Alien Powers: Powers of Appointment, "Dogma," and the Pure Theory of Jurisdiction-Selecting Choice of Law

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When a trust whose validity is governed by the law of one state grants a power of appointment to a donee domiciled in another state, determining the substantial validity of an exercise of the power will sometimes require a choice of law. The different choice-of-law rules formulated to meet that case by the American Law Institute, on the one hand, and the Uniform Law Commission, on the other, are section 274(a) of the Restatement (Second) of Conflict of Laws and section 103(2) of the Uniform Powers of Appointment Act (UPAA), respectively. The primary contention of this Article is that Restatement section 274(a) and UPAA section 103(2) are both irrational in the sense that, in each case, the rule yields results that are inconsistent with the preferences for choice of law that are supposed by the rule's (institutional) author to inform the rule. But en route to that destructive conclusion, constructive evidence is collected indicating that in light of the common preference for jurisdiction-selecting choice of law (which goes unchallenged here), it would be better to adjust the approach of Restatement section 274(a) than to abandon it (as UPAA section 103(2) does). And occasion is taken to sketch a serviceable adjustment.

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I. INTRODUCTION

A power of appointment can induce a conflict of laws when, for example, an *inter vivos* trust whose validity is governed by the law of one state, *State A*,[1] grants a testamentary "special" (as opposed to "general")

1. For conflicts purposes, the "governing law" applicable to a given express trust comprises the body or bodies of law controlling the trust's validity, construction, and administration. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 10, topic 1, intro. note (AM. L. INST. 1971). The body or bodies of law controlling a particular express trust in these several 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, 314 (Del. 1942) (finding settlor of trust created in New York intended change of law governing administration to effect change of law governing construction).

power of appointment[2] to a donee[3] domiciled in another state, *State B*. Assuming that the special power itself is valid,[4] that it is exercised intentionally,[5] and that the intended exercise is within the scope of the power,[6] the dispositive arrangement effected by the exercise—that is, the attempted *appointment*—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*.[7] In

2. 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 para. 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 (AM. L. INST. 2011); *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).

3. 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).

4. 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") must be practicable, lawful, congenial to public policy, and for the benefit of the trust's beneficiaries. *See, e.g.*, 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 2, 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 2, 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.

5. "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).

6. *See generally id.* §§ 19.1(2)-(3), 19.8-19.15 (describing permissible appointments under valid powers). For the notion of a donee's exceeding the relevant scope by "fraud on a power," see *id.* § 19.16. *See also* JOHN A. BORRON, JR. ET AL., THE LAW OF FUTURE INTERESTS § 981, at 547 (3d ed. 2004); THOMAS, *supra* note 2, para. 9.04 (indicating that "fraud on a power" need not involve dishonesty or deception).

7. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. b.

that case, determining the validity of the exercise requires a choice of law.[8]

The different choice-of-law rules formulated to meet such a case by the American Law Institute (ALI), on the one hand, and the Uniform Law Commission (ULC), on the other, are section 274(a) of the Restatement (Second) of Conflict of Laws (Restatement of Conflicts)[9] and section 103(2) of the Uniform Powers of Appointment Act (UPAA),[10] respectively. These rules operate quite differently from one another but they are both conventional in being jurisdiction-selecting: each purports to determine, not the rule of decision (on the validity of the exercise of the power of appointment in question), but the *jurisdiction* whose law should provide the rule of decision.[11]

The primary contention of this Article is that Restatement of Conflicts section 274(a) and UPAA section 103(2) are both *irrational* in the sense that, in each case, the rule yields results that are inconsistent with the preferences—for choice of law—that are supposed, *by the rule's author*, to inform the rule.[12] But *en route* to that destructive conclusion, we shall collect constructive evidence indicating that in light of the common preference for jurisdiction-selecting choice of law (which shall go unchallenged here[13]), it would be better to *adjust* the approach of

8. "[T]he central problem of conflict of laws . . . is to find the appropriate rule of decision when the interests of two or more states are potentially involved." BRAINERD CURRIE, *On the Displacement of the Law of the Forum*, *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 3, 66 (1963). 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; 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, at 3, 35 (1985).

9. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(a).

