in an unascertained person *or* is subject to a condition precedent.²⁵¹

In following these common law definitions, the proposed model law departs sharply from the *Restatement (Third)* and the many commentators who have proposed revisions to the definition of vesting.²⁵² This proposed revision involves a distinction between conditions precedent and conditions subsequent, and is best illustrated with two conveyances:

Example 19: *O* grants Blackacre "to *A* for life, then to *B* if *B* reaches the age of 21, but if *B* does not reach the age of 21, then to *C*."

Example 20: *O* grants Blackacre "to *A* for life, then to *B*, but if *B* does not reach the age of 21, then to *C*."

Both of these conveyances appear to intend to achieve the same outcome: Giving the future interest in Blackacre to *B* if *B* lives to reach the age of 21, and if *B* dies before the age of 21, giving the future interest in Blackacre to *C*. Because of their wording, however, the conveyances create different

246. See *supra* notes 74–82 and accompanying text (noting specific common law distinctions between future interests and giving reasons why they should be abolished in modern property law).

247. *Infra* App. § 3.2.

248. *Infra* App. § 3.2; see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 25.2 (Preliminary Draft No. 12, 2007) ("All future interests are subsumed under the term 'future interest.' The ancient distinctions among remainders, executory interests, reversions, possibilities of reverter, and rights of entry are discontinued.").

249. See STOEUBUCK & WHITMAN, *supra* note 13, § 3.2 (discussing the distinctions between vested and nonvested future interests).

250. *Infra* App. § 3.3.

251. *Infra* App. § 3.3.

252. *Infra* App. § 3.3.

interests.²⁵³ In common law parlance, Example 19 creates contingent remainders in *B* and *C*.²⁵⁴ Because *A* may or may not die before *B* has reached 21, *O* also has a reversion. In the simplified terms of the proposed model law, Example 19 creates contingent future interests in *B*, *C*, and *O*.²⁵⁵ Example 20, in contrast, creates a vested remainder in *B* and an executory interest in *C* (in common law terms), or a vested future interest in *B* and a contingent future interest in *C* (in proposed model law terms).²⁵⁶ The key difference is in the treatment of *B*'s interest: In Example 19, it is contingent, but in Example 20, it is vested.²⁵⁷ The condition in Example 19 is a condition precedent: *B* must live to the age of 21 before the interest vests.²⁵⁸ The condition in Example 20 is a condition subsequent: The interest in *B* is vested on creation, but may be divested subsequently if the condition (*B* dying before the age of 21) occurs.²⁵⁹

This disparate treatment of conveyances with apparently similar intents has been a bugbear for scholars of future interest law. Many academic commentators on the subject have criticized the distinction between conditions precedent and conditions subsequent as arbitrary and meaningless.²⁶⁰ As a result, Professor Waggoner proposed a definition of contingency that does not depend on the distinction: An interest is contingent "if the interest is in favor of

253. See SINGER, *supra* note 13, §7.4.2 (discussing how to classify contingent and vested remainders).

254. See *id.* (giving an example of a contingent remainder in *B*, "'*O* to *A* for life, then to *B* if she has graduated from law school,'" that is analogous to Example 19).

255. See *infra* note 269 and accompanying text (discussing the contingent nature of *O*'s interest).

256. See SINGER, *supra* note 13, § 7.4.2 (giving an example of a conveyance, "*O* to *A* for life, then to *B*, but if *B* drops out of law school, then to *C*," that creates a vested remainder in *B* and an executory interest in *C* and that is analogous to Example 20).

257. See *id.* (explaining the distinction between contingent and vested remainders).

258. See *id.* (defining a condition precedent as a later event that causes the divestment of an interest).

259. See *id.* (defining a condition subsequent as a condition that needs to be fulfilled before the interest in the contingent remainder can vest).

260. See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 25.3, n.1 (Preliminary Draft No. 12, 2007) ("The Restatement of Property perpetuated the historical distinction between contingent remainders (remainders subject to a condition precedent) and defeasibly vested remainders (remainders subject to a condition subsequent). The first Restatement was heavily criticized for this approach."); Edward C. Halbach, Jr., *Vested and Contingent Remainders: A Premature Requiem for Distinctions Between Conditions Precedent and Subsequent*, in ESSAYS FOR AUSTIN WAKEMAN SCOTT 152 (Roscoe Pound et al. eds., 1964) (arguing for the abolition of the distinction between conditions precedent and subsequent); Waggoner, *supra* note 2, at 743 ("What is wrong with [the distinction between conditions precedent and subsequent] is not that it is ambiguous, but rather that it is patently artificial.").

one or more unascertained or unborn persons, or is for any reason uncertain to become possessory at some future time."²⁶¹ The *Restatement (Third)* follows this approach, using a definition that focuses on a generic notion of uncertainty rather than on whether the contingency might occur before or after the interest vests.²⁶²

The proposed model law uses a definition of vesting that maintains the distinction between conditions precedent and conditions subsequent for three related reasons. First, vesting is a well-established common law concept that, unlike many aspects of estates and future interest law, continues to work well. Making substantive alterations to this established concept would lead to a great deal of confusion, and would therefore be unwarranted as a practical matter.²⁶³

Second, the distinction between conditions precedent and conditions subsequent is intuitive, even if it may seem analytically arbitrary. The conveyance to *B* in Example 19 is by its terms conditional, where the conveyance to *B* in Example 20 is not.²⁶⁴ Further, the practical difference between the two is not as illusory as some commentators have implied. For example, consider what would happen in Examples 19 and 20 if *A* died when *B* was 17. In Example 19, *O*'s reversion will become possessory because the contingency of whether *B* will reach the age of 21 has not resolved itself. When the contingency does resolve itself, then either *A* or *B* will divest *O*. In Example 20, *B*'s vested future interest will immediately become possessory on *A*'s death, though it might be divested by *C* if *B* dies before turning 21.

Third, the condition precedent/condition subsequent distinction has a significant impact on the applicability of the Rule Against Perpetuities, and alteration of the impact of the rule in this context is unwarranted.²⁶⁵ Interests

261. Waggoner, *supra* note 2, at 767.

262. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 25.3 (Preliminary Draft No. 12, 2007) (discussing the distinction between classifying a future interest as contingent or vested). As currently drafted, the *Restatement (Third)* definition of vesting does not reflect the importance of the interest being created in an ascertained person, *id.*, but I expect this omission to be corrected in a subsequent version.

263. Although discussion of vesting typically involves future interests, the traditional approach has the conceptual advantage that it easily applies to present interests. Under the traditional approach, a present interest is by definition vested, because it is in an ascertained person (the present interest holder) and is not subject to a condition precedent (the present interest holder already has possession). Revising the definition of vesting to include interests that are subject to a condition subsequent would have the negative impact of conceptually drawing defeasible present interests into the category of contingent interests.

