CONFLICT OF LAWS AND THE TRANSITIVITY OF THE "RELATION BACK" OF SPECIAL POWERS OF APPOINTMENT

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Author's Synopsis: Section 274(a) of the Restatement (Second) of Conflict of Laws *describes a choice-of-law deployment of the so-called "relation back theory" of powers of appointment. The* Restatement *suggests that analogies to local-law exemplifications of the relation back theory in cases concerning remoteness of vesting and resulting trusts will allow a judge to derive—or at least assist a judge in deriving—the rule of section 274(a) in a conflicts case of first impression. This Article explores that suggestion by noting that, in the perpetuities and resulting trusts contexts, the relation back is transitive over successively generated special powers of appointment and then examining a suite of hypothetical conflicts cases in which that transitivity, if recognized for choice of law purposes, would be decisive.*

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I. CHOICE OF LAW AND THE "RELATION BACK" OF POWERS

The conflict of laws implication of the so-called "relation back theory" of powers of appointment[1] concerns choice of law[2] when, for example, an *inter vivos* trust whose validity is governed by the law of one state, *State A*,[3] grants a testamentary "special" (as

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[1] *See generally* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.4 cmt. f (AM. L. INST. 2011); JOHN A. BORRON, JR. ET AL., THE LAW OF FUTURE INTERESTS § 911 (3d ed. 2004).

[2] As a branch or department of law, conflict of laws comprises (1) rules concerning jurisdiction over matters involving what are, in respect of the *lex fori*, foreign elements, (2) rules concerning recognition of foreign judgments, and (3) choice of law rules. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 cmt. a (AM. L. INST. 1971); ADRIAN BRIGGS, THE CONFLICT OF LAWS 1 (2d ed. 2008); DAVID F. CAVERS, *A Critique of the Choice-of-Law Problem*, *in* THE CHOICE OF LAW: SELECTED ESSAYS, 1933–1983 3, 35 (1985). Choice of law rules concern the extent to which the *lex fori* will yield to foreign law in interstate or international cases; they are conventionally *jurisdiction* selecting rather than result- or norm-selecting rules:

> When a case arises in which a foreign law is offered in evidence or in which the applicability of the law of the forum is denied, a court faithful to the conventional approach will turn in search of a conflict of laws rule to determine the *jurisdiction* whose law should govern the question at issue. The conflicts rule indicates in which jurisdiction the appropriate law may be found. Assuming the law offered to be from that jurisdiction, the court will then proceed with the case, employing that law as a rule of decision. Not until its admission for that purpose does the content of that law become material.

CAVERS, *supra*, at 9; *see also, e.g.*, BRIGGS, *supra*, at 28.

[3] For conflicts purposes, the "governing law" applicable to a given express trust comprises the law(s) controlling the trust's validity, the construction (i.e., meaning and effect) of the trust's terms, and the trust's administration. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 10, topic 1, intro. note. The law(s) "governing" a particular express

opposed to "general") power of appointment[4] to a donee[5] domiciled in another state, *State B*. Assuming the special power itself is valid,[6] that it is exercised intentionally,[7] and that the intended exercise is within the scope of the power,[8] a particular appointment under the

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trust in these respects may be unitary (i.e., that of a single jurisdiction) or divergent and they may change, together or severally, over time. *See, e.g.*, Wilmington Tr. v. Wilmington Tr., 24 A.2d 309, 315 (Del. 1942) (finding settlor of trust created in New York intended change of law governing administration to effect change of law governing construction).

[4] Traditionally, the signal characteristic of a "special" power of appointment was merely that the class of permissible appointees should be expressly limited by the terms of the instrument granting the power. *See, e.g.*, GERAINT THOMAS, THOMAS ON POWERS ¶ 1.17 (2d ed. 2012); RONALD H. MAUDSLEY, THE MODERN LAW OF PERPETUITIES 60 (1979). In the United States, the acceptation of the term came to include the idea that the power is *not* a *general power*, "general power" having come to denote a power of appointment exercisable in favor of the power holder, her creditors, her estate, or the creditors of her estate. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.3 cmt. b; *see also* UNIF. POWERS OF APPOINTMENT ACT § 102(6), (10) (UNIF. L. COMM'N 2013) (defining terms "general power of appointment" and "nongeneral power of appointment," respectively).

[5] The "donee" of a power of appointment is the person to whom the power is granted—the *holder* of the power. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.2(b).

[6] Trust provisions granting a power of appointment must conform to general constraints according to which the terms of an express trust having definite or definitely ascertainable beneficiaries (i.e., an express trust *other than* a charitable trust or a noncharitable "purpose trust," *see infra* note 105) must be practicable, lawful, congenial to public policy, and for the benefit of the trust's beneficiaries. *See* UNIF. TR. CODE §§ 105(b)(3), 404 (UNIF. L. COMM'N 2010); RESTATEMENT (THIRD) OF TRUSTS §§ 27(2), 29–30 (AM. L. INST. 2003); HAROLD GREVILLE HANBURY & RONALD HARLING MAUDSLEY, MODERN EQUITY 317–26 (Jill E. Martin ed., 13th ed. 1989). Furthermore, excepting presently exercisable general powers, *see supra* note 4, a power of appointment is invalid at common law unless it is sure to be exercised (if at all) only within the perpetuities testing period. *See, e.g.*, MAUDSLEY, *supra* note 4, at 60–61; JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 922 (8th ed. 2009). And that principle has its analogy under modern "wait-and-see" perpetuities reforms. *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(b)–(c) (UNIF. L. COMM'N 1990). Thus, a power may be invalid if it can be exercised at a time beyond the testing period of an applicable rule against perpetuities or if it is not exercised within the wait-and-see period of an applicable perpetuities reform statute. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. a.

[7] "A power of appointment is exercised to the extent that: (1) the donee manifests an intent to exercise the power in an otherwise effective document . . . ." RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.1(1).

[8] *See generally id.* §§ 19.1(2)–(3), 19.8–19.15. For the notion of a donee's exceeding the relevant scope by "fraud on a power," see *id.* § 19.16; *see also* BORRON, *supra* note 1, § 981, at 547; THOMAS, *supra* note 4, ¶ 9.04.

power—that is, a given exercise of it—may be valid so far as the law of *State A* is concerned but invalid according to the law of *State B* or *vice versa*.[9] In that case, if the special power is a power to appoint "movables,"[10] then "as to questions of substantial validity,"[11] the appointment is valid only if it is valid under the state law that determines the validity of the trust (the law of *State A* in our example):

> An appointment made in the exercise of a power created under a trust to appoint interests in movables is valid . . . if made . . . *as to questions of substantial validity, in accordance with the law which determines the validity of the trust* or, if the power is a general power, in accordance with the law applicable to the disposition by the donee of his own property.[12]

This is at least superficially consistent with the conventional idea that, for certain purposes, the exercise of a special power of appointment "relates back" to the donor's creation of the power:

> It is frequently said that the property which passes upon the exercise of a power of appointment is the property of the donor and not the property of the donee of the power.

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[9] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. b (AM. L. INST. 1971).

[10] I.e., property in things other than land, for conflicts principles concerning property vary depending on whether the property in question is or is not real estate. *See id.* ch. 10, topic 1, intro. note.

[11] *Id.* § 274(a). In the nomenclature of the *Restatement (Second) of Conflict of Laws*, the limbs of the standard (if ineliminably vague) dichotomy in "issue characterization" between substantive questions, on the one hand, and questions about formalities and capacity, on the other, are tagged by the terms "substantial validity" and "formal validity," respectively. *See id.* § 274 cmt. b–c. Other secondary sources distinguish formal validity from, for example, "essential," "intrinsic," or "material" validity. *See* BRIGGS, *supra* note 2, at 9–11, 19. As to the role of issue characterization in conflicts analysis generally, see, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7; BRIGGS, *supra* note 2, at 8–13, 28; BRAINERD CURRIE, *Purchase-Money Mortgages and State Lines: A Study in Conflict-of-Laws Method*, *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 376, 381–82 (1963). The "substantial validity" of a given exercise of a power of appointment will depend, for example, on whether future interests granted by the exercise are liable to vest beyond the testing period of an applicable rule against perpetuities. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. b. The formal validity of an exercise will depend, for example, on requirements for the manner of exercise imposed by the instrument granting the power and on the donee's capacity. *See id.* cmt. c.

[12] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(a) (emphasis added) (internal cross references omitted); *see also id.* § 274 cmt. b.

> *It is said that the instrument by which the power is exercised is to be read back into the instrument which created the power. For this reason it is said* that the substantial validity of the exercise of the power is determined by the law which determines the validity of the trust under which the power was created.
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> This is undoubtedly so where the power is a special power, that is, a power to appoint among a limited class of persons. The appointees take the property from the donor rather than from the donee, even though the donee may select which members of the class shall take and in what proportions . . . . The applicable law is that which governs the validity of the trust and not that which would govern a disposition by the donee of his own property.[13]

Thus, the relation back seems to be capable of supplying a potent "foreign element"[14] in a case involving a trust-spawned power of appointment. It may supply the only such element—on the right facts, the law determining the validity of a trust that grants a power of appointment could be the only appropriate reference to any law other than, for example, the law of the donee's domicile.[15] And in any case, regardless of the number and weight of "connecting factors"[16] linking the matter to the *lex fori* or the law of a third state, the relation back will *determine* the choice of law governing the substantial validity of an exercise of a power of appointment if the power in question is a special power[17] (at least if the law of the forum is not so eccentric as to have rejected every other implication of the relation back of special powers).[18]

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[13] *Id.* § 274 cmt. b (emphasis added) (citations omitted).