10. UNIF. POWERS OF APPOINTMENT ACT § 103(2) (UNIF. L. COMM'N 2013).

11. As to the conventionality of this conception of choice of law, see, for example, CAVERS, *supra* note 8, at 9 (quoted *infra* text accompanying note 47).

12. This concept of irrationality, which is standard among economists and decision theorists, concerns the disutility of means to given ends: "if someone has a set of preferences that is not rational, it is possible to make book against him in such a way that whatever happens he will lose out by his own standards." DONALD DAVIDSON, *Hempel on Explaining Action*, *in* ESSAYS ON ACTIONS AND EVENTS 261, 268 (2001). *See also* F.P. RAMSEY, *Truth and Probability*, *in* PHILOSOPHICAL PAPERS 52, 78 (D.H. Mellor ed., 1990) ("If anyone's mental condition violated [rational-choice axioms], his choice would depend on the precise form in which the options were offered him . . . [h]e could have a book made against him by a cunning better and would then stand to lose in any event.").

13. *But cf. infra* text accompanying notes 49-50 (quoting two classical challenges in passing).

Restatement of Conflicts section 274(a) than to abandon it (as UPAA section 103(2) does).[14] The space available here will allow us only to *sketch* what might be a serviceable adjustment.[15]

II. RESTATEMENT OF CONFLICTS SECTION 274(A), IRRATIONALITY, AND THE TRANSITIVITY OF THE RELATION BACK OF SPECIAL POWERS[16]

Restatement of Conflicts section 274(a) provides that if the testamentary special power of appointment that we hypothesized above[17] is a power to appoint "movables,"[18] then "as to questions of substantial validity,"[19] the hypothesized *appointment*—that is, the hypothesized exercise of the power—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):

> § 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

14. *See infra* Parts III and IV.

15. *See infra* subpart IV.B and Part V.

16. Portions of this Part are based on James P. Spica, *Conflict of Laws and the Transitivity of the "Relation Back" of Special Powers of Appointment*, 56 REAL PROP. TR. & EST. L.J. 333, 333-56 (2021).

17. *See supra* text accompanying notes 1-7.

18. 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* RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 10, topic 1, intro. note (AM. L. INST. 1971).

19. *Id*. § 274(a). In the nomenclature of the Restatement of Conflicts, 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 8, at 9-11, 19. As to the role of issue characterization in conflicts analysis generally, see, for example, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7; BRIGGS, *supra* note 8, 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.

> 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.[20]

A. The Relation Back Theory

In support of section 274(a), the Restatement of Conflicts adduces the "relation back theory"[21] of powers:

> 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. 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. 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 (Second) of Trusts, § 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 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.[22]

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20. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 (emphasis added) (internal cross references omitted).

21. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.4 cmt. f (AM. L. INST. 2011). The "theory" of the relation back of powers is sometimes referred to as a "doctrine." *See, e.g.*, *id.* § 27.1 cmt. j(3); UNIF. STATUTORY RULE AGAINST PERPETUITIES § 2 cmt. (UNIF. L. COMM'N 1990); BORRON, *supra* note 6, § 911.

22. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. b. Whereas the "donee" of a power of appointment is the person to whom the power is granted (*see supra* note 3), the "donor" is the person who grants the power. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.2(a).

That is the sum total of the Restatement of Conflicts' express account of the rule of section 274(a).[23]

1. The Role of Analogy to Local Law

The law "restated" by the Restatement of Conflicts is common law:[24] "In the United States, and in other Anglo-American countries, Conflict of Laws rules generally form part of the common law."[25] It is not surprising, therefore, that the characteristic method of common law argument and justification, viz., analogy and distinction,[26] is sometimes used (as in the case of section 274(a)) to elucidate the Restatement of Conflicts' "black letter" formulations,[27] and that this may involve assumptions (as it does with section 274(a)) about the content of local law.[28]

23. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. a-h.

24. "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. 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).

25. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5 cmt. c; *accord* BRIGGS, *supra* note 8, 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 one respect in which "any rule of choice of law [is] like any other common law rule").