264. See *supra* Part IV.C.2 (discussing Examples 19 and 20).

265. See SINGER, *supra* note 13, § 7.4.2 ("Nonetheless, equivalent though they may be, the difference [between contingent remainders and vested remainders subject to divestment] is legally significant because the rule against perpetuities traditionally applied to contingent

that are subject to conditions precedent (*B*'s interest in Example 19) are subject to the Rule Against Perpetuities, while interests that are subject to conditions subsequent (*B*'s interest in Example 20) are not.²⁶⁶ Professor Waggoner recognized the significance of the distinction for the application of the Rule Against Perpetuities.²⁶⁷ He also forthrightly acknowledged that his revised definition of vesting would lead to a significant change in the law, applying the Rule Against Perpetuities to interests, like *B*'s vested interest in Example 20, that were immune from the rule at common law.²⁶⁸

As discussed above in the context of the future interests that accompany defeasible present interests, the proposed model law subjects some interests to the Rule Against Perpetuities that were immune at common law.²⁶⁹ There does not appear to be any good reason to make a similar change here. Consider two further examples:

Example 21: *O* conveys Blackacre "to *A* for life, then to *D*'s children who reach the age of 25, but if none of *D*'s children reach the age of 25 to *E*." *D* is alive and has no children over the age of 25.

Example 22: *O* conveys Blackacre "to *A* for life, then to *E*, but if any of *D*'s children reach the age of 25, then to those children." *D* is alive and has no children over the age of 25.

remainders but not to vested remainders subject to divestment.").

266. See Waggoner, *supra* note 2, at 744–45 (discussing the distinction between the treatment of future interests subject to conditions precedent and those which are subject to conditions subsequent for the purposes of applying the Rule Against Perpetuities).

267. See *id.* (noting that the distinction has significant legal consequences for the application of the Rule Against Perpetuities). As Professor Waggoner noted, the distinction was also significant for the Rule of Destructibility of Contingent Remainders. *Id.* The proposed model law follows the modern trend and abolishes the destructibility rule, *infra* App. § 3.8, so the relevance of the distinction in this context is not discussed further here.

268. See Waggoner, *supra* note 2, at 762–63 (discussing the effect that the reformulated structure would have on vested remainders subject to defeasance). Professor Gallanis has argued that the concept of vesting is not necessary for the proper functioning of the system of estates and future interests. See Gallanis, *supra* note 5, at 563–64 (describing a model act designed to update and simplify future interest law and noting that an important element of the proposed act is to "eliminate all classifications, including those based on vesting"). This assertion makes sense in the context of Professor Gallanis's broader reform proposal, which includes the abolition of the Rule Against Perpetuities. *Id.* at 565. Because the proposed model law avoids the broad topic of perpetuities reform, and because the concept of vesting is central to the operation of the Rule Against Perpetuities, the proposed model law maintains the vested/contingent distinction.

269. See *supra* notes 217–25 and accompanying text (discussing how and why the proposed model law will subject interests, such as a future interest in a grantor, to the Rule Against Perpetuities when such interests were not subject to the rule at common law).

In Example 21, *D*'s children have (in common law terms) a contingent remainder, and *E* has a contingent remainder.²⁷⁰ In Example 22, *E* has a vested remainder subject to divestment, and *D*'s children have an executory interest.²⁷¹ The contingent remainders in Example 21 both violate the Rule Against Perpetuities.²⁷² As a result, both interests would be stricken from the conveyance, leaving "to *A* for life." The executory interest in Example 22 also violates the Rule Against Perpetuities, and is stricken from that conveyance.²⁷³ *E*'s vested remainder in Example 22, however, is immune from the Rule Against Perpetuities.²⁷⁴ The conveyance in Example 22 therefore would be revised to read "to *A* for life, then to *E*." In other words, *E*'s interest survives in Example 22 but not in Example 21. Although this disparate treatment bothered Professor Waggoner and other commentators, it can be defended in terms of the probable intent of the grantor. In Example 22, it seems that the plain and immediate language "then to *E*" makes it reasonable to presume that *O* would have intended *E*'s interest to survive if the interest in *D*'s children was voided. In Example 21, the conditional language creating *E*'s interest makes *O*'s intent harder to gauge. Making guesses about the grantor's intent is an inherently uncertain and unreliable business, but it seems reasonable for the law to preserve interests created in direct language such as that in Example 22 where it voids interest created by vaguer language such as that used in Example 21.

Under the proposed model law's definition, the category of contingent future interests encompasses interests that at common law would have been classified as possibilities of reverter, rights of entry, contingent remainders, and executory interests.²⁷⁵ It also encompasses some interests that at common law would have been classified as reversions.²⁷⁶ The reversion in Example 14 provides an illustration: It is contingent because it is subject to a condition precedent (*A* dying before *B* either reaches the age of 21 or not).²⁷⁷ Similarly,

270. See *supra* note 255 and accompanying text (discussing how a contingent future interest is conveyed). For the reasons discussed above in connection with Example 19, there is also a contingent future interest in *O*.

271. See STOEBUCK & WHITMAN, *supra* note 13, § 3.6 (discussing how remainders and executory interests are classified).

272. See *id.* § 3.18 (discussing how the Rule Against Perpetuities is applied to contingent remainders and executory interests).

273. *Id.*

274. *Id.*

275. *Supra* note 248 and accompanying text.

276. *Supra* note 248 and accompanying text.

277. See HOVENKAMP ET AL., *supra* note 125, § 7.5(11) (explaining that remainders that will not become possessory until the occurrence of a condition precedent are contingent remainders).

the reversion in Example 21 is subject to a condition precedent (*A* dying before any of *D*'s children reach the age of 25 or none do).²⁷⁸ Because the proposed model law abolishes the immunity of interests created in the grantor from the Rule Against Perpetuities,²⁷⁹ this type of reversion would be subject to the Rule Against Perpetuities. There are two reasons, however, why this change would have virtually no practical significance. First, most contingent reversions would satisfy the Rule Against Perpetuities. The reversion in Example 21, for instance, is valid under the Rule Against Perpetuities because it vests or fails on *A*'s death, and *A* is a life in being. Second, the voiding of contingent interests that violate the Rule Against Perpetuities typically will leave a vested reversion.²⁸⁰ Again considering Example 21, when the contingent interests in *D*'s children and *E* are struck from the conveyance, all that remains is "to *A* for life." *O*'s reversion would then be vested, and immune from the Rule Against Perpetuities.²⁸¹ It is therefore difficult to come up with an example of a contingent reversion that would raise perpetuities concerns.

The category of vested future interests under the proposed model law includes interests that at common law would have been classified as vested remainders.²⁸² It also includes the majority of reversions—most common law reversions are not subject to a condition precedent, and the conditional reversions discussed in the preceding paragraph are relatively unusual.²⁸³ Vested future interests fall into three categories. First, an *indefeasibly vested future interest* is one that is not conditional (i.e., it is certain to become possessory) and not subject to divestment by a contingent future interest.²⁸⁴ *B*'s interest in Example 8, above, is an example. Second, a *defeasibly vested future interest* is one that can be divested by a contingent future interest.²⁸⁵ The future interest created in *B* in Example 16, above, is an example. In the terms of the vesting discussion above, a defeasibly vested future interest is one that is

278. *Id.*

279. *Supra* notes 217–25 and accompanying text (discussing how the proposed model law subjects all contingent future interests to the Rule Against Perpetuities regardless of whether they are held by the grantor or the grantee).