[14] I.e., the conventional term in conflicts analysis for an aspect of a legal matter that, relative to the law of one jurisdiction with which the matter is connected, connects the matter with the law of some other jurisdiction. *See, e.g.*, *id.* § 2 cmt. a; BRIGGS, *supra* note 2, at 1.

[15] As to what may constitute an "appropriate reference" to a jurisdiction's law, see, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 (concerning choice of the *lex fori*).

[16] "Connecting factors" being Adrian Briggs' term for what the *Restatement (Second) of Conflict of Laws* less compactly calls "bases for the application of the local law of a state." *See* BRIGGS, *supra* note 2, at 20–21; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 cmt. f. Other commentators refer to such connecting factors even more compactly as "contacts." *See* Cavers, *supra* note 2, at 21.

[17] *See supra* notes 10–13 and accompanying text.

[18] As to the parenthetical condition, see *infra* Part IV.E.

II. TWO CONCEPTS OF CHOICE OF LAW RULES AND TWO CONCEPTS OF CHOICE

In one sense, the decisiveness with which the relation back of special powers determines the choice of law for substantial validity in this context—selecting the law[19] that determines the validity of the trust that spawned the special power without regard to the number or weight of connecting factors linking the case to other law—is, according to the *Restatement (Second) of Conflict of Laws* (*Restatement*), characteristic of choice of law rules pertaining to property:

> [A]ny rule of choice of law, like any other common law rule, represents an accommodation of conflicting values. Those chapters in the Restatement of this Subject which are concerned with choice of law state the rules which the courts have evolved in accommodation of the factors listed in [*Restatement* section 6]. *In certain areas, as in parts of Property, such rules are sufficiently precise to permit them to be applied in the decision of a case without explicit reference to the factors which underlie them.* In other areas, such as in Wrongs and Contracts, the difficulties and complexities involved have as yet prevented the courts from formulating a precise rule, or series of rules, which provide a satisfactory accommodation of the underlying factors in all of the situations which may arise. All that can presently be done in these areas is to state a general principle, such as application of the local law "of the state of most significant relationship," which provides some clue to the correct approach but does not furnish precise answers. In these areas, the courts must look in each case to the underlying factors themselves in order to arrive at a decision which will best accommodate them.[20]

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[19] As to the jurisdiction-selecting character of choice of law rules in general, see *supra* note 2.

[20] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (emphasis added) (internal cross references omitted); *see id.* § 6(2) (specifying general "choice of law principles"). For a nearby example of a choice of law rule that merely "state[s] a general principle, such as application of the local law 'of the state of most significant relationship,'" *id.* § 6 cmt. c, see *id.* § 270(a) (pointing, apropos of validity of trust of movables created *inter vivos*, to "the local law of the state with which, as to the matter at issue, the trust has its most significant relationship under the principles stated in § 6").

But the *uniqueness* of the reference (to applicable law) deduced from the relation back of special powers with respect to substantial validity contrasts with that deduced from the same consideration with respect to formalities. "[A]s to questions of formalities and of the capacity of the donee,"[21] the choice of law implication of the relation back is more relaxed: a putative exercise of a power granted by the terms of a trust is formally valid, and the exercising donee has sufficient capacity, if those things are true under "*either* the law [that] determines the validity of the trust" (that of *State A* in our example) "*or* the law applicable to [] disposition[s] by the donee of [her] own property,"[22] which, in the case of a testamentary power, is the law of the donee's domicile[23] (the law of *State B* in our example). In this context, the choice of law contribution of the relation back is additive, providing an *additional* "close relationship to the case"[24] under a general, alternative reference[25] principle for the choice of law governing formalities:

> Situations will arise where [for example] a will although invalid under the local law of the state where the decedent was domiciled at the time of his death, is valid under the local law of some other state having *a close relationship to the case* such as the state where the testator was domiciled at the time the will was executed. If in such a situation the courts of the state of the last domicil would

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[21] *Id.* § 274(b); *see supra* note 11.

[22] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(b) (emphasis added).

[23] When the power in question is a testamentary power (like the testamentary special power in our example), the hypothetical disposition by the donee of her own property that is most analogous to an exercise of the power of appointment is a *testamentary* disposition, and the law applicable to testamentary dispositions by the donee of her own property is the law of the donee's domicile governing the validity of domestic wills. *See id.* § 274 cmt. c. As we shall see, that law may include "alternative references" to the laws of other states. *See infra* notes 25–26 and accompanying text.

[24] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 263 cmt. g.

[25] The same idea is sometimes referred to in the literature as "*alternate* reference": "to determine the validity of a will not conforming to the law of the testator's last domicil, the Model Execution of Wills Act prescribes, by way of *alternate reference*, the law of the place of execution or the law of the testator's [residence] at the time of execution . . . ." DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS 227 (1965) (emphasis added). But apropos of *choice* of law, the term "*alternate* reference" evidently illustrates the solecism of taking "alternate" (by turns) to mean "alternative" (offering a choice). *See* H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 20 (Ernest Gowers ed., 2d ed. 1965); MICHAEL DUMMETT, GRAMMAR & STYLE FOR EXAMINATION CANDIDATES AND OTHERS 89 (1993).

> uphold the validity of the will by application of the local law of the other state, the forum will do likewise. The courts of the last domicil would be particularly likely to reach such a result in a situation where the difference between their own local law and that of the other state is relatively slight and does not stem from a significant divergence in policy. In such a situation, the courts of the last domicil might feel it more important to give effect to the intentions of the testator by upholding the will than to insist upon a rigid application of their local law.[26]

In the case of a testamentary power of appointment granted by the terms of a trust, the confluence of that alternative reference principle regarding formalities and the relation back yields that:

> In the absence of [express requirements for specified formalities of execution in the trust instrument granting the power], the courts will, in their desire to uphold the exercise of the power and thus give effect to the intentions of the donor and of the donee, hold that powers exercised by will or inter vivos are validly exercised by an instrument which meets the formal requirements of the law which governs the validity of the trust *or of the local law applicable to the disposition by the donee of his own property*. Thus, if the donee is given a power to appoint

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[26] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 263 cmt. g (emphasis added) (stating alternative reference principle for "will[s] of movables"); *see id.* § 239 cmt. g (stating same for "will[s] of land"). The "local law" of a given state is the state's domestic law, that is, the state's law *excluding* conflicts rules. *See id.* § 4; *see also id.* § 222 cmt. e, ch. 9, topic 2, intro. note; CAVERS, *supra* note 25, at 70. Thus, the *Restatement* would seem to regard alternative reference rules like those found in Uniform Probate Code (UPC) section 2-506, and Uniform Trust Code (UTC) section 403, as falling within the enacting state's conflicts apparatus rather than local law. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. a (thus characterizing alternative reference rule of Model Execution of Wills Act's counterpart to UPC section 2-506); CAVERS, *supra* note 25, at 227 (same). But that characterization is not beyond controversy:

> This [i.e., the Model Execution of Wills Act's counterpart to UPC section 2-506] is not so much a rule of alternative reference to the law of the state of execution, or of domicile, as it is a recognition that the policies of all the states are substantially the same and may be fulfilled by compliance with any—not just a particular one—of the formal requirements.

BRAINERD CURRIE, *Notes on Methods and Objectives in the Conflict of Laws*, *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 177, 186 (1963).

> by will, the appointment [sic] is validly exercised by a will which satisfies the requirements of the domicil of the donor or of the domicil of the donee.[27]

So, a putative exercise of a testamentary power of appointment granted by the terms of a trust is valid as to questions of formalities and the capacity of the donee if it is valid in those respects under *either* the law that determines the validity of the trust *or* the law of the donee's domicile.[28] But as to questions of *substantial* validity,[29] if the power in question is a special power, the appointment is valid only if it is valid under the law that determines the validity of the trust.[30] These are the choice of law rules that the *Restatement* deploys, in sections 274(b) and 274(a), respectively, to meet our simple example involving *States A* and *B*:

> § 274. Exercise of Power Under a Trust to Appoint Interests in Movables
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> An appointment made in the exercise of a power created under a trust to appoint interests in movables is valid, unless when the trust is created by will the appointment is invalid under the strong public policy of the testator's domicil at death, if made
>
> (a) as to questions of substantial validity, in accordance with the law which determines the validity of the trust or, if the power is a general power, in accordance with the law applicable to the disposition by the donee of his own property; and
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> (b) as to questions of formalities and of the capacity of the donee, in accordance with either the law which determines the validity of the trust or the law applicable to the disposition by the donee of his own property.[31]

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[27] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. c (emphasis added). The assumption at the end of the quoted passage that the law governing the validity of the trust in question is the law of the donor's domicile is sloppy; for that may or may not be the case. *See, e.g.*, *id.* § 270 (regarding validity of trust of movables created *inter vivos*).

[28] *See id.* § 274(b); *see also id.* § 274 cmt. c.

[29] *See supra* note 11.

[30] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(a); *see also id.* § 274 cmt. b.

[31] *Id.* § 274 (internal cross references omitted).

III. ANALOGY TO LOCAL LAW COMMITMENTS

The law "restated" by the *Restatement* is common law:[32] "In the United States and in other Anglo-American [sic] countries, Conflict of Laws rules generally form part of the common law."[33] It is not surprising, therefore, that the characteristic method of common law argument and justification, viz., analogy and distinction,[34] is sometimes used to elucidate the *Restatement*'s "black letter" formulations,[35] and that this may involve assumptions about the content of *local law*.[36] We should particularly expect this sort of elucidation when the black letter formulation in question is a rule that is, like *Restatement* section 274, "sufficiently precise to permit [it] to be applied in the decision of a case without explicit reference to the factors [among those listed in *Restatement* section 6] which underlie

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[32] "Common law" meaning judge-made rules and principles, legal *and* equitable, applicable in common law jurisdictions since the statutory unification of law and equity in England by the Judicature Acts of 1873 and 1875. *See, e.g.*, J.E. PENNER, THE LAW OF TRUSTS ¶¶ 1.10–1.15 (8th ed. 2012) (discussing unification of the jurisdictions in England). In this sense, "common law [is] contrasted with *statute law*" so that "equity is just another form of common law." A.W.B. Simpson, *The Common Law and Legal Theory*, *in* OXFORD ESSAYS IN JURISPRUDENCE 77, 77 (A.W.B. Simpson ed., 2d series 1973) (emphasis added).