26. *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., 1961); A.W.B. Simpson, *The* Ratio Decidendi *of a Case and the Doctrine of Binding Precedent*, *in* OXFORD ESSAYS IN JURISPRUDENCE 148, 158, 171-72 (A.G. Guest ed., 1961). As to the antiquity of this method of argument and justification and its independence of the relatively recent doctrine of precedent, see, for example, H.F. JOLOWICZ, LECTURES ON JURISPRUDENCE 226-30 (J.A. Jolowicz ed., 1963).

27. *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"). In this context, "black letter" refers to the numbered sections of the Restatement of Conflicts, 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).

28. The "local law" of a given state is the state's domestic law, that is, the state's law *excluding* conflicts rules. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 4; *id.* § 222 cmt. e; *id*. ch. 9, topic 2, intro. note; DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS 70 (1965).

a. As a Sign of Evolutionary Maturity: Two Concepts of Choice-of-Law Rules

We should, perhaps, particularly expect this sort of elucidation when the black-letter formulation in question is a choice-of-law rule that the Restatement of Conflicts distinguishes as "sufficiently precise to permit [it] to be applied in the decision of a case without explicit reference to the [policy] factors [or "principles" among those listed in Restatement of Conflicts section 6] which underlie [the rule]":[29]

> [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 of Conflicts 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.[30]

Section 274(a) is evidently a rule of the distinguished kind: there is no reference to the "factors" or "principles" listed in Restatement of Conflicts section 6 in either the black letter of section 274(a) or the Comment elucidating the black letter.[31] And because rules of the distinguished kind reflect judicial *experience* in multistate situations with

29. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c.

30. *Id*. (emphasis added) (internal cross references omitted). For an 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*., 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 [section] 6"). This aspect of Restatement of Conflicts section 270(a) is discussed *infra* subpart IV.A.2.

31. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 (quoted *supra* text accompanying note 20); *id*. § 274 cmt. b (quoted *supra* text accompanying note 22); *see also id*. § 6(2) (specifying general "choice of law principles").

"[t]he policies . . . which underlie [] particular *local law* rules,"[32] we can expect them to be justified or explained in terms of local law. This is a mark of evolutionary as well as functional distinction; for the movement from case-by-case application of general choice-of-law principles described in Restatement of Conflicts section 6, which point to "the state of most significant relationship"[33] (and thereby "provide[] some clue to the correct approach but [do] not furnish precise answers")[34] to rules of "greater precision and definiteness,"[35] is, according to the Restatement of Conflicts, 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."[36]

b. As Justification for Unique-Reference, Jurisdiction-Selecting Choice

But there will be, in any case, a jurisprudential premium on analogy to local law in the explication of any choice-of-law rule that is, like Restatement of Conflicts section 274(a), both (1) capable of yielding a unique (as opposed to *alternative*) reference to foreign law and (2) conventionally jurisdiction-selecting.

i. Two Concepts of Choice in Choice of Law

The *uniqueness* of the reference (to appropriate law)[37] deduced, under section 274(a), from the relation back with respect to *substantial* validity contrasts with the reference deduced from the same consideration with respect to formalities. "[A]s to questions of formalities and of the capacity of the donee,"[38] 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

32. *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).

33. *Id*. § 6 cmt. c.

34. *Id*.

35. *Id*. § 5 cmt. c.

36. *Id*.

37. As to what may constitute an appropriate reference to a jurisdiction's law in general, see, for example, *id*. § 9 (concerning choice of the *lex fori*).

38. *Id*. § 274(b); *see supra* note 19.

to [] disposition[s] by the donee of [her] own property,"[39] which in the case of a testamentary power is the law of the donee's domicile[40] (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* (rather than exclusive) "close relationship to the case"[41] under a general, alternative reference[42] principle for the choice of law governing formalities:

> 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 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.[43]

So, according to Restatement of Conflicts section 274(b), 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.[44] But as to

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39. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(b) (emphasis added).

40. When the power of appointment in question is a testamentary power (like the testamentary special power in our example), the disposition by the donee of her own property that is most analogous to an exercise of the power 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 42-44 and accompanying text.

41. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 263 cmt. g.

42. 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 . . . ." CAVERS, *supra* note 28, at 227 (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).

43. 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*).