280. See SINGER, *supra* note 13, § 7.7.4 (discussing how the voiding of a contingent interest that violated the Rule Against Perpetuities will create a reversionary interest).

281. See STOEBUCK & WHITMAN, *supra* note 13, § 3.18 (stating that the Rule Against Perpetuities only applies to nonvested future interests).

282. *Infra* App. § 3.2–3.4.

283. *Infra* App. § 3.2–3.4; see HOVENKAMP ET AL., *supra* note 125, § 7.2 (explaining the characteristics of future interests classified as reversions).

284. *Infra* App. § 3.4(a).

285. *Infra* App. § 3.4(b).

subject to a condition subsequent.²⁸⁶ Third, a *vested future interest in an open class* is one that is created in an open class of persons where the interest of at least one member of the class is vested.²⁸⁷ This in turn means that (a) at least one member of the class is in existence (per the definition of vesting); (b) that class member's interest is not subject to a condition precedent (per the definition of vesting); and (c) it remains possible for new members to enter the class (because the class is open).²⁸⁸ *B*'s future interest in Example 15, above, is an example.

The interests of the current class members are by definition vested.²⁸⁹ The interests of the potential other class members will always be contingent.²⁹⁰ In some circumstances, they will be contingent because they are unascertained persons.²⁹¹ For example, consider a conveyance "to *A*'s children." *A* is still alive and has one child, *B*. Because we presume that *A* can still have children, the class of *A*'s children is still open, but the potential unborn children are unascertained and the interests of these potential class members are therefore contingent.²⁹² In other circumstances, it will be contingent because it is subject to a condition precedent.²⁹³ For example, consider a conveyance "to *A*'s children who reach the age of 21." *A* is alive and has two children, *B*, who is 25, and *C*, who is 18. *C*'s interest is contingent because it is subject to condition precedent. The interests of *A*'s potential unborn children are contingent both because they are unascertained and because their interest is subject to a condition precedent.²⁹⁴

286. See *supra* notes 260–68 and accompanying text (discussing the current distinction between contingent remainders subject to a condition precedent and defeasibly vested remainders subject to a condition subsequent).

287. *Infra* App. § 3.4(c).

288. See SINGER, *supra* note 13, § 7.4.2 (explaining that a vested remainder in an open class is a remainder belonging to an ascertainable class that can increase with no conditions precedent that must be satisfied before the remainder can become possessory).

289. See *id.* ("If a remainder is to a class that can increase, it is a *vested remainder subject to open*.").

290. See STOEBUCK & WHITMAN, *supra* note 13, § 3.9 (stating that future interests of potential and yet unascertained persons in a class are contingent remainders).

291. See *id.* ("A remainder is 'contingent' if it is created in favor of an unborn or otherwise unidentifiable person.").

292. See SINGER, *supra* note 13, § 7.7.4 (discussing the "fertile octogenarian" presumption that a woman can have more children until her death and how this presumption creates contingent remainders in her unascertained potential children).

293. See *id.* § 7.4.2 ("A remainder is contingent, rather than vested, if . . . there is a condition precedent that must be satisfied before the remainder is certain to become possessory.").

294. See *id.* (discussing contingent remainders in unborn children).

By having the Rule Against Perpetuities apply to contingent interests, but not to vested interests, the proposed model law changes the perpetuities treatment of class gifts.²⁹⁵ In most, but not all, U.S. jurisdictions, the Rule Against Perpetuities applies to vested remainders in an open class.²⁹⁶ In the leading English case on the issue, *Leake v. Robinson*,²⁹⁷ the interests of some, but not all, of the members of the class had vested.²⁹⁸ The court refused to protect the vested interests from the Rule Against Perpetuities, reasoning that the gift was made to the whole class, not to individual members of the class.²⁹⁹ This result has been widely criticized, and the leading commentators have demonstrated that there is no sound reason for the rule announced in *Leake*.³⁰⁰ Professor Leach stated, with characteristic vigor, that:

It is the thesis of this article that [the rule in *Leake*] is practically and analytically unsound; that no reason for the rule exists and that nothing which could be dignified by the name of a rationalization has ever been suggested; that the rule is anomalous in the light of analogies well established in English and American law; that, so far as it is a part of American law, it has become so through a mechanical citation of English authorities without independent examination of the problem involved; and that is high time that American courts and legislatures began the process of expunging this doctrine from our law.³⁰¹

The proposed model law follows Professor Leach's suggestion, and expressly immunizes vested future interests in an open class from the Rule Against Perpetuities.³⁰² The contingent future interests of potential future class members remain subject to the Rule Against Perpetuities.³⁰³

295. *Infra* App. § 3.5.

296. *See* BORRON ET AL., *supra* note 13, § 1265 (noting that although the whole class doctrine is generally followed some American courts have rejected it and some state legislatures have altered the doctrine via statute).

297. *See* *Leake v. Robinson*, (1817) 35 Eng. Rep. 979, 983 (Ch.) (applying the Rule Against Perpetuities to the vested and contingent interests at issue).

298. *Id.*

299. *See* BORRON ET AL., *supra* note 13, § 1265 (discussing the holding of *Leake v. Robinson* and its refusal to protect certain vested interests from the Rule Against Perpetuities).

300. *See id.* (noting that there "is no real explanation" for the *Leake* doctrine and discussing courts and legislatures that have not applied the rule).

301. *See* Leach, *supra* note 90, at 1329–30 (1938).

302. *Infra* App. § 3.4(c).

303. *Infra* App. § 3.4(c).

D. Rules Furthering Alienability

This subpart discusses the proposed model law's treatment of four common law rules: The Rule Against Perpetuities, the Doctrine of Worthier Title, the Rule in Shelley's Case, and the Rule of Destructibility of Contingent Remainders.

1. The Rule Against Perpetuities

The common law Rule Against Perpetuities promotes alienability by voiding certain contingent interests that vest or fail too far into the future.³⁰⁴ The rule is notoriously difficult to apply even for knowledgeable practitioners.³⁰⁵ Abolition or reform of the rule would go a long way towards simplifying the American law of estates and future interests. Perpetuities reform therefore would seem to be a logical candidate for inclusion in the proposed model law.

The proposed model law, however, intentionally avoids proposing any changes to the internal mechanics of the rule because perpetuities reform is a hotly contested issue that is the subject of substantial activity in state legislatures.³⁰⁶ No matter how desirable perpetuities reform would be, a provision in the model law taking sides in this complex debate would imperil the proposed model law in state legislatures.³⁰⁷ Further, comprehensive model legislation on the Rule Against Perpetuities has already been developed and widely adopted.³⁰⁸

The proposed model law, however, does make two important changes to perpetuities law. First, it makes future interests created in the grantor subject to the Rule Against Perpetuities.³⁰⁹ Second, it protects vested future interests in

304. See MAKDISI & THOMAS, *supra* note 13, § 28.01 (noting that the Rule Against Perpetuities was "[d]eveloped to improve transmissibility and therefore marketability of property interests").