[33] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5 cmt. c; *accord* BRIGGS, *supra* note 2, at 32 (attributing basic principles of "private international law" to "develop[ment] by the common law"); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (indicating particular respect in which "any rule of choice of law . . . [is] like any other common law rule").

[34] *See, e.g.*, CARLETON KEMP ALLEN, LAW IN THE MAKING 298–300 (4th ed. 1946); RUPERT CROSS, PRECEDENT IN ENGLISH LAW 24–26, 182–88 (3d ed. 1977); A.G. Guest, *Logic in the Law*, *in* OXFORD ESSAYS IN JURISPRUDENCE 176, 190–91 (A.G. Guest ed., 1968); A.W.B. Simpson, *The Ratio Decidendi of a Case and the Doctrine of Binding Precedent, in* OXFORD ESSAYS IN JURISPRUDENCE, *supra*, 148, 158, 171–72. As to the antiquity of this method of argument and justification and its independence of the relatively recent doctrine of precedent, see, e.g., H.F. JOLOWICZ, LECTURES ON JURISPRUDENCE 226–30 (J.A. Jolowicz ed., 1963).

[35] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5 cmt. b (indicating that a court derives its conflicts rules from, among other sources of law, "analogy, and from other forms of legal reasoning"). The *"black letter" formulations* of the *Restatement* are the numbered sections, such as section 274, as opposed to the Comments, Reporter's Notes, Introductory Notes, etc.: "The comments, it should be noted, no less than the *black letter* carry the approval of the [American Law] Institute." Herbert Wechsler, *Introduction* to RESTATEMENT (SECOND) OF CONFLICT OF LAWS vii, viii (AM. L. INST. 1971) (emphasis added).

[36] I.e., the domestic law of the hypothetical state whose conflicts rules the *Restatement* restates. *See supra* note 26.

[it]";[37] for such rules reflect judicial *experience* in multistate situations with "[t]he policies which underlie [] particular *local law* rules."[38]

The *Restatement*'s deployment of the relation back in section 274(a)—for choice of law on the substantial validity of appointments under special powers granted by the terms of trusts[39]—apparently involves two assumptions about the local law of the hypothetical state whose conflicts rules the *Restatement* restates, one concerning so-called "resulting trusts" and one concerning remoteness of vesting:

> [W]hen the power is a special power . . . [t]he appointees take the property from the donor rather than from the donee, even though the donee may select which members of the class shall take and in what proportions. If an appointment is made in trust and the trust fails there is a resulting trust to the estate of the donor and not to the estate of the donee. See Restatement of Trusts (Second), § 427. The permissible period under the rule against perpetuities begins at the time of the creation of the power and not at the time of its exercise. See 4 Restatement of Property § 273, Comment *d*. The applicable law is that which governs the validity of the trust and not that which would govern a disposition by the donee of his own property.[40]

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[37] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (quoted *supra* text accompanying note 20).

[38] *Id.* § 5 cmt. d (emphasis added); *see id.* § 6(2)(e) (indicating that "the factors relevant to the choice of the applicable rule of law include . . . the basic policies underlying the particular field of law . . . ."); *see also id.* § 6 cmt. h (regarding same). The movement from case-by-case application of general choice of law principles (described in *Restatement* section 6) that point to "the state of most significant relationship," *id.* § 6 cmt. c, and thereby "provide[] some clue to the correct approach but [do] not furnish precise answers," *id.*, to rules of "greater precision and definiteness," *id.* § 5 cmt. c, is, according to the *Restatement*, the natural evolution of conflicts rules: "As experience accumulates, some existing Conflict of Laws rules may be modified and additional rules may be devised in order to cover narrower situations with greater precision and definiteness." *Id.*

[39] *See supra* Part I.

[40] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. b.

A. Resulting Trust for Donor of Special Power

Because so-called "resulting trusts" are the equitable analogues of implied legal reversions,[41] the first of the local law instances of the relation back of special powers adduced in the passage just quoted (Resulting Instantiation) seems to follow merely from the conventional, legal-taxonomic distinction between special and general powers of appointment.[42]

> A resulting trust arises when a person (the "transferor") makes or causes to be made a disposition of property under circumstances (i) in which some or all of the transferor's beneficial interest is not effectively transferred to others (and yet not expressly retained by the transferor) and (ii) which raise an unrebutted presumption that the transferor does not intend the one who receives the property (the "transferee") to have the remaining beneficial interest.
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> Because the transferee under such a disposition is not entitled to the beneficial interest in question and because that beneficial interest is not otherwise disposed of, it remains in and thus is said "to result" (that is, it reverts) to the transferor or to the transferor's estate or other successor(s) in interest.[43]

The signal characteristic of a special power is that it cannot be exercised in favor of the donee, her creditors, her estate, or the creditors of her estate.[44] It is, therefore, not surprising that "[i]f an appointment is made in trust and the trust fails[,] there is a resulting trust to the estate of the donor and not to the estate of the donee";[45] for if there *were* a resulting trust to the estate of the donee, the donee's inadvertence in creating an incomplete

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[41] *See* RESTATEMENT (THIRD) OF TRUSTS § 7 (AM. L. INST. 2003); JOHN C. GRAY, THE RULE AGAINST PERPETUITIES §§ 116, 327.1, 414 (Roland Gray ed., 4th ed. 1942); BORRON, *supra* note 1, § 1240.

[42] I.e., the distinction described *supra* note 4.

[43] RESTATEMENT (THIRD) OF TRUSTS § 7 cmt. a.

[44] *See supra* note 4.

[45] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. b (quoted *supra* text accompanying note 40); *see also* RESTATEMENT (SECOND) OF TRUSTS § 427 (AM. L. INST. 1957).

express trust would succeed in converting her special power to a general one.[46]

B. Remoteness of Vesting

The other standard instance of the relation back of special powers that the *Restatement* adduces in support of section 274(a) (Perpetuities Instantiation)[47] also seems to follow naturally from an implicit policy of local law—in this case, the resolve to regulate remoteness of vesting. The Perpetuities Instantiation requires that the period during which the exercise of a special power of appointment can postpone the vesting of future interests is measured from the time the power was created:[48] "Where an appointment is made under a special power, the appointment is *read back* into the instrument creating the power (as if the donee were filling in blanks in the donor's instrument) *and the period of perpetuities is computed from the date the power was created*."[49] As a general account of the meaning and effect of powers, the relation back theory has its limitations,[50] but the Perpetuities Instantiation was thoroughly entrenched in the common law as the principle that the remotest date by which future interests granted by the exercise of a special power of appointment must

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[46] The contrary-to-fact conditional in the text posits the donee's *inadvertence* in creating an incomplete express trust because the acceptation of the term "resulting trust" may exclude a case in which the settlor is known to have intended the rebound: "Normal usage of the term excludes the case where the trust arises because of [the transferor's] own stipulation that it should, i.e., [when the trust] is an express trust to this effect, he being the settlor." SIMON GARDNER, AN INTRODUCTION TO THE LAW OF TRUSTS 288 (3d ed. 2011); *accord* RESTATEMENT (THIRD) OF TRUSTS § 7 cmt. a.

[47] *See supra* text accompanying note 40.

[48] *See, e.g.*, GRAY, *supra* note 42, §§ 474.2, 526.2, at 467, 514–15; BORRON, *supra* note 1, § 1274. The Perpetuities Instantiation covers testamentary general powers as well as special powers. *See, e.g.*, GRAY, *supra* note 42, § 514. On the other hand, that Instantiation does *not* cover presently exercisable general powers of appointment, "the remoteness of an appointment under [which] is to be judged [for perpetuities purposes] from the point of time of its exercise, and not from the time of its creation." GRAY, *supra* note 42, § 524; *accord* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c; RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.4 cmt. f(1) (AM. L. INST. 2011). "[A] general power of appointment presently exercisable is, for perpetuities purposes, treated as absolute ownership in the donee." Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1669 (1985); *accord* GRAY, *supra* note 42, § 477.

[49] MAUDSLEY, *supra* note 4, at 62 (emphasis added) (quoting W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 653 (1938)).

[50] *See infra* Part III.C.

vest (if at all) is reckoned from the time the power was created rather than from the time of exercise.[51]

In this context, the relation back prevents the exercise of a power of appointment, when possession of the power itself does not vest equitable ownership,[52] from postponing the vesting of future interests for longer than the donor of the power could have arranged without interposing the power.[53] The need for some such prevention is implicit in the local law's determination to limit the period during which the vesting of future interests can be postponed because without it, deployments of powers of appointment are liable to make the relevant limitation *elective*[54]—whether the limitation invalidates interests that may vest beyond the limitation period *ab initio*, as the common law rule against perpetuities (RAP) does,[55] or forces vesting within a "wait-and-see period," as the Uniform Statutory Rule Against Perpetuities does.[56]

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[51] *See supra* note 48. For examples of modern codification of the principle, see 20 PA. CONS. STAT. § 6104(c); MICH. COMP. LAWS § 556.124(1). All state statutory citations in this Article refer to the current statute unless otherwise indicated.

[52] I.e., a special or testamentary general power as opposed to a presently exercisable general one. "A presently exercisable general power of appointment is an ownership-equivalent power." RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.4 cmt. f(1) (AM. L. INST. 2011); *accord* RESTATEMENT (THIRD) OF TRUSTS § 74 cmt. a, at 25. *See supra* note 48.