44. *See id*. § 274(b); *id*. § 274 cmt. c. The Restatement of Conflicts regards alternative reference rules like those found in Restatement of Conflicts section 274(b), Uniform Probate Code

questions of *substantial* validity, Restatement of Conflicts section 274(a) provides that 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.[45]

ii. Jurisdiction-Selecting Unique-Reference

If a unique-reference choice-of-law rule, like Restatement of Conflicts section 274(a) (with respect to special powers), is, like section 274(a), conventionally jurisdiction-selecting, its single choice is blind; for, again, such a rule purports to determine not the rule of decision (on the matter in issue) but the *jurisdiction* whose law should provide the rule of decision.[46]

> 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 conflicts 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.[47]

That raises a profoundly simple question: How can a litigant, who but for the "foreign element"[48] in her case would be entitled to demand justice according to the local law of the forum, be relegated by the forum to a

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(UPC) section 2-506, and Uniform Trust Code section 403, as falling within a state's conflicts apparatus rather than its 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 28, 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).

45. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(a); *id.* § 274 cmt. b.

46. *See supra* text accompanying note 11.

47. CAVERS, *supra* note 8, at 9.

48. "Foreign element" being 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.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 cmt. a; BRIGGS, *supra* note 8, at 1.

rule of decision selected without regard to the rule's content and, therefore, without regard to its effect upon the litigant's claim? "The court is [after all,] not idly choosing a law; it is determining a controversy. How can it choose wisely without considering how that choice will affect that controversy?"[49] This is a context in which the prospect of Justice's being blind is philosophically unsettling; for it seems to invite the criticism that:

> instead of declaring an overriding public policy, [a unique-reference, jurisdiction-selecting choice-of-law rule] proclaims the state's indifference to the result of the litigation. Let there be a domestic case of tort or contract, and the law of the state points to the *result* which alone can advance the social and economic policy embodied in that law. Let a conventionally suitable foreign factor be injected and the state immediately loses interest.[50]

But that criticism is avoided (or blunted) to the extent that a unique-reference, jurisdiction-selecting choice-of-law rule can be derived from or supported by analogies to *local law*. To that extent, the forum descries *in its own law, by the ordinary method of common law argument and justification*, a reason to look *away* for a rule of decision and to do so without regard to the content of the desiderated rule. Hence in a pure theory[51] of jurisdiction-selecting choice of law, a choice-of-law rule that can be derived or supported by analogical reasoning from the *lex fori* is charmed.

2. The Restatement of Conflicts' Assumptions about Local Law Apropos of Section 274(a)

As we have seen, the Comment to Restatement of Conflicts section 274(a) makes two assumptions about the local law of the hypothetical jurisdiction whose conflict of laws rules the Restatement of Conflicts restates: it assumes the state observes the relation back of special powers for purposes of (1) imposing resulting trusts and (2) regulating perpetuities (i.e., restricting remoteness of vesting).[52]

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49. CAVERS, *supra* note 8, at 19.

50. CURRIE, *supra* note 8, at 52.

51. "[B]y analogy with the distinction between 'pure' and 'organic' in chemistry. The pure theory simplifies and clarifies, enabling students to understand more readily the complexities manifest in the organic world." Martyn P. Thompson, *Foreword to the Second Edition* of KENNETH MINOGUE, ALIEN POWERS: THE PURE THEORY OF IDEOLOGY xiii (2d ed. 2007).

52. *See supra* note 22 and accompanying text.

a. Resulting Trusts for Donors of Special Powers

Because a resulting trust is just the equitable analogue of an implied legal reversion,[53] the first of the local law exemplifications of the relation back of special powers adduced in the Comment (Resulting Instantiation) seems to follow merely from the conventional, legal-taxonomic distinction between special and general powers of appointment.[54]

> 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.
>
> 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.[55]

The distinguishing 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.[56] It is, therefore, not surprising that "[i]f an appointment is made in trust and the trust fails[,] there is [in the absence of provision for takers in default] a resulting trust to the estate of the donor and not to the estate of the donee";[57] for if there *were* a resulting trust to the estate of the donee, the donee's inadvertence in creating an incomplete express trust would succeed in converting her special power to a general one.[58]

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53. *See* RESTATEMENT (THIRD) OF TRUSTS § 7 (AM. L. INST. 2003); JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES §§ 116, 327.1, 414 (Roland Gray ed., 4th ed. 1942); BORRON, *supra* note 6, § 1240.