305. See *id.* ("No rule in Anglo-American property has generated as much lawyerly debate and consternation as the rule against remoteness in vesting, commonly called the rule against perpetuities.")

306. See *supra* notes 97–117 and accompanying text (discussing the importance of enactability concerns for statutory reform of property law).

307. See *supra* notes 84–86 and accompanying text (explaining why this proposed model legislation differs from previous model legislation that failed to reform current property law).

308. See generally UNIF. STATUTORY RULE AGAINST PERPETUITIES (amended 1990), 8B U.L.A. 223 (2001).

309. *Supra* notes 113–15, 279 and accompanying text (noting the current distinction between future interests in the grantor and the grantee and discussing why the proposed model

an open class from the operation of the rule.³¹⁰ Because these changes are intimately linked to the basic structure of interests in property, they are both appropriate for the scope of the proposed model law. Neither change affects the internal operation of the Rule Against Perpetuities, so no additional steps would be necessary to incorporate these changes into the versions of the rule in force in various jurisdictions.

2. *The Doctrine of Worthier Title*

The operation of the Doctrine of Worthier Title is best illustrated through an example:

Example 23: *O* conveys Blackacre "to *A* for life, then to *O*'s heirs."

In common law terms, *A*'s life estate is followed by a contingent remainder in *O*'s heirs. Heirs are not identified until a person's death, so the remainder is contingent because it is in an unascertained person.³¹¹ The Doctrine of Worthier Title replaced the contingent remainder in *O*'s heirs with a reversion in *O* and the operation of the doctrine therefore rewrites the conveyances to read "to *A* for life."³¹² By destroying the contingent remainder, the Doctrine of Worthier Title promoted the alienability of property.³¹³

The Doctrine of Worthier Title originally applied to both testamentary and inter vivos transfers, but the testamentary branch of the doctrine no longer survives.³¹⁴ The inter vivos branch is also out of favor.³¹⁵ To the extent it

legislation would eliminate that distinction and subject both to the Rule Against Perpetuities).

310. *Infra* App. § 3.4(c); see *supra* notes 296–303 and accompanying text (discussing how the current Rule Against Perpetuities generally applies to vested remainders in an open class).

311. See STOEUCK & WHITMAN, *supra* note 13, § 3.9 n.2 (noting that "the persons who may be heirs of any person cannot be identified with certainty during that person's lifetime").

312. See BORRON ET AL., *supra* note 13, §§ 1601–1613 (explaining the application of the Doctrine of Worthier Title); HOVENKAMP ET AL., *supra* note 125, § 8.2 (same); MAKDISI & THOMAS, *supra* note 13, § 30.03(j) (same); STOEUCK & WHITMAN, *supra* note 13, § 3.15 (same).

313. See STOEUCK & WHITMAN, *supra* note 13, § 3.15 ("After the English courts came to recognize the validity of the contingent remainders, they developed a rule of law—the so-called Doctrine of Worthier Title—which precluded the creation of a contingent remainder in favor of the heirs of a grantor or a testator."); Bostick, *supra* note 169, at 1075–78 (noting that the "new" construction of the Doctrine of Worthier Title "freed the alienability of even more property by vesting title in presently ascertainable persons able to convey that title, rather than tying it down to heirs or next of kin whose identity was in doubt").

314. See Gallanis, *supra* note 5, at 543 ("The doctrine's testamentary branch is virtually extinct in the United States.").

315. See BORRON ET AL., *supra* note 13, §§ 1601–1613 (discussing the modern significance

survives today, it is more of a rule of construction than a rule of law.³¹⁶ The Doctrine gained its second life as a rule of construction in Judge Cardozo's opinion in *Doctor v. Hughes*.³¹⁷ Whatever the abstract merits of Judge Cardozo's position, the use of the Doctrine as a rule of construction has led to widespread confusion.³¹⁸ The proposed model law therefore abolishes the Doctrine of Worthier Title using language modeled after Section 2-710 of the Uniform Probate Code, which abolished the Doctrine for testamentary conveyances.³¹⁹

3. *The Rule in Shelley's Case*

The Rule in Shelley's Case, like the Doctrine of Worthier Title, promotes alienability by destroying a contingent remainder created in a person's heirs.³²⁰ The Rule applies to the following scenario:

Example 24: *O* conveys Blackacre: "To *A* for life, then to *A*'s heirs."

of the doctrine of worthier title and noting that the rule is now generally applied merely as a rule of construction); MAKDISI & THOMAS, *supra* note 13, § 30.03(j) (noting that "[t]he inter vivos branch of this rule is a rule of construction and can be avoided by showing contrary intent in the grantor"); STOEBUCK & WHITMAN, *supra* note 13, § 3.15 (discussing the movement by legislatures and courts away from applying the doctrine of worthier title). The doctrine was abolished in England in 1833. See BORRON ET AL., *supra* note 13, § 1603 ("The rule was abolished by statute in England many years ago. . .") (citing Inheritance Act, 1833, 3 & 4 Wm. IV, c. 106, § 3 (Eng.)).

316. See Gallanis, *supra* note 5, at 547 (noting that the doctrine of worthier title has changed from "an inflexible rule of law to a rule of construction that applies only when the donor's intent is unclear").

317. See *Doctor v. Hughes*, 122 N.E. 221, 221 (N.Y. 1919) (holding that a reference to heirs does not create a remainder upon which creditors can seize). The court noted: "But in the absence of modifying statute, the rule persists to-day, at least as a rule of construction, if not as one of property. There are modern instances of its application to facts hardly to be distinguished from those of the case at bar." *Id.* at 222.

318. See *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559, 563 (D.C. Cir. 1966) (discussing how use of the Doctrine of Worthier Title as a rule of construction has led to "a shower of strained decisions difficult to reconcile with one another and generative of considerable confusion in the law").

319. *Infra* App. § 3.6; see UNIF. PROBATE CODE § 2-710 (amended 1991), 8 U.L.A. 204 (1998) ("The Doctrine of Worthier Title is abolished as a rule of law and as a rule of construction.").

320. See SINGER, *supra* note 13, § 7.4.5 (noting that the Rule in Shelley's Case destroys contingent remainders and that the doctrine may be justified by "the modern idea that prohibiting owners from creating a contingent remainder in heirs serves to promote alienability of the property").