[53] *See, e.g.*, GRAY, *supra* note 42, § 514; BORRON, *supra* note 1, § 1274.

[54] Legislative history indicates, for example, that the so-called "Delaware tax trap," Internal Revenue Code sections 2041(a)(3) and 2514(d), was a response to the peculiarity of Delaware law that the period determining the remotest date on which interests granted by exercise of a special power of appointment must vest is measured, contrary to the common law rule, from the time the power is *exercised*.

> In at least one State a succession of powers of appointment, general *or limited*, may be created and exercised *over an indefinite period* without violating the rule against perpetuities. In the absence of some special provision in the [Internal Revenue Code], property could be handed down from generation to generation without ever being subject to estate tax.

S. REP. No. 82-382, at 1 (1951), *as reprinted in* 1951 U.S.C.C.A.N. 1530, 1535 (emphasis added); *see* DEL. CODE ANN. tit. 25, § 501. As to the uniqueness of Delaware's rule on this point among common law jurisdictions having a rule against perpetuities, see, e.g., GRAY, *supra* note 42, § 514 n.1.

[55] *See, e.g.*, MAUDSLEY, *supra* note 4, at 4.

[56] *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES §§ 1, 3 (UNIF. L. COMM'N 1990). *See generally* MAUDSLEY, *supra* note 4, at 80–81; Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 REAL PROP. PROB. & TR. J. 569, 571–73 (1986).

C. The Force of Analogy—A Model Treating Like Cases Alike for Different Purposes of Law

That the local law of a given state recognizes both the Resulting Instantiation and the Perpetuities Instantiation cannot *entail* the state's recognition of the rule of *Restatement* section 274(a); for the common law eschewed several logical implications of the relation back of powers.[57] Thus, for example, even though the period during which the exercise of a special power of appointment can postpone the vesting of a future interest is measured from the date on which the power is created,[58] "[t]he words of the appointment [by means of such a power] are to be interpreted in the light of circumstances existing at the time the power is *exercised*."[59]

> *A* may bequeath his estate to *B* for life, remainder to such of *B*'s issue as *B* shall appoint by will. *B* has a son, *C*, who is born after *A*'s death, but who dies before *B*. Suppose *B* appoints "to the children of my son, *C*." If we were to read this into the original instrument creating the power and construe it in the light of circumstances then existing, we would conclude that the appointment is bad. For *C* was, at that time, an unborn person; and a bequest to the children of an unborn person would be void [*ab initio* under the RAP]. But since *C* died before *B*, and *B* was in being when the power was created, it is certain that the interest created by the appointment will vest at *B*'s death. Hence the appointment is good.[60]

So, the relation back theory does not behave argumentatively like an independent source of law[61]—it does not *yield*, by its logical implications, legal conclusions in jurisdictions that have received the common law.[62] It

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[57] *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.4 cmt. f; GRAY, *supra* note 42, §§ 523.1–523.2; BORRON, *supra* note 1, §§ 913, 1274, at 274–75; THOMAS, *supra* note 4, ¶¶ 7.169–7.170.

[58] *See supra* Part III.B.

[59] BORRON, *supra* note 1, § 1274, at 274 (emphasis added).

[60] *Id.* § 1274, at 274–75.

[61] I.e., in the way that the *rationes decidendi* of cases decided by superior courts do. *See, e.g.*, CROSS, *supra* note 34, at 155.

[62] "The [relation back] theory is not uniformly applied and does not predict the outcome in any particular case." RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.4 cmt. f.

is, like any other "general theoretical proposition[] of the common law,"[63] a generalization over the *rationes decidendi* of cases; it is an encapsulated attempt to "explain and justify past practice in the settlement of [certain kinds of] disputes."[64] And that means that its force as an argument for any particular legal conclusion depends on the strength of the relevant jurisdiction's (or jurisdictions') commitments—the commitments of the jurisdiction(s) in which, or with respect to which, the argument is pitched—to the kinds of cases that count as evidence for the theory.

Now, we want to explore that dependency, and it will be helpful, in doing so, to adopt, as a model, some particular interpretation of the *Restatement*'s adduction, in the Comment to section 274(a), of the Resulting and Perpetuities Instantiations.[65] It does not matter which particular interpretation we choose; for, as just explained, what we want to explore is a function of the logical form of the relation back theory as a general proposition of the common law: no matter *how* what (the Comment tells us) "is said" [66] about the Resulting and Perpetuities Instantiations is supposed to justify, explain, or otherwise support the rule of section 274(a), the strength of that justification, explanation, or other support is bound to depend on the strength of the relevant jurisdiction's (or jurisdictions') commitments to the kinds of cases that count as evidence for the relation back theory.[67] That means we can be guided by convenience in selecting our model interpretation; and convenience presumably recommends the most literal interpretation that the Comment will bear. We shall assume, therefore, that the point of the Comment's references to the Resulting and Perpetuities Instantiations is simply to *analogize* choice of law in the situations contemplated by section 274(a) to the forum state's imposition of resulting trusts and the regulation of perpetuities. On that

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[63] Simpson, *supra* note 32, at 92. "[F]or example the rule against perpetuities, or the doctrine of anticipatory breach . . . ." *Id.*

> What may be called general theoretical propositions of the common law, which are the stuff of legal argument and justification, take a variety of forms. Sometimes they are said to state *doctrines* of the common law (the doctrine of offer and acceptance), sometimes *principles* or *general principles* (the principle of 'volenti non fit iniuria') . . . .

Id. at 78.

[64] *Id.* at 94.

[65] I.e., the deployment of the references to the Resulting and Perpetuities Instantiations discussed *supra* in the text accompanying notes 34–40.

[66] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. b (quoted *supra* text accompanying note 13).

[67] *See supra* notes 63–66 and accompanying text.

interpretation, special powers relate back for the relevant choice of law purposes (according to the *Restatement*) *because* they relate back, under the local law of the state of the forum, in the Resulting and Perpetuities Instantiations.

Of course, things cannot be quite as simple as that. For one thing, when the *subjects* of cases that count as evidence for a general theoretical proposition of common law (like the relation back theory) are merely being analogized to the matter at hand, as when analogies to cases concerning local law on resulting trusts and remoteness of vesting are used to commend a choice of law rule, a tacit premise is that *there is no reason to treat the matter at hand differently*.[68] And though the rule of section 274(a) can be "applied in the decision of a case without explicit reference to the factors [listed in *Restatement* section 6] which underlie [it]," [69] it is axiomatic with the *Restatement* that such factors *do underlie* the rule,[70] which means that we have to recognize in the argument of the Comment (however we interpret it) some such further, tacit premises as (for example) (1) that as the Resulting and Perpetuities Instantiations reflect "the basic policies underlying the particular field of law" within in the meaning of *Restatement* section 6,[71] and (2) that in the situations contemplated by section 274(a), the balance of "the factors relevant to the choice of the applicable rule of law"[72] makes the basic policies underlying the law of powers of appointment determinative.[73]

Such elaborations are necessary to make our model interpretation plausible, but they do not affect the force, the *persuasiveness*, of the Comment's adduction of the Resulting and Perpetuities Instantiations. According to the model, that force is just the force of analogy in legal argument generally. But on any interpretation that depicts the Comment to section 274(a) as justifying, explaining, or otherwise supporting the rule of section 274(a), the force of the Comment's references to Resulting and

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[68] *See, e.g.*, CROSS, *supra* note 34, at 24 (characterizing "the [] principle that dissimilar cases should be decided differently" as "the converse" of "the principle that like cases must be decided alike").

[69] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (quoted *supra* in text accompanying note 20).

[70] "*All* choice-of-law rules should be derived from the principles stated in § 6." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 245 cmt. b (emphasis added).

[71] *Id.* § 6(2)(e).

[72] *Id.* § 6(2).

[73] "Varying weights will be given to a particular factor [of the kind listed in section 6(2)], or to a group of [such] factors, in different areas of choice of law." *Id.* § 6 cmt. c.

Perpetuities Instantiations will depend primarily on the extent of the relevant jurisdiction's (or jurisdictions') commitments in practice to those particular instances of the relation back.[74]

IV. EXTENDING THE CHOICE OF LAW RULE IN A STATE THAT HAS STRONG LOCAL LAW COMMITMENTS TO THE RELATION BACK OF SPECIAL POWERS

As a commendation of the rule of section 274(a), then, the *Restatement* will be most persuasive in or with respect to a common law state whose local law adheres to the Resulting and Perpetuities Instantiations.[75] If the judiciary of such a state (Committed State) has not already expressly recognized the rule of section 274(a) (and assuming the state's legislature has not done so),[76] the *Restatement* recommends the state's commitment to the Resulting and Perpetuities Instantiations as a basis for doing so.[77] A judge sitting in a Committed State who is considering *adopting* section 274(a) as a rule of decision in a case of first impression[78] may proceed by asking whether she agrees with the tacit premise[79] of the *Restatement* that in light of the local-law and multistate policy considerations[80] indicated in *Restatement* section 6,[81] there is no reason why a special power that "relates back" for purposes of the State's imposing resulting trusts and regulating perpetuities should not also relate back for purposes of determining choice of law;[82] for, again, according to the *Restatement*, though a choice of law rule of the "precision and definiteness"[83] of section 274(a)

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[74] *See supra* notes 63–66 and accompanying text.

[75] *See supra* Part III.

[76] "A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (AM. L. INST. 1971).

[77] *See id.* § 274 cmt. b; *see also supra* text accompanying note 40.

[78] I.e., a case in which a party's contention that a special power of appointment should "relate back" for choice of law purposes presents "a novel point of law" as far as the decisions that are binding on the judge as precedent are concerned. *See* CROSS, *supra* note 34, at 192.