54. I.e., the distinction described *supra* note 2.

55. RESTATEMENT (THIRD) OF TRUSTS § 7 cmt. a.

56. *See supra* note 2.

57. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. b (AM. L. INST. 1971) (quoted *supra* text accompanying note 22); RESTATEMENT (SECOND) OF TRUSTS § 427 (AM. L. INST. 1957).

58. 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" normally excludes the situation 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 [the transferor] being [the] settlor." SIMON GARDNER, AN INTRODUCTION TO THE LAW OF TRUSTS 288 (Paul Craig ed., 3d ed. 2011); *accord* RESTATEMENT (THIRD) OF TRUSTS § 7 cmt. a.

b. Remoteness of Vesting

The other exemplification of the relation back of special powers that the Restatement of Conflicts adduces in support of section 274(a) (Perpetuities Instantiation)[59] 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:[60] "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*."[61] As a general account of the effect of powers, the relation back theory has its limitations,[62] but the Perpetuities Instantiation is 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 vest (if at all) is reckoned from the time the power was created rather than from the time of exercise.[63]

In this context, the relation back prevents the exercise of a power of appointment, when *possession* of the power does not itself vest equitable ownership,[64] from postponing the vesting of future interests for longer

59. *See supra* text accompanying note 22.

60. *See, e.g.*, GRAY, *supra* note 53, §§ 474.2, 526.2, at 467, 514-15; BORRON, *supra* note 6, § 1274. The Perpetuities Instantiation covers testamentary general powers as well as special powers. *See, e.g.*, GRAY, *supra* note 53, § 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 53, § 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 53, § 477.

61. MAUDSLEY, *supra* note 2, at 62 (emphasis added) (quoting W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 653 (1938)).

62. *See infra* subpart II.B.1.

63. *See supra* note 60. 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.

64. I.e., when the power being exercised is 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 &

than the donor of the power could have arranged without interposing the power.[65] 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. Without it, deployments of powers of appointment are liable to make the relevant limitation *elective*[66]—whether the limitation invalidates interests that may vest beyond the limitation period *ab initio*, as the common law rule against perpetuities (RAP) does,[67] or forces vesting within a "wait-and-see period," as the Uniform Statutory Rule Against Perpetuities (USRAP) does.[68]

B. The Force of Analogy, "Dogma," and the Attempt to Treat Like Cases Alike for Different Purposes of Law

What has either the Resulting Instantiation or the Perpetuities Instantiation to do with choice of law? We may begin with the negative observation that a state's recognition of the Resulting and Perpetuities Instantiations cannot *entail* the state's recognition of the rule of Restatement of Conflicts section 274(a) (or any other particular interpretation of the relation back); for the common law eschews several logical implications of the relation back of powers.[69]

OTHER DONATIVE TRANSFERS § 17.4 cmt. f(1); *accord* RESTATEMENT (THIRD) OF TRUSTS § 74 cmt. a, at 25 (AM. L. INST. 2003). *See supra* note 60.

65. *See, e.g.*, GRAY, *supra* note 53, § 514; BORRON, *supra* note 6, § 1274.

66. 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 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 6 (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, for example, GRAY, *supra* note 53, § 514 n.1.

67. *See, e.g.*, MAUDSLEY, *supra* note 2, at 4.

68. *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES §§ 1, 3 (UNIF. L. COMM'N 1990); MAUDSLEY, *supra* note 2, at 80-81; Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 REAL PROP. PROB. & TR. J. 569, 571-73 (1986).

69. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.4 cmt. f; GRAY, *supra* note 53, §§ 523.1-523.2; BORRON, *supra* note 6, §§ 913, 1274, at 274-75; THOMAS, *supra* note 2, paras. 7.169-7.170.