Note that the contingent remainder in this example is in *A*'s heirs, rather than *O*'s heirs as was the case with the Doctrine of Worthier Title. The Rule operates to merge the remainder and the life estate, creating a fee simple absolute in *A*.³²¹

The Rule in Shelley's Case has been abolished in most U.S. jurisdictions.³²² As Professor Waggoner observed, the Rule was "[b]ased solidly in the feudal system," and "should never have been adopted in America in the first place."³²³ Some statutory abolitions of the Rule have been ambiguous as to whether they apply to both testamentary and inter vivos conveyances.³²⁴ The proposed model law clearly abolishes the Rule in Shelley's Case for all conveyances of property.³²⁵

321. See BORRON ET AL., *supra* note 13, §§ 1541–1572 (discussing the development and application of the Rule in Shelley's Case); HOVENKAMP ET AL., *supra* note 125, § 8.1 ("When in the same conveyance an estate for life is given to a person with remainder to that person's heirs . . . , then the person to whom the life estate is conveyed takes the remainder in [] fee simple . . . and the person's heirs take nothing."); MAKDISI & THOMAS, *supra* note 13, § 30.03(i) ("The Rule in Shelley's Case operates to convert a remainder in heirs into a remainder in the ancestor."); STOEBUCK & WHITMAN, *supra* note 13, § 3.16 (describing the process and results of applying the Rule in Shelley's case to contingent remainders); Bostick, *supra* note 169, at 1068–70 (noting that by applying the Rule in Shelley's Case "the courts could guarantee that an estate had been created in which a grantee had an immediately alienable interest"); Gallanis, *supra* note 5, at 534–35 (stating that the Rule in Shelley's Case states that a remainder interest in land to a life tenant's heirs is held by the life tenant).

322. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 16.2 (Preliminary Draft No. 12, 2007) ("The Rule in Shelley's Case is repudiated. A remainder interest in favor of the life tenant's heirs (or the heirs of the body of the life tenant) passes to the life tenant's heirs (or the heirs of the body of the life tenant), not to the life tenant."); BORRON ET AL., *supra* note 13, § 1563 (discussing the limited extent to which the Rule in Shelley's Case is now recognized); HOVENKAMP ET AL., *supra* note 125, § 8.1 (noting that the Rule in Shelley's Case has been abolished by legislation in most states); MAKDISI & THOMAS, *supra* note 13, § 30.03(i) ("Most states have abrogated the Rule in Shelley's Case."); STOEBUCK & WHITMAN, *supra* note 13, § 3.16 (same); Bostick, *supra* note 169, at 1068–70 (noting that the Rule in Shelley's case is not the law in the majority of American jurisdictions); Gallanis, *supra* note 5, at 534–35 (same); C.C. Marvel, Annotation, *Modern Status of the Rule in Shelley's Case*, 99 A.L.R.2D 1161, 1165–66 (1965) ("In the majority of American jurisdictions, the Rule in Shelley's Case has been abolished, wholly or in part, by express statutory provisions."). The Rule was abolished in England in 1925. Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 131 (Eng.). The Rule appears to be thriving only in Arkansas and Delaware. See Gallanis, *supra* note 5, at 536–42 (discussing all the states that have abolished or no longer apply the rule in Shelley's Case and noting that only Arkansas and Delaware still use the doctrine).

323. Waggoner, *supra* note 2, at 756.

324. See BORRON ET AL., *supra* note 13, § 1563 ("Moreover, even those statutes which purport to apply to both deeds and to wills do not always cover all situations in which the rule in Shelley's Case would be applicable at common law.").

325. See *infra* App. § 3.7 (abolishing the Rule in Shelley's case); see also *supra* notes 322–24 and accompanying text (discussing how the Rule has been abolished in most U.S. jurisdictions).

4. Destructibility of Contingent Remainders

The Rule of Destructibility of Contingent Remainders comes into play if a contingent remainder fails to vest at or before the end of the preceding present interest.³²⁶ Consider the conveyance in Example 14, above. *O* conveyed Blackacre "to *A* for life, then to *B* if *B* reaches the age of 21." Say that *B* is 18 when *A* dies. The rule of destructibility would destroy *B*'s contingent remainder, because it had not vested by the time *A*'s life estate ended.³²⁷

The destructibility rule has been widely abolished,³²⁸ and appears to thrive only in Florida.³²⁹ The proposed model law explicitly abolishes the rule.³³⁰

E. Rules of Construction

The proposed model law includes two related rules of construction relevant to future interests.³³¹ Under the first rule, ambiguous language will be interpreted to create a vested, rather than a contingent, future interest.³³² Second, the language creating a contingent future interest will be interpreted to make that interest vest at the soonest possible time.³³³

326. See STOEBC & WHITMAN, *supra* note 13, § 3.10 (stating that under the "obsolete destructibility rule" contingent remainders are destroyed if they fail to vest "at or before the termination of the last preceding estate created by the same instrument").

327. See BORRON ET AL., *supra* note 13, § 193 (discussing how the destructibility rule applies to contingent remainders); MAKDISI & THOMAS, *supra* note 13, § 23.13(b) (same); STOEBC & WHITMAN, *supra* note 13, § 3.10 (same); Bostick, *supra* note 169, at 1074–75 (same).

328. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 25.5 (Preliminary Draft No. 12, 2007) ("The rule of destructibility of contingent remainders is not recognized as part of American law."); STOEBC & WHITMAN, *supra* note 13, § 3.10 ("[T]he destructibility doctrine has been eliminated by statute in England and in many of the American states."); Gallanis, *supra* note 5, at 530–34 (noting that the doctrine has been "abolished by statute or abrogated by judicial decision" in most American jurisdictions).

329. See Gallanis, *supra* note 5, at 530–31 ("Today, however, the rule seems to thrive in its traditional form only in Florida, where one can find post-World War II decisions endorsing it.").

330. *Infra* App. § 3.8.

331. *Infra* App. § 4.1(e).

332. *Infra* App. § 4.1(e).

333. *Infra* App. § 4.1(e); see BORRON ET AL., *supra* note 13, § 573 (noting that "as between a construction which effects an earlier or a more remote vesting the presumption is in favor of the earlier vesting"); MAKDISI & THOMAS, *supra* note 13, §§ 23.11(c), 30.03(f)(3) (noting that in construing a remainder, a court "favors a construction that will make it vested, and, second, if the interest is contingent the law will vest it at the earliest possible moment"); POWELL, *supra* note 13, § 24.04[2][b][ii] (discussing the modern preference for the rule favoring early vesting); Waggoner, *supra* note 2, at 754 n.88 (noting that "future interests are construed to become

The inclusion of these rules may mark a divergence between the proposed model law and the *Restatement (Third)*. The comments to Section 25.3 state that the common law rules favoring vesting are not endorsed by the *Restatement (Third)*.³³⁴ It is not obvious from the cross references provided in the Restatement comment that this is the case. Section 11.3 of the *Restatement (Third)* establishes the primacy of donor intent in interpreting ambiguous language.³³⁵ A comment to Section 11.3, however, notes that the grantor should be presumed to have favored the alienability of property,³³⁶ and vesting promotes alienability. In any event, the rules favoring vesting are well established and are eminently supportable because of their role in improving the alienability of property.³³⁷ Grantors, of course, may create contingent interests, but must use clear language to do so.³³⁸

V. Retroactivity and Constitutional Considerations

Prior proposals for estates and future interests reform have tended to steer clear of the topic of the constitutionality of retroactive changes in property law.³³⁹ This decision is eminently sensible—the constitutional issues involved

indefeasibly vested at the earliest possible time").

334. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 25.3 cmt. c. (Preliminary Draft No. 12, 2007) ("Historically, there was a constructional preference for vested interests and for vesting at the earliest possible moment. . . . Neither constructional preference is endorsed in this Restatement.").

335. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 11.3 (Preliminary Draft No. 12, 2007) (2003) (stating that rules of construction or constructional preference resolve an ambiguity unless evidence establishes that the donor had a different intention).

336. See *id.* § 11.3 cmt. m ("Public policy favors alienability of property, and hence disfavors restrictions on alienability. Consequently, ambiguities in donative documents affecting alienability should, unless overcome by evidence of a different intention, be resolved in favor of the construction that does not curtail alienability or curtails it less than other plausible constructions.").

337. See, e.g., BORRON ET AL., *supra* note 13, § 573 (stating that the doctrine of presumption in favor of early vesting is recognized everywhere); MAKDISI & THOMAS, *supra* note 13, §§ 23.11(c), 30.03(f)(3) (discussing the preference for, and public policy rationale supporting, the vesting of estates); POWELL, *supra* note 13, § 24.04[2][b][ii] (analyzing modern courts' preference for early vesting and the varying public policy rationales for this presumption, including increased alienability).

338. See POWELL, *supra* note 13, § 24.04[2][b][ii] ("The courts have clearly stated that the conveyor's intent controls; if the instrument clearly provides for a contingent remainder, . . . the courts must find the interest to be contingent.").

339. See Gallanis, *supra* note 5, at 569, 574 (discussing retroactive application of proposed reforms but not addressing constitutional issues); Waggoner, *supra* note 2, at 766 (summarizing

are complex and warrant article-length treatment of their own. This Part has the modest agenda of briefly arguing that the reforms included in the proposed model law are much less likely to raise retroactivity concerns than other types of changes to property law.

From both a constitutional and policy perspective, retroactive changes in property law are problematic because they undercut reasonably held expectations about property ownership. The majority of the substantive changes included in the proposed model law do not raise serious retroactivity concerns because they protect, rather than undermine, reasonable expectations about property.³⁴⁰ Consider the provision of the proposed model law that makes vested future interests in an open class immune from the Rule Against Perpetuities.³⁴¹ This reform would have the effect of validating certain interests that would have been void at common law.³⁴² By validating these interests, the proposed model law protects the expectations of the parties involved in the transaction. The grantor would have expected that the interests created by the transaction would be valid.³⁴³ The grantees also would have had this expectation—outside of the odd movie plot,³⁴⁴ ordinary people would not expect the invalidation of interests under the highly technical common law Rule Against Perpetuities. Similarly, the retroactive abolition of the Doctrine of Worthier Title,³⁴⁵ the Rule in Shelley's Case,³⁴⁶ and the Rule of Destructibility of Contingent Remainders³⁴⁷ would validate certain interests that would have

a proposal for reformulating the structure of estates without discussing the constitutionality of potential retroactive changes).

340. The changes in nomenclature included in the proposed model law have no substantive impact, and therefore do not raise retroactivity concerns—a person has no cause for complaint if her contingent remainder is now called a contingent future interest.

341. See *infra* App. § 3.4(c) ("[V]ested future interests in an open class are not subject to the Rule Against Perpetuities.").

342. See *supra* notes 296–99 and accompanying text (discussing the common law application of the Rule Against Perpetuities to vested remainders in an open class).

343. This expectation is reflected in the common law rule of construction that the conveyer desired a disposition of property to be as fully effective as possible. See POWELL, *supra* note 13, § 24.04[2][c] (discussing this common law constructional preference).

344. In the movie *Body Heat*, Kathleen Turner's character intentionally encourages the creation of an interest that violates the Rule Against Perpetuities so that she will receive the property when that interest is invalidated. *BODY HEAT* (Warner Bros. 1981).

345. See *infra* App. § 3.6 (abolishing retroactively the Doctrine of Worthier Title under the proposed model law).

346. See *infra* App. § 3.7 (abolishing retroactively the Rule in Shelly's Case under the proposed model law).

347. See *infra* App. § 3.8 (abolishing retroactively the Rule of Destructibility of Contingent Remainders under the proposed model law).

been void at common law, and would therefore preserve the expectations of the parties involved with the conveyance.³⁴⁸ Indeed, the retroactive abolition of the Rule of Destructibility of Contingent Remainders has been held universally to be constitutional.³⁴⁹

The provision of the proposed model law that makes future interests created in the grantor subject to the Rule Against Perpetuities³⁵⁰ would have the opposite effect, undermining expectations by voiding interests that would have been valid at common law.³⁵¹ For this reason, the proposed model law does not make this change retroactive.³⁵² Making even this change retroactive, however, might be constitutional. As Professor Bostick has noted, some courts have held the retroactive application of statutes that have invalidated some possibilities of reverter and rights of entry to be unconstitutional.³⁵³ Other courts, however, have gone the other way and upheld the retroactive application of these types of statutes.³⁵⁴ In any event, Professor Bostick is too quick to imply from these cases involving possibilities of reverter and rights of entry that retroactive abolition or alteration of the Doctrine of Worthier Title, the Rule in Shelley's

348. See discussion *supra* Part IV.D.2-4 (discussing the common law application of the Doctrine of Worthier Title, the Rule in Shelly's Case, and the Rule of Destructibility of Contingent Remainders).

349. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 25.5 n.2 (Preliminary Draft No. 12, 2007) (stating that statutes retroactively abolishing the Rule of Destructibility of Contingent Remainders have been held constitutional when challenged as effecting a deprivation of property without due process of law).

350. See *infra* App. § 3.5 ("The Rule Against Perpetuities applies to all contingent future interests, whether created in a grantee or grantor.").

351. See *supra* note 207 and accompanying text (discussing how the possibility of reverter and right of entry have generally been held to be immune from the Rule Against Perpetuities as interests created in the grantor).

352. See *infra* App. § 1.5 (addressing retroactivity).

353. See Bostick, *supra* note 169, at 1097 & n.166 (stating that in such cases these statutes have been declared unconstitutional violations of the Fourteenth Amendment); see also *Bd. of Educ. v. Miles*, 207 N.E.2d 181, 187 (N.Y. 1965) (declaring that a provision of a statute that retroactively invalidated reverter to a grantor's successors was unconstitutional under the Contract and Due Process Clauses); POWELL, *supra* note 13, §§ 20.03[3]-[4] (discussing potential constitutional problems with the retroactive alteration of a law relating to possibilities of reverter and rights of entry).