[79] *See supra* text accompanying note 68.

[80] "The policies reflected by Conflict of Laws rules are essentially of two kinds: those which underlie the particular local law rules at issue and those which underlie multistate situations in general." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5 cmt. d.

[81] *See id.* § 6(2) (specifying general "choice of law principles").

[82] *See supra* note 68 and accompanying text.

[83] *See supra* note 38.

can be "applied in the decision of a case without explicit reference to the factors [listed in *Restatement* section 6] which underlie [it],"[84] such a rule *is underlaid* by those factors and, as a matter of policy, is to be justified in terms of them.[85]

On the other hand, such a judge—a judge sitting in a Committed State who is considering adopting section 274(a) as a rule of decision in a case of first impression—could not be faulted for relying on the *Restatement* itself as authority for the proposition that the policies underlying a Committed State's local-law treatment of special powers of appointment (as evidenced by the Resulting and Perpetuities Instantiations) and the policies underlying "multistate situations in general"[86] favor the rule of section 274(a): that is the confluence of the "black letter"[87] and the *Restatement*'s express rationale for the black letter on this point.[88] And the "great department of modern law"[89] that we call "conflict of laws" (and English jurists call "private international law")[90] "has been built up very largely on the researches and opinion of learned writers,"[91] so that "there is [or was in the first half of the twentieth century] hardly a case in which the opinion of learned writers, such as Story, Westlake, or Dicey [] is not cited as authority."[92] There is, of course, room within such a tradition for the authority of the American Law Institute.[93]

A. A Case for Extension

If the judiciary or, perhaps, the legislature of a Committed State has, with or without the help of the *Restatement*, already recognized the choice of law rule of section 274(a) as a part of the state's conflict of laws

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[84] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (quoted *supra* text accompanying note 20).

[85] *See supra* notes 38, 69–70 and accompanying text.

[86] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5 cmt. d.; *see also supra* note 80.

[87] I.e., *Restatement* section 274(a) itself. *See supra* note 35.

[88] *See supra* Parts I, III.

[89] ALLEN, *supra* note 34, at 237.

[90] *See, e.g.*, *id.*; BRIGGS, *supra* note 2, at 2; *see also* CAVERS, *supra* note 2, at 31.

[91] ALLEN, *supra* note 34, at 237. "[O]pinions of courts are not the only ingredients . . . . The opinions of commentators as to what decisions 'hold' are often equally influential." CAVERS, *supra* note 2, at 12 n.16.

[92] ALLEN *supra* note 34, at 239.

[93] As is attested by the six printed volumes of the *Restatement* containing citations in the courts through June of 2015. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS *passim* (AM. L. INST. 2016).

apparatus—making the state, we may say, a *Fully* Committed State[94]—the *Restatement* suggests a straightforward basis on which that rule may be extended by means of local-law elaborations of the Resulting and Perpetuities Instantiations. Suppose, for example, that a settlor, *S*, settles an irrevocable *inter vivos* trust, t_1, whose validity is determined by the law of *State A*[95] and under whose terms a beneficiary, D_1, who is domiciled in (different) *State B*, is granted a testamentary special power, p_1, to appoint the trust assets (which are "movables" within the meaning of the *Restatement*).[96] Suppose too that the dispositive arrangement effected by D_1's exercise of p_1 is a testamentary trust, t_2, whose "governing law" provision[97] designates the law of *State B* and under whose terms a beneficiary, D_2, who is domiciled in (yet different) *State C*, is granted a testamentary special power, p_2, over the trust assets. And suppose that the dispositive arrangement effected by D_2's exercise of p_2 is a testamentary "accumulation trust," t_3, whose "governing law" provision designates the law of *State C*.[98]

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[94] I.e., a state whose local law authorities expressly recognize the Resulting and Perpetuities Instantiations, *see supra* notes 76–77, *and* whose conflicts authorities expressly recognize the rule of *Restatement* section 274(a).

[95] As we shall shortly see, it would be an expository inconvenience if the fact that the validity of t_1 is determined by the law of *State A* were attributable to an application (in our hypothetical Fully Committed State) of the rule of *Restatement* section 274(a). *See infra* Part III.B–C. Let us stipulate, therefore, (1) that *S* did not create t_1 by the exercise of a special power of appointment, but rather by a transfer, in trust, of assets that she owned outright (or over which she held, at the time, a presently exercisable general power) to the trustee of t_1 subject to a "governing law" provision (*see infra* note 97) designating the law of *State A* and (2) that *State A* is the only state in which *S* was domiciled and the only state in which t_1 was administered. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270(a).

[96] *See supra* note 10 and accompanying text.

[97] I.e., a private choice of law provision of the kind authorized, for example, by the UTC. *See* UNIF. TR. CODE § 107(1) (UNIF. L. COMM'N 2010). The UTC's express authorization for such a provision pertains only to the "meaning and effect of the terms of the trust," as opposed to the validity or administration of the trust. *See id.* § 107 cmt.; *see also supra* note 3. But the UTC permits the terms of a trust to displace the alternative references (*see supra* notes 25–26 and accompanying text) for trust validity provided in UTC section 403. *See* UNIF. TR. CODE § 105. And the *Restatement* expressly recognizes a settlor's presumptive privilege to designate the law governing the validity and administration of a trust as well as the construction of the trust's terms. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 268, 270, 272.

[98] We may suppose also that p_1 is a valid power under the law of *State A*, *see supra* text accompanying note 6; that p_2 is a valid power under the laws of both *States A* and *B*, and that in each case, the exercise of the testamentary special power held by D_1 or D_2 is within the scope of the power, *see supra* note 8 and accompanying text, and valid "as to

The problem, let us say, is that a beneficiary of t_3, *B*, has petitioned a court in *State C* for an order striking the lengthy initial accumulation period prescribed by the terms of t_3 on the ground that the period violates the common law rule against accumulation of income.[99] In her response to *B*'s petition, the trustee of t_3, *T*, admits that the common law rule is in full vigor under the local law of *State C* but claims (1) that *State C*'s superior courts have frequently employed the rule of *Restatement* section 274(a) in deciding conflicts cases; (2) that because t_3 was created by the exercise of a special power of appointment (p_2) that was granted under the terms of a trust (t_2), the rule of 274(a) takes precedence in determining the substantial validity of t_3 (as the intended result of D_2's exercise of p_2) over D_2's privilege as the settlor of t_3 to designate "governing law" in the t_3 trust instrument;[100] (3) that the rule of section 274(a) points, on these facts, to the law of *State B*; and (4) *State B* has long since abrogated the common law rule against accumulation of income.[101]

B, of course, is not slow to notice that everything that *T* has said about the application of the rule of section 274(a) to t_3—as the intended result of D_2's exercise of p_2—can presumably be said with equal truth about t_2 in respect of D_1's exercise of p_1. And there is nothing in the *Restatement* to suggest that the rule of section 274(a) should (for some reason) be applied only once to a given set of transactionally related facts and, then, only to the latest-occurring proper subset of such facts that displays a trust created by the exercise of a special power of appointment that was itself granted under the terms of a trust. Therefore (*B*'s reply to *T*'s responsive pleading

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questions of formalities and of the capacity of the donee" (RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(b); *see supra* note 11) under the laws of all three states involved, *see supra* notes 21–23 and accompanying text.

[99] Although its durational limit is that of the common law RAP testing period, the rule against accumulation of income is a common law rule independent of the RAP and is recognized as such in the United States. *See* Gertman v. Burdick, 123 F.2d 924, 931 (D.C. Cir. 1941); *see generally* BORRON, *supra* note 1, § 1466; Robert H. Sitkoff, *The Lurking Rule Against Accumulations of Income*, 100 NW. U. L. REV. 501, 503–07 (2006). In some common law jurisdictions, violation of the rule wholly voids a prescribed accumulation; in others, violation voids accumulations only to the extent that they may exceed the perpetuities testing period. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 2.2, reporter's note 1 (AM. L. INST. 1983); BORRON, *supra* note 1, § 1469. The position advanced by our hypothetical beneficiary, *B*, in the hypothesized petition entails that *State C* subscribes to the stricter interpretation.

[100] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 269 cmt. k, at 160 (AM. L. INST. 1971); *see also id.* § 270 cmt. f, at 169.

[101] For real-life examples of such abrogation by statute, see DEL. CODE ANN. tit. 25, § 506; MICH. COMP. LAWS § 554.93(1)(d).

concludes) the rule of section 274(a) points, on these facts, not to the law of *State B*, but, *by recursive application*, to the law of *State A*, under which, as it happens (let us suppose), the common law rule against accumulation of income is in full vigor!

Thus, *B* is motivated to argue that the "relation back" of special powers under the rule of *Restatement* section 274(a) is transitive over such powers, and the *Restatement* clearly indicates the relevant argument to that effect given that *State C* is (as we shall suppose) a Fully Committed State:[102] to the extent that the rationale for a special power's relating back for choice of law purposes is the *lex fori*'s commitment to the Resulting and Perpetuities Instantiations,[103] the transitivity of the relation back within those Instantiation (that is, for purposes of imposing resulting trusts or regulating perpetuities) is presumably a strong reason for recognizing the transitivity of the relation back for purposes of determining choice of law.

B. The Transitivity of the Relation Back over Special Powers under Local Law

1. Apropos of Resulting Trusts

Like the basic idea of the Resulting Instantiation,[104] the transitivity of the relation back of special powers in that Instantiation (that is, for purposes of imposing resulting trusts) seems to follow naturally from the Committed State's recognition of the legal-taxonomic discrimination between special and general powers of appointment. If t_3 in our elaborated example should fail utterly (as would happen if, for example, t_3 constituted a noncharitable purpose trust[105] that was, for that reason, unenforceable

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[102] I.e., a state whose law expressly recognizes the Resulting and Perpetuities Instantiations as well as the choice of law rule of *Restatement* section 274(a). *See supra* note 94 and accompanying text.