1. The Relation Back Theory as a General Theoretical Proposition of the Common Law

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,[70] "[t]he words of the appointment [by exercise of such a power] are to be interpreted in the light of circumstances existing at the time the power is *exercised*."[71]

> *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.[72]

So, the relation back theory does not behave argumentatively like an independent source of law[73]—it does not *yield*, by its logical implications, legal conclusions in jurisdictions that have received the common law.[74] It is, like any other "general theoretical proposition[] of the common law,"[75] 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."[76] And that means that its force as an argument for any

70. *See supra* subpart II.A.2.b.

71. BORRON, *supra* note 6, § 1274, at 274 (emphasis added).

72. *Id.* § 1274, at 274-75.

73. I.e., in the way that the *rationes decidendi* of cases decided by superior courts do. *See, e.g.*, CROSS, *supra* note 26, at 155.

74. "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.

75. Simpson, *supra* note 24, 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.

76. *Id.* at 94.

particular legal conclusion depends partly 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.

2. The Premise of the Support of Restatement of Conflicts Section 6, the Stigma of "Dogma," and Incoherence

Obviously, the Comment to section 274(a) cannot explain, let alone commend, the rule of section 274(a) simply by *assuming* that it is recognized in the hypothetical jurisdiction whose conflicts rules the Restatement of Conflicts restates. So, how is the assumption that that hypothetical jurisdiction recognizes the Resulting and Perpetuities Instantiations supposed to explain or commend the choice-of-law rule? We need not look for any particularly nuanced interpretation, for as we are about to see,[77] no matter *how* what (the Comment tells us) "is said"[78] about the Resulting and Perpetuities Instantiations is supposed to justify, explain, or otherwise support the rule of section 274(a), the argument must include the tacit premise that the rule can be derived from or supported by the principles stated in Restatement of Conflict section 6. And, as we shall see, the rule of section 274(a) can be shown to *flout* the principles stated in section 6 to the extent the rule is analogous to the Resulting and Perpetuities Instantiations.

a. The Premise of the Support of Restatement of Conflicts Section 6 and the Stigma of "Dogma"

The Comment's argument in support of section 274(a) (however we interpret that argument) must include the premise that the rule of the section can be derived from or supported by the principles stated in Restatement of Conflicts section 6 because it is axiomatic with the Restatement of Conflicts that "[*a*]*ll* choice-of-law rules should be derived from the principles stated in [section] 6."[79] Otherwise, such rules, *especially* those that are "sufficiently precise to permit them to be applied in the decision of a case without explicit reference to the factors [listed in section 6] which underlie them,"[80] would be liable to be stigmatized as

77. *See infra* subparts II.B.2.a-b and II.C.

78. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. b (AM. L. INST. 1971) (quoted *supra* text accompanying note 22).

79. *Id*. § 245 cmt. b (emphasis added).

80. *Id*. § 6 cmt. c (quoted *supra* text accompanying note 30).

the sort of "dogma" the retreat from which is supposed signally to distinguish the Restatement of Conflicts (*Second*) from the first *Restatement of Conflict of Laws*:

> The essence of [] change has been the jettisoning of a multiplicity of rigid rules in favor of standards of greater flexibility . . . [and] candid recognition that black-letter formulations often must consist of open-ended standards . . . [presenting] *a striking contrast to the first Restatement in which dogma was so thoroughly enshrined* . . . Restatement Second supplants these rules by the broad principle that rights and liabilities with respect to a particular issue are determined by the local law of the State which, as to that issue, has "the most significant relationship" to the occurrence and the parties. The "factors relevant" to that appraisal, absent a binding statutory mandate, are enumerated generally [in section 6] . . . The *retreat from dogma* that is so pervasive a feature of this work . . . .[81]

So, although the rule of section 274(a) can be "applied in the decision of a case without explicit reference to the factors [listed in Restatement of Conflicts section 6] which underlie [it],"[82] it is not (the argument must go) a mere "rigid rule[]" of "dogma" because such factors *do underlie* it. That means that we have to recognize in the argument of the Comment to section 274(a) (however we interpret that argument) some such tacit premises as (for example) that the Resulting and Perpetuities Instantiations reflect "the basic policies underlying the particular field of law" within the meaning of Restatement of Conflicts section 6[83] and that in the situations contemplated by section 274(a), the balance of "the factors relevant to the choice of the applicable rule of law"[84] makes the basic policies underlying the law of powers of appointment determinative.[85]

b. Incoherence

The trouble is that to the extent the rule of section 274(a) is analogous to the Resulting and Perpetuities Instantiations, it must apply recursively over a series of successively generated special powers of appointment,[86] and that can easily cause the rule to *oppose* the

81. Wechsler, *supra* note 27, vii-viii (emphasis added).

82. *See supra* note 80 and accompanying text.

83. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(e).

84. *Id*. § 6(2).

85. "Varying weight 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.

86. *See infra* subpart II.C.

preponderance of the factors listed in Restatement of Conflicts section 6 in situations contemplated by section 274(a). Thus (as we are about to demonstrate), at the confluence of the Restatement of Conflicts' accounts of the rule section 274(a) in particular and of choice-of-law rules in general, the Restatement of Conflicts implicitly repudiates Restatement of Conflicts section 274(a).

C. Proof of Incoherence

1. A Case in Point

We can illustrate that repudiation by supposing that a settlor, *S*, settled an irrevocable *inter vivos* trust, *t1*, whose validity was determined by the local law of *State A*[87] and under whose terms a beneficiary, *D1*, who was domiciled in (different) *State B*, was granted a testamentary special power, *p1*, to appoint the trust assets (which were "movables" within the meaning of the Restatement of Conflicts);[88] the dispositive arrangement effected by *D1*'s exercise of *p1* was a testamentary trust, *t2*, whose "governing law" provision[89] (concerning validity as well as construction and administration) designated the law of *State B* and under whose terms a beneficiary, *D2*, who was domiciled in (yet different) *State C*, was granted a testamentary special power, *p2*, over the trust assets (still movables); the dispositive arrangement effected by *D2*'s exercise of *p2* was a testamentary trust, *t3*, whose governing law provision (including validity) designated the law of *State C* and under whose terms a beneficiary, *D3*, who was domiciled in (possibly different) *State D*, was granted a testamentary special power, *p3*, over the trust assets (still

87. As we shall see shortly, it would be an expository inconvenience if the fact that the validity of *t1* is determined by the local law of *State A* were attributable to an application of the rule of Restatement section 274(a). *See infra* subparts II.C.2-3. Let us stipulate, therefore, (1) that *S* created *t1*, not 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 *t1*.

88. *See supra* note 18 and accompanying text.

89. I.e., a private choice-of-law provision of the kind authorized, for example, by the Uniform Trust Code (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 1 (regarding "governing law"). But the UTC permits the terms of a trust to displace the alternative references (*see supra* notes 42-44 and accompanying text) for trust validity provided in UTC section 403. *See* UNIF. TR. CODE § 105. And the Restatement of Conflicts 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.

movables) . . . the dispositive arrangement effected by *Dn-1*'s exercise of *pn-1*[90] is a testamentary "accumulation trust," *tn*, whose governing law provision (including validity) designates the law of *State N* (which is different from *State A* but not necessarily different from every state in the series *State B*, *State C*, *State D* . . . *State N-1*).[91]

What has happened, let us say, is that a beneficiary of *tn*, *B*, has petitioned a court in *State N* for an order striking the lengthy initial accumulation period prescribed by the terms of *tn* on the ground that the period violates the common law rule against accumulation of income.[92] In her response to *B*'s petition, the trustee of *tn*, *T*, points out that *State N* has long since abrogated the common law rule against accumulation of income.[93] But *T* frankly acknowledges (1) that *State N*'s superior courts have employed the rule of Restatement of Conflicts section 274(a) *and have treated the Restatement of Conflicts as sufficient authority for doing so*;[94] (2) that because *tn* was created by the exercise of a special power of

90. The potential amplitude of the value *n* in the hypothesized series *p1*, *p2*, *p3* . . . *pn-1* is not an artificial feature of our hypothetical case. As we have already noted, the practicability of long series of the kind figures in the legislative history of the Delaware tax trap. *See supra* note 66.

91. We may also suppose that under the laws of all of the states involved, the powers *p1*, *p2*, *p3* . . . *pn-1* were valid, *see supra* text accompanying note 4, and that