354. See *Kilpatrick v. Snow Mountain Pine Co.*, 805 P.2d 137, 140 (Or. Ct. App. 1991) (declaring a retroactive statute constitutional because the statute was neither "arbitrary and irrational" nor "harsh and oppressive"); *Hiddleston v. Neb. Jewish Educ. Soc'y*, 186 N.W.2d 904, 907 (Neb. 1971) (concluding that a statute retroactively limiting possibilities of reverter was reasonable and therefore did not violate the Contract or Due Process Clauses of the United States or Nebraska Constitutions); *Trs. of Sch. v. Batdorf*, 130 N.E.2d 111, 115 (Ill. 1955) (ruling that the Reverter Act, which provided that neither possibilities of reverter nor rights of entry for breach of condition subsequent would be valid for longer than fifty years, where the condition had not been broken, was a reasonable legislative act and therefore constitutional).

Case, and the Rule of Destructibility of Contingent Remainders would raise similar constitutional concerns.³⁵⁵ Retroactive abolition of these rules would validate interests that would be invalid at common law, and would therefore promote the reasonable expectations of property owners. By promoting, rather than undercutting, property owners' expectations, the retroactive application of the reforms included in the proposed model law should raise relatively little constitutional concern.

VI. Conclusion

The proposed model law developed in this Article owes a great deal to prior reform proposals, but differs in many ways from them. Two differences are especially significant. First, the proposed model law departs sharply from the *Restatement (Third)* on issues of vesting.³⁵⁶ Second, the proposed model law is highly focused on issues of enactability, and therefore avoids certain issues that have been included in previous attempts at creating a legislative reform of estates and future interests. Most notably, it avoids reform of the basic operation of the Rule Against Perpetuities, leading to substantive differences with the reforms proposed by Professor Gallanis.³⁵⁷ It also departs from Professor Gallanis's proposal by avoiding issues, such as acceleration, that are covered by other model laws.³⁵⁸

The development of the reformist *Restatement (Third)* suggests that now is the time to finally act on decades of calls for legislative reform of estates and future interests law. The proposed model law developed in this Article is offered as a starting point for discussion, but any proposed legislative solution to a complex legal problem should go through a comprehensive review process before it is recommended for widespread adoption. NCCUSL and/or the ALI therefore should immediately begin the institutional process of developing a model law to reform the American law of estates and future interests.

355. See Bostick, *supra* note 169, at 1098 (suggesting that any retroactive legislation reforming the Rule in Shelley's Case, the Destructibility Rule, and the Doctrine of Worthier Title would raise similar constitutional concerns as in cases seeking to retroactively reform future interests).

356. See *supra* notes 262–63, 334–37 and accompanying text (discussing the diverging approaches between the *Restatement (Third) of Property* and the proposed model law concerning vesting of interests).

357. See *supra* note 115 and accompanying text (contrasting the approach taken in this article with Professor Gallanis's proposed reform of estates and future interests, which incorporated abolition of the Rule Against Perpetuities).

358. See *supra* notes 157–62 and accompanying text (discussing acceleration and the reasons for the concept's omission from the model law proposed here).

*Appendix: A Proposed Model Law of Estates and Future Interests***1.0. General Matters.**

1.1. **Scope.** This law provides the basic system of ownership of both real and personal property, whether held in law or in equity.³⁵⁹

1.2. **Irrelevance of Feudal Concepts.** The property law inherited in this state from England reflected certain feudal vestiges such as the distinction between freehold and leasehold estates and the concept of seisin. These feudal concepts are archaic and irrelevant to the modern law of estates and future interests. To the extent that these feudal concepts survive in this state, they are abolished.³⁶⁰

1.3. **Free Alienability.** All present and future interests in property as a matter of their legal nature are fully alienable, and may be freely transferred during life and at death. The alienability of interests in property may be restricted by contract to the limited extent permitted by common law.³⁶¹

1.4. **Numerus Clausus.** The interests in property described in this law are the only permitted forms of property ownership. Conveyances of property may only transfer property in these forms. This paragraph codifies the common law *numerus clausus* principle.³⁶²

1.5. **Retroactivity.** All of the provisions of this law are retroactive, except as follows:

(a) Sections 2.6(a) and 3.5 combine to make the contingent future interest that accompanies a defeasible present interest subject to the Rule Against Perpetuities. Such future interests that are created in a grantor, at common law labeled possibilities of reverter and rights of entry, have previously been exempt from the Rule Against Perpetuities. This change in the perpetuities treatment of these interests created in a grantor is not retroactive. No change is made in this law to the perpetuities treatment of future interests accompanying a defeasible present interest that is created in any person other than the grantor. These contingent future interests, at common law labeled executory interests, have previously been, and remain, subject to the Rule Against Perpetuities.³⁶³

359. *Supra* note 134 and accompanying text.

360. *Supra* note 126 and accompanying text.

361. *Supra* notes 127–33 and accompanying text.

362. *Supra* note 235 and accompanying text.

363. *Supra* notes 218, 352 and accompanying text.

2.0. Present Interests in Property

2.1. Present Interest. A present interest is an ownership interest in property in which the owner has a current right to possession or enjoyment of the subject property.³⁶⁴

2.2. Fee Simple Absolute. A fee simple absolute is a present interest in real property that is unlimited in duration. Absolute ownership is the personal-property counterpart of the fee simple absolute. Because the fee simple absolute and absolute ownership are of unlimited duration, they are not subject to termination and are therefore never accompanied by a future interest. Words of inheritance are not necessary to create a fee simple absolute or absolute ownership. A fee simple absolute or absolute ownership may be created by language in the form of "to A," "to A and her heirs," or by other language that evinces an intention to create a present interest of unlimited duration.³⁶⁵

2.3. Nonrecognition of Fee Tail and Fee Simple Conditional. The estates of fee tail and fee simple conditional are not recognized in this state. To the extent they have been recognized in this state, they are abolished. Language that would have created a fee tail or fee simple conditional at common law creates a fee simple absolute.³⁶⁶

2.4. Life Estate. A life estate is a present interest in property that terminates on the death of one or more human measuring lives. The measuring life (or lives) must be a human life, and cannot be the life of a corporation, an animal, or any other nonhuman entity. The measuring life may be the life (or lives) of a person other than the owner of the life estate; at common law, this type of life estate was known as a life estate *pur autre vie*. A life estate may be created by language in the form of "to A for life" or other language that evinces a clear intention to create a present interest measured in duration by one or more human lives.³⁶⁷

2.5. The Tenancies. A tenancy is a present possessory interest in property that is of limited duration but is not defined in terms of a natural person's life.³⁶⁸ There are three types of tenancy:

364. *Supra* note 138 and accompanying text.

365. *Supra* notes 141–44 and accompanying text.

366. *Supra* notes 149–50 and accompanying text.

367. *Supra* notes 151–54 and accompanying text.

368. *Supra* note 171 and accompanying text.