[103] *See supra* text accompanying notes 64–74.

[104] *See supra* Part III.A.

[105] A noncharitable purpose trust is a noncharitable express trust lacking definite or definitely ascertainable beneficiaries. *See, e.g.*, UNIF. TR. CODE § 409(1) (UNIF. L. COMM'N amended 2018). *See generally* PENNER, *supra* note 32, ¶¶ 9.1–9.30; Paul Matthews, *The New Trust: Obligations without Rights?*, *in* TRENDS IN CONTEMPORARY TRUST LAW 1 *passim* (A.J. Oakley ed., 1996); Thomas Glyn Watkin, *Changing Concepts of Ownership in English Law During the Nineteenth and Twentieth Centuries: The Changing Idea of Beneficial Ownership Under the English Trust*, *in* CONTEMPORARY PERSPECTIVES ON PROPERTY, EQUITY AND TRUSTS LAW 139, 149–51, 154–55 (Martin Dixon & Gerwyn LL.H. Griffiths eds., 2007).

under the local laws of *States A*, *B*, and *C*),[106] the property that D_2 attempted to appoint from the trustee of t_2 to the nominal trustee of t_3 can hardly *result* in the sense of "jump[ing] back"[107] to D_1 or D_1's heirs given that D_1 never owned that property or had any right to own it. Again, the signal characteristic of a special power is that it cannot be exercised in favor of the donee, her creditors, her estate, or the creditors of her estate,[108] which means that the last person in our example who owned or was entitled to own the property in question was *S* and that the relation back of special powers is, therefore, presumably transitive for purposes of imposing resulting trusts.

2. For Perpetuities Purposes

It is certainly the case that the relation back is transitive over special powers for perpetuities purposes:

> If [a] trust or other donative disposition was created by the exercise of a nongeneral or testamentary power that was created by the exercise of a nongeneral or a testamentary power, the relation-back doctrine is applied twice and the donor of the first power is the transferor of the trust or other donative disposition created by the second donee's exercise of his or her power.[109]

Thus, if a power, p_1, is a special power of appointment that is exercised to grant another special power, p_2, and p_2 is exercised to grant yet another special power, p_3, and this process of successive generation continues until a special power p_{n-1} is exercised to create a special power, p_n, then no matter how large the number n is, we know that p_n is deemed to have been

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[106] Because, let us suppose, the laws of those states recognize no exception to the common law principle that "a private trust, its terms, and its administration must be for the benefit of its beneficiaries, who must be identified or ascertainable." RESTATEMENT (THIRD) OF TRUSTS § 27(b) (AM. L. INST. 2003) (internal cross-reference omitted); *see supra* note 105; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 269 cmt. d (AM. L. INST. 1971) (indicating that a testamentary trust may be invalid "because there are no beneficiaries to enforce it").

[107] "Semantically, a 'resulting' trust is a trust whose beneficiary is also the person from whom the trustee acquired the trust property: a beneficial interest 'results,' i.e. jumps back, to him." GARDNER, *supra* note 46, at 288.

[108] *See supra* note 44 and accompanying text.

[109] RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 27.1 cmt. j(3) (AM. L. INST. 2011). For codifications of this principle of transitivity, see, e.g., MICH. COMP. LAWS § 556.124(2); 20 PA. CONS. STAT. § 6104(c).

"created," for perpetuities purposes, on the date that p_1 was created because according to the relation back, p_n was created when p_{n-1} was created, and p_{n-1} was created when p_{n-2} was created, and the process of attribution continues back to the creation of $p_{n-x} = p_1$. The occurrence of a presently exercisable general power anywhere in the series $p_1, p_2, p_3 \ldots p_n$ would reset the date of creation for any power created by the exercise of that presently exercisable general power.[110] But among special powers (or testamentary general ones)[111] in an unbroken series of such powers formed by successive generation, the date of each successive power's "creation," for perpetuities purposes, is transitive because the relation back applies recursively.[112]

Like the basic idea of the Perpetuities Instantiation,[113] the transitivity of the relation back for perpetuities purposes seems to follow naturally from the Committed State's determination to limit the period during which the vesting of future interests can be postponed; for the relation back obviously has to be transitive over powers other than those the mere possession of which vests equitable ownership[114] if it is to prevent exercises of a series of special powers from postponing the vesting of future interests for longer than the donor of the initial power in such a series could have arranged without interposing the initial power.[115]

C. Reasoning from Local Law to Conflicts Again

The upshot is that *B* (in our elaborated example)[116] will argue that given the transitivity of the relation back of special powers in the Resulting and Perpetuities Instantiations (that is, for purposes of imposing resulting trusts and regulating perpetuities), the judge, as a member of the judiciary of a Fully Committed State,[117] should acknowledge the transitivity of the relation back of special powers for purposes of determining choice of law.[118]

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[110] *See supra* note 109 and accompanying text; *see also supra* note 48.

[111] *See supra* note 48.

[112] *See supra* note 109 and accompanying text.

[113] *See supra* Part III.B.

[114] I.e., over powers other than presently exercisable general powers. *See supra* note 52 and accompanying text.

[115] *See supra* text accompanying notes 52–56.

[116] *See supra* Part IV.A.

[117] *See supra* note 102 and accompanying text.

[118] *See supra* notes 80–82 and accompanying text.

Now, in this case,[119] the judge cannot rely on the *Restatement* itself as persuasive authority *on point*, that is, for the proposition that in light of the kinds of factors listed in *Restatement* section 6,[120] there is no reason why a special power that "relates back" *recursively* for the analogized purposes of local law should not also relate back recursively for choice of law purposes;[121] for the Restatement does not broach the transitivity of the relation back over successively generated special powers of appointment.[122] But surely the relevant analogy here is strong: to the extent special powers relate back for choice of law purposes[123] *because* they relate back in the Resulting and Perpetuities Instantiations,[124] and the relations back of special powers is transitive in the Resulting and Perpetuities Instantiations,[125] then presumably the relation back should be transitive for choice of law purposes. To that extent, the judge will agree with *B* (at least if we assume that this is a case of first impression)[126] that the rule of section 274(a) points, on our facts, not to the law of *State B*, but to the law of *State A*, under which, by hypothesis, the initial accumulation prescribed by the terms of t_3 is prohibited as a violation of the common law rule against accumulation of income, and that D_2's exercise of p_2 is therefore substantially invalid to the extent of the initial accumulation.[127]

T (our hypothetical trustee of t_3) may try to undermine *B*'s argument by suggesting that the transitivity of the relation back over successively generated special powers of appointment bears differently on the policy factors listed in *Restatement* section 6 that underlie the rule of section 274(a).[128] She (*T*) might suggest, for example, that if, on facts otherwise

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[119] As opposed to the situation considered *supra* text accompanying notes 78–93.

[120] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. L. INST. 1971) (specifying general "choice of law principles").

[121] *Cf. supra* notes 78–82 and accompanying text.

[122] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. b; *cf.* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 27.1 cmt. j(3) (AM. L. INST. 2011) (quoted *supra* text accompanying note 109).

[123] As provided in *Restatement* section 274(a). *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(a) (discussed *supra* Part I).

[124] *See id.* § 274 cmt. b (discussed *supra* Part III); *see also supra* text accompanying notes 64–74.

[125] *See supra* Part IV.B.

[126] I.e., there is no case that is binding on the judge as precedent whose *ratio decidendi* rejects the transitivity of the relation back over successively generated special powers for purposes of the choice of law rule of *Restatement* section 274(a). *Cf. supra* note 78.

[127] *See supra* Part IV.A.

[128] *See supra* text accompanying notes 84–86.

identical to the instant case, the common law rule against accumulation of income had been abrogated in *State C* for as long as it has been abrogated in *State B*, and there were a longer succession of successively generated special powers under trusts whose "governing law" provisions designated one or the other of those two states, "the protection of justified expectations"[129] and "ease in the determination and application of the law to be applied"[130] would militate against the transitivity of the relation back for choice of law purposes.

But on our model interpretation,[131] at least, that argument proves too much. The transitivity of the relation back over successively generated special powers is an aspect of the relation back in the Resulting and Perpetuities Instantiations that is, no doubt, less often *remarked* than the relation back itself, but it is no less well-settled: in the circumstances to which it applies under local law, the *transitivity* of the relation back is dictated by the rationale for the relation back *tout court*.[132] So, given the *Restatement*'s exclusive reliance on the Resulting and Perpetuities by way of express rationale for rule of section 274(a), *T*'s argument (above) about the protection of justified expectations and ease of determination and application is really just an argument against relating special powers back for choice of law purposes, that is, against the rule of *Restatement* section 274(a). That proves too much *for T's purposes* because *T needs* the relation back to *State B* to save t_3's initial accumulation period.[133] And even if the argument could help *T*, it would likely be dismissed (on our model interpretation) because, as we have seen, a judge sitting in a Committed

[129] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(d).

[130] *Id.* § 6(2)(g).

[131] According to which special powers relate back for choice of law purposes (according to the *Restatement*) just because they relate back, under the local law of the state of the forum, in the Resulting and Perpetuities Instantiations. *See supra* text accompanying notes 64–74. It is possible, of course, that the transitivity of the relation back of successively generated special powers of appointment provides an argument (along the lines suggested in the text by our hypothetical trustee, *T*) *against* the literalness of the model interpretation: it may be that the respective local-law policies underlying the Resulting and Perpetuities Instantiations ultimately have too little to do with the policies underlying choice of law to support a choice of law deployment of the relation-back theory and that the analogies adduced by the *Restatement* in support section 274 are more superficial than our model interpretation takes them to be. To that extent, the sense in which the rule of section 274(a) can be "applied in the decision of a case without explicit reference to the factors [listed in *Restatement* section 6] which underlie [it]," (*see supra* note 69) is also superficial. *See infra* text accompanying note 132.

[132] *See supra* Part IV.B.

[133] *See supra* text accompanying notes 99–101.

State may rely on the *Restatement* itself as authority for the proposition that the confluence of policies underlying a Committed State's treatment of special powers in the Resulting and Perpetuities Instantiations and the policies underlying "multistate situations in general" favors the rule of section 274(a).[134]

D. A Statutory Exception to Normal Transitivity for Additions to Trust

What would improve *T*'s position is a weakening of *State C*'s local-law commitment to the transitivity of the relation back on account of a supervening policy that did not displace the State's local-law commitment to the relation back of special powers altogether but limited its application, for reasons that resonate in the factors listed in *Restatement* section 6,[135] to a one-relation-back-*per*-power rule for at least some special powers granted by the terms of trusts. There is a provision of the Uniform Statutory Rule Against Perpetuities (USRAP) that might foot the bill, one that we can involve in our elaborated example if we stipulate that *State C* has enacted the USRAP and that t_3 is not a testamentary trust but rather a funded *inter vivos* trust whose "governing law" provision designates the law of *State B* and to which D_2's exercise of p_2 contributes an addition (of the assets appointed from t_2).

In that case, we have drawn, as far as *State C* is concerned, an exception to the common law transitivity of the relation back of special powers for perpetuities purposes;[136] for although the USRAP provides that generally "the time of creation of a nonvested property interest or a power of appointment is determined under general principles of property law,"[137] and those principles are expressly said to include the relation back of special powers,[138] the statute also provides that "[f]or purposes of [the USRAP], a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust . . . is created when

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[134] *See supra* text accompanying notes 86–93.

[135] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. L. INST. 1971) (specifying general "choice of law principles").

[136] I.e., the transitivity described *supra* Part III.B.2.

[137] UNIF. STATUTORY RULE AGAINST PERPETUITIES § 2(a) (UNIF. L. COMM'N 1990).

[138] "[G]eneral principles of property law adopt the 'relation back' doctrine. Under that doctrine, the appointed interests or powers are created when the power was created not when it was exercised, if the exercised power was a nongeneral power or a general testamentary power." *Id.* § 2 cmt.

the nonvested property interest or power of appointment in the original contribution was created."[139]

Thus, as far as *State C*'s local law is concerned, if a beneficiary of trust t_3, T_3B, has, as of the time just before D_2's death, under the terms of t_3, a nonvested beneficial interest in or a special or testamentary general power of appointment over the assets of t_3, and D_2 exercises her testamentary special power by appointing the assets of t_2 to the trustee of t_3 so as to subject those assets to the terms of t_3, then T_3B's resultant interest in or special or testamentary general power over the assets contributed from t_2 is "created," for perpetuities purposes (that is, for purposes of the USRAP),[140] not as of the time p_1 was created—as would be true under the common law rule[141]—but as of the time T_3B's interest in or power over the original *res* of t_3 was created.[142]

B (our hypothetical beneficiary-petitioner) will point out (1) that the USRAP's deviation from the pure transitivity of the common law relation back of powers is not a *rejection* of such transitivity (as one can see simply by supposing that t_3, in our latest elaboration of the example, was created by the exercise of a special power of appointment);[143] (2) that according to the legislative history,[144] the deviation is merely intended to spare trustees the administrative burden of having to account for separate perpetuities parcels within the *res* of a single trust;[145] and (3) that any given choice of law rule is as likely to point, in any given case, to the law

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[139] *Id.* § 2(c).

[140] The USRAP displaces the RAP in the enacting jurisdiction. *See id.* § 9.

[141] *See supra* note 109 and accompanying text.

[142] *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES § 2(c).

[143] For in that case, T_3B's interest in or power over the original *res* of t_3 will "relate back" to the date of creation of the power whose exercise created t_3. *See id.* § 2(a) (discussed *supra* notes 137–138 and accompanying text).

[144] I.e., the official Uniform Law Commission Comment to section 2 of the USRAP. "[T]he Comments to any Uniform Act, may be relied on as a guide for interpretation." UNIF. TR. CODE § 106 cmt. (UNIF. L. COMM'N 2010) (citing Acierno v. Worthy Bros. Pipeline Corp., 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code) and Yale Univ. v. Blumenthal, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act)); *see also, e.g.*, Harry Wilmer Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957, 970 (1940). For the proposition that decisions of foreign courts interpreting a given uniform act should be considered by courts in states that have enacted that act, see, e.g., Robert S. Summers, *Statutory Interpretation in the United States*, *in* INTERPRETING STATUTES: A COMPARATIVE STUDY 407, 427–28 (D. Neil MacCormick & Robert S. Summers eds., 1991).

[145] *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES § 2 cmt.

of a state that alleviates that particular burden (because, for example, the selected state has enacted the USRAP) as to the law of a state that imposes it (by adhering, for example, to the pure transitivity of the common law relation back of powers).[146] All of which indicates (*B*'s counterargument will conclude) that the USRAP's deviant transitivity is irrelevant to the application of the rule of *Restatement* section 274(a).

But *T* will insist that the USRAP's deviant transitivity reflects an important determination that as a matter of the basic policies underlying the Perpetuities Instantiation,[147] the transitivity of the relation back of special powers should be subordinated to convenience and common sense, both of which (*T* will say) militate in favor of a single application of the rule of section 274(a) with respect to any given exercise of a special power granted by the terms of a trust. It should be enough (*T*'s argument goes) for the donee of the exercised power and her immediate appointee(s)[148] to reckon the substantial validity of the exercise under the law that determines the validity of the trust under whose terms the exercised power was actually granted *determined*, for conflicts purposes, *without regard to whether that trust was itself created by the exercise of a special power of appointment*.[149]

We need not decide whether *B* or *T* has the better argument here. The point is that on the facts of our re-elaborated example,[150] the USRAP's deviant transitivity deprives *B*'s argument of the force of analogy on which the *Restatement*'s express commendation of the rule of section 274(a) depends and, thereby, deprives the rule of its wonted "precision and definiteness";[151] it allows *T* (assuming the case is one of first impression)[152] to treat the question whether the application of the rule should be recursive over successive exercises of successively generated special powers of appointment as an open one to be referred directly to the kinds

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[146] As to the jurisdiction-selecting character of choice of law rules, see *supra* note 1.

[147] I.e., "the basic policies underlying [that] particular field of law" within the meaning of RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(e) (AM. L. INST. 1971).

[148] *See supra* notes 129–130 and accompanying text.

[149] I.e., determined (in the case of a trust of movables) under the rules of *Restatement* section 269 or section 270 (determining choice of law on the validity of testamentary and inter vivos trusts, respectively) without regard to section 274. *Cf.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 269 cmt. k, at 160; *see also id.* § 270 cmt. f, at 169.

[150] *See supra* text accompanying notes 135–139.

[151] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5 cmt. c; *see also supra* note 38.

[152] *See supra* note 126 and accompanying text.

of factors listed in *Restatement* section 6[153] rather than the kinds of judicial decisions (constituting the Resulting and Perpetuities Instantiations) adduced by the *Restatement* in support of the rule itself.[154] In the re-elaborated example, the USRAP's deviant transitivity prevents *B* from characterizing the transitivity of the relation back of special powers as (1) latent in the rule of section 274(a) because inherent in the judicial decisions on local law that the rule analogizes and, therefore, (2) like the rule itself, "sufficiently precise to . . . be applied in the decision of a case without explicit reference to the factors"[155] described in *Restatement* section 6 which justify the rule's decisiveness in the choice of law.[156]

E. More Radical Departures

Of course, we can imagine local law departures from the Resulting and Perpetuities Instantiations that are more radical than the USRAP's deviant transitivity and, therefore, more threatening to *B*'s enterprise in our elaborated example.[157] Delaware, for instance, had, for a time, legislatively abrogated the Perpetuities Instantiation,[158] though it later partially reintroduced the Instantiation by way of statutory anti-"Delaware-tax-trap" protection.[159] If we imagine that *State C* in our elaborated example has abrogated the Perpetuities Instantiation *completely*, that will obviously undermine the state's commitment to the rule of section 274(a)—at least as far as the stated rationale for that rule provided by the *Restatement* is concerned[160]—as well as the force of *B*'s argument for the transitivity of the relation back of special powers under that rule. But if *State C*'s superior courts continued to apply the rule of section 274(a) in that case, *T* would be entitled, *a fortiori*, to treat the question whether section 274(a) should be applied recursively (over successive exercises of successively

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[153] *See supra* note 20 and accompanying text.

[154] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. b; *see also supra* text accompanying note 40.

[155] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (quoted *supra* in text accompanying note 20).

[156] *Cf. supra* notes 78–93 and accompanying text.

[157] *See supra* Part IV.A.

[158] *See* DEL. CODE ANN. tit. 25, § 501 (1935); GRAY, *supra* note 42, § 514 n.1.

[159] *See* DEL. CODE ANN. tit. 25, § 504. *See generally* James P. Spica, *A Trap for the Wary: Delaware's Anti-Delaware-Tax-Trap Statute Is Too Clever by Half (of Infinity)*, 43 REAL PROP. TR. & EST. L.J. 673 *passim* (2009).

[160] *See supra* Part III.

generated special powers of appointment) as one to be referred directly to the kinds of factors listed in *Restatement* section 6.[161]

As far as the *Restatement*'s stated rationale for section 274(a) is concerned,[162] a state whose local law completely rejected both of the adduced instances of the relation back (viz., the Resulting Instantiation and the Perpetuities Instantiation) would have no reason to adopt the choice of law rule of that section. It may therefore be doubted whether, in that case, the relation back of special powers would even occur as a candidate approach to be evaluated according to the factors listed in Restatement section 6.[163] But the case of Delaware's abrogation of the Perpetuities Instantiation, which was temporarily *complete*, suggests that radical excision of so pervasive a feature of the common law as the relation back of special powers may be impractical.