(a) Term of Years. A term of years is a tenancy the duration of which is fixed in calendar dates or units of a year or multiples or divisions thereof.³⁶⁹

(b) Periodic Tenancy. A periodic tenancy is a tenancy the duration of which will continue for successive periods of time unless it is terminated.³⁷⁰

(c) Tenancy at Will. A tenancy at will is a tenancy that is terminable at the will of the transferor and also at the will of the transferee and that has no other designated period of duration. A notice period of the greater of thirty days or the interval between rental payments (up to a maximum of six months), must be given before one party unilaterally terminates a tenancy at will.³⁷¹

2.6. Defeasibility. A defeasible interest is a present interest in land that terminates upon the happening of an uncertain event. Any present interest may be defeasible.³⁷²

(a) A defeasible present interest is accompanied by a contingent future interest. The holder of this contingent future interest obtains the power to terminate the present interest upon the happening of the uncertain event. The statute of limitations for the exercise of the power to terminate begins to run immediately upon the happening of the uncertain event. The defeasible present interest does not end until the contingent future interest holder exercises the power to terminate in writing. The present interest holder may assert defenses including, but not limited to, waiver, election, and estoppel, to the exercise of the power to terminate. The present interest holder is responsible for all liabilities associated with the property during the time period between the happening of the uncertain event and the exercise of the power to terminate. The present interest holder is not liable to the contingent future interest holder for any portion of the rental value of the property during this time period.³⁷³

(b) The distinctions between the interests historically known as the fee simple determinable, the fee simple subject to a condition subsequent, and the fee simple subject to executory limitation, and their equivalents for present interests of lesser duration, are abolished. Language that at common law would have created any of these three fee simple estates now creates a fee simple defeasible.³⁷⁴

369. *Supra* note 173 and accompanying text.

370. *Supra* note 174 and accompanying text.

371. *Supra* note 175 and accompanying text.

372. *Supra* note 180 and accompanying text.

373. *Supra* notes 185–206 and accompanying text.

374. *Supra* notes 183–84 and accompanying text.

(c) If the contingent future interest accompanying a defeasible present interest is void because of application of the Rule Against Perpetuities or for any other reason, the entire conditional portion of the conveyance is invalid and the present interest holder owns the property unencumbered by the conditional language. For example, if the present interest conveyed is a fee simple defeasible, the striking of the conditional language renders this interest a fee simple absolute.³⁷⁵

3.0. Future Interests In Property

3.1. Future Interest. A future interest is an ownership interest in property in which the owner has no current right to possession or enjoyment of the subject property. The owner's right to possession or enjoyment is postponed until some time in the future and may be either certain or uncertain. A future interest is a present ownership interest in property, even though the right to possession or enjoyment is postponed until some time in the future and may be either certain or uncertain. A future interest arises when it is created, not in the future when and if the right to possession or enjoyment matures.³⁷⁶

3.2. Abolition of Classification System. The common law system of classification of future interests is abolished. The generic category "future interest" incorporates interests that would have been classified at common law as remainders, executory interests, reversions, possibilities of reverter, and rights of entry.³⁷⁷

3.3. Vested and Contingent Interests. A vested interest is one that is both (a) in an ascertained person and (b) not subject to a condition precedent. A contingent interest is one that is either (a) in an unascertained person or (b) subject to a condition precedent.³⁷⁸

3.4. Types of Vested Future Interests. Vested future interests fall into three categories:

(a) Indefeasibly Vested Future Interest. An indefeasibly vested future interest is one that is not conditional and not subject to divestment by a contingent future interest.³⁷⁹

375. *Supra* notes 224–25 and accompanying text.

376. *Supra* notes 139–40, 242 and accompanying text.

377. *Supra* note 248 and accompanying text.

378. *Supra* notes 250–51 and accompanying text.

379. *Supra* note 284 and accompanying text.

(b) Defeasibly Vested Future Interest. A defeasibly vested future interest is one that can be divested by a contingent future interest.³⁸⁰

(c) Vested Future Interest in an Open Class. A vested future interest in an open class is one that is created in an open class of persons where the interest of at least one member of the class is vested.³⁸¹ Consistent with Section 3.5, vested future interests in an open class are not subject to the Rule Against Perpetuities.³⁸² The contingent future interests of potential future class members are subject to the Rule Against Perpetuities.³⁸³

3.5. Applicability of Rule Against Perpetuities. The Rule Against Perpetuities applies to all contingent future interests, whether created in a grantee or grantor.³⁸⁴ It does not apply to vested future interests.

3.6. Abolition of Doctrine of Worthier Title. The Doctrine of Worthier Title is abolished for all conveyances of property, whether inter vivos or testamentary, as a rule of law and as a rule of construction. Language in a conveyance describing recipients as the grantor's "heirs," "heirs at law," "next of kin," "distributes," "relatives," or "family," or language of similar import, does not create or presumptively create a future interest in the grantor.³⁸⁵

3.7. Abolition of Rule in Shelley's Case. The Rule in Shelley's Case is abolished for all conveyances of property, whether inter vivos or testamentary, as a rule of law and as a rule of construction.³⁸⁶

3.8. Abolition of Rule of Destructibility of Contingent Remainders. The Rule of Destructibility of Contingent Remainders is abolished for interests created by any conveyance of property, whether inter vivos or testamentary, as a rule of law and as a rule of construction.³⁸⁷

4.0. Interpretation of Conveyances

4.1. Rules of Construction. Courts shall use the following rules of construction in interpreting conveyances of property made by deed, will, or other instrument. Courts may use other common law or statutory rules of

380. *Supra* note 285 and accompanying text.

381. *Supra* note 287 and accompanying text.

382. *Supra* notes 302, 341 and accompanying text.

383. *Supra* note 303 and accompanying text.

384. *Supra* note 217 and accompanying text.

385. *Supra* note 319 and accompanying text.

386. *Supra* note 325 and accompanying text.

387. *Supra* note 330 and accompanying text.

construction to the extent that those rules do not conflict with the rules set forth herein.³⁸⁸

(a) Rule Favoring Fee Simple Absolute. A fee simple absolute is favored over any other interest. A conveyance creates a fee simple absolute unless the language clearly creates a lesser estate.³⁸⁹

(b) Rule Favoring Term of Years and Disfavoring Tenancy at Will. A term of years is favored over a periodic tenancy and a tenancy at will. A periodic tenancy is favored over a tenancy at will. Courts may take into account the conduct of the parties, including but not limited to rental payments, in interpreting ambiguous conveyances of tenancies.³⁹⁰

(c) Rule Disfavoring Defeasibility. Defeasible interests in property are disfavored. If conditional language in a conveyance is ambiguous or precatory, that language shall be interpreted to create a nondefeasible interest.³⁹¹

(d) Rule Favoring Free Alienability of Property. Ambiguous language in conveyances shall be interpreted to favor the free alienability of property.³⁹²

(e) Rules Favoring Vesting. Ambiguous language in conveyances shall be interpreted to create a vested, rather than a contingent, future interest. Language creating a contingent future interest shall be interpreted to make that interest vest at the earliest possible time.³⁹³

388. *Supra* note 237 and accompanying text.

389. *Supra* note 238 and accompanying text.

390. *Supra* note 239 and accompanying text.

391. *Supra* note 240 and accompanying text.

392. *Supra* note 241 and accompanying text.

393. *Supra* note 333 and accompanying text.