For one thing, Delaware's general abrogation of the relation back of powers is clearly limited to the Perpetuities Instantiation and other rules potentially limiting the duration of trusts: it is "for the purpose of any rule of law against perpetuities, remoteness in vesting, restraint upon the power of alienation or accumulations."[164] That prompts the reflection that a legislative intention to reject *all* of a common law "theory's" instances[165] cannot be *inferred* form a legislative rejection of any one of them, even the most prominent, because "[t]he presumption is for a minimum change to be effected by legislation in a common law area."[166] So that even a resolute abrogation of the Perpetuities Instantiation in a jurisdiction that

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[161] *See supra* notes 152–153 and accompanying text.

[162] *See supra* Part III.

[163] For a suggestion that the relation back *might* occur as a candidate even in that case, see *infra* note 166.

[164] DEL. CODE ANN. tit. 25, § 501(a).

[165] *See supra* notes 63–64 and accompanying text.

[166] RUPERT CROSS, STATUTORY INTERPRETATION 43–44 (John Bell & George Engle eds., 3d ed. 1995); *see, e.g.*, Robert C. Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297, 304–05 (1959) ("[N]o statute is to be construed as altering the common law[] farther than its words import."); Heaney v. Borough of Mauch Chunk, 322 Pa. 487, 490 (1936) ("Statutes in derogation of the common law must be construed strictly and only such modification of the law will be recognized as the statute clearly and definitely prescribes."); Nation v. W.D.E. Elec. Co., 563 N.W.2d 233, 236 (Mich. 1997) ("[S]tatutes in derogation of the common law . . . will not be extended by implication to abrogate established rules of common law."); KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 119 (2013) ("Among other substantive canons . . . statutes that alter the common law should be strictly construed.").

was antecedently a Fully Committed State [167] would leave both the Resulting Instantiation and the rule of *Restatement* section 274(a) presumptively standing. In that case, depending on the reasons for the abrogation, it might be possible to argue subsequently that the rule of section 274(a) is still supported by (what is presumably) the state's continuing commitment to the Resulting Instantiation in exactly the way suggested by the *Restatement*.[168]

And Delaware's partial reintroduction of the Perpetuities Instantiation by way of statutory anti-"Delaware-tax-trap" protection[169] indicates that a legislature intending to reform an aspect of the common law that is as deeply entrenched as is the relation back of special powers[170] may find it convenient to retain some vestige of the aspect rather than extirpate it

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[167] *See supra* note 94.

[168] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §274 cmt. b (AM. L. INST. 1971); *see also supra* text accompanying note 40.

[169] *See supra* note 159 and accompanying text.

[170] The durability of the "relation back" of special powers at common law is perhaps sufficiently explained by the logical implications we have noted concerning the standard characterization of special powers (which seems to entail the Resulting Instantiation when the exercise of such a power creates an incomplete express trust) and a determination (judicial or legislative) to regulate remoteness of vesting (which seems to entail the Perpetuities Instantiation when a special power can be exercised to create future interests). *See supra* text accompanying notes 44–46, 54–56. But it has no doubt been supported by lawyers' caste tendency to conceive exercises of legal powers in general in terms of filling out writs. Analytical jurisprudence (i.e., the analysis of legal concepts like rights, duties, property, legal personality, etc., *see, e.g.*, A.W.B. Simpson, *The Analysis of Legal Concepts*, *in* LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 335, 335 (1987)) provides a sweeping example in Jeremy Bentham, who explained what he called "investitive" and "divestitive" rights—legal powers to change the legal position of others (what Hohfeld identified by the "correlates" *power-liability*, *see* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 50–57 (Walter W. Cook ed., 1964))—as delegations of discrete legislative authorities, which, if exercised, implement and, thus, relate back for their consequences to the sovereign source of law. *See* JEREMY BENTHAM, OF LAWS IN GENERAL 80-91 (H. L. A. Hart ed., 1970); *see also* H. L. A. HART, *Legal Rights, in* ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 162, 170 (1982). Bentham even hit on the metaphor of filling in blanks:

> The horse which was yours, but by the gift you have made of it is become the horse of a friend of yours,—how has it been constituted such—constituted by law? Answer: By a blank left as it were in the command to the judge,—that blank being left to be filled up by you in favour of this friend of yours, or any other person to whom it may happen to be your wish to transfer the horse, either gratuitously or for a price.

3 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM PUBLISHED UNDER THE SUPERINTENDENCE OF HIS EXECUTOR, JOHN BOWRING 222 (Edinburgh, William Tait 1843) (emphasis omitted); *Cf. supra* text accompanying note 49.

entirely. There are, for example, relation-back-retaining anti-"Delaware-tax-trap" statutes in most states that have reformed their rules against perpetuities.[171] Thus, even in a reforming state, there is likely to be some, perhaps only vestigial trace of the relation back of special powers.

V. CONCLUSION

A vestigial commitment, however, will not bear the weight that the *Restatement*'s account of section 274(a) puts on the Resulting and Perpetuities Instantiations of the relation back theory. Again, the *Restatement* endorses the rule of section 274(a) as the judgment of judges sitting in Committed States[172] that in light of the local law and multistate policy considerations[173] indicated in *Restatement* section 6,[174] there is no reason why a special power that "relates back" for purposes of the Resulting and Perpetuities Instantiations should not also relate back for purposes of determining choice of law.[175] Thus, on our model interpretation, at least, a Committed State has its motivation to treat like cases alike as a reason to follow the choice of law rule of section 274(a).[176] But the force of that reason is bound to be proportional to the strength of the state's local-law commitments to the Resulting and Perpetuities Instantiations: unless those commitments predominate, they will merely recommend the rule of section 274(a) as one possible approach (to choice of law on the substantial validity of exercises of special powers granted under the terms of trusts), a possible approach to be selected or rejected based on the balance of factors like those listed in *Restatement* section 6.[177]

But for a state whose local law commitments to the Resulting and Perpetuities Instantiations *do* predominate (that is, for a Committed State),[178] the *Restatement*'s treatment of this particular choice of law problem exemplifies the "precision and definiteness" that it associates with evolutionary maturity in conflicts principles;[179] for the "black letter"

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[171] *See, e.g.*, MICH. COMP. LAWS § 554.93(3); 20 PA. CONS. STAT. § 6107.1(b)(3).

[172] *See supra* notes 75–77 and accompanying text.

[173] *See supra* note 80.

[174] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (AM. L. INST. 1971).

[175] *See supra* notes 78–93 and accompanying text.

[176] *See supra* Part III.C.

[177] *See supra* Part IV.D–E; *see also supra* text accompanying notes 159–161.

[178] *See supra* notes 75–77 and accompanying text.

[179] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5 cmt. c; *see also supra* note 38.

of section 274(a) does not refer to any of the factors in *Restatement* section 6 that purportedly underlie it,[180] and neither does the rationale for the rule as stated in the official Comment.[181] According to section 274(a), the relation back theory determines the choice of law on the substantial validity of an appointment under a special power granted by the terms of a trust[182] *regardless* of the number and weight of connecting factors linking the matter to the *lex fori* or the law of another state[183] and it does that, according to the *Restatement*, *because of* the *lex fori*'s commitment to the Resulting and Perpetuities Instantiations.[184]

In the *Restatement*'s scale of values, the move away from consequentialist reasoning[185] in terms of the factors listed in *Restatement* section 6 to rules that display the kind of "precision" that is characteristic of "formal reasoning"[186] and is exemplified by section 274(a)[187] is *progress* in the evolution of conflicts principles.[188] The *Restatement*'s express rationale for section 274(a)—analogizing choice of law in the situation the section addresses to impositions of certain resulting trusts and to certain aspects of the regulation of perpetuities[189]—suggests (on our model interpretation, at least) that local-law commitments supporting "general theoretical propositions of the common law"[190] like the relation back theory may be capable of yielding principles of the desiderated "precision." And, in that context, the transitivity of the relation back over successively generated

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[180] In the sense described in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (quoted *supra* text accompanying note 20).

[181] *See id.* § 274 cmt. b (quoted *supra* text accompanying note 40).

[182] *See supra* Part I.

[183] *See supra* text accompanying note 16; *see generally supra* Part II.

[184] *See supra* Part III.

[185] To borrow the term that James Harris uses to distinguish legal reasoning based on *policy* from "formal-doctrinal" reasoning based on the idea that "solutions to legal problems are to be sought from within the law . . . whether by appeal to some overarching maxim, or by analogical reasoning, or by any other justificatory process which assumes that sufficient premises are to be found in the established legal materials." J.W. Harris, *Legal Doctrine and Interests in Land, in* OXFORD ESSAYS IN JURISPRUDENCE 167, 167–69 (John Eekelaar & John Bell eds., 3d series 1987).

[186] "[T]hat is, an insistence that new legal problems should be referred, not to extra-legal ('policy') considerations, but to some feature of the already given legal materials." *Id.* at 170.

[187] *See supra* Part II.

[188] *See supra* note 38.

[189] *See supra* Part III.

[190] Simpson, *supra* note 32, at 78; *see also supra* note 63.

successively generated special powers of appointment illustrates (1) how "existing Conflict of Laws rules may be modified and additional rules . . . devised in order to cover narrower situations with greater precision and definiteness"[191] and (2) how the *Restatement* itself can contribute to that evolutionary process.

[191] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5 cmt. c (AM. L. INST. 1971) (quoted *supra* in note 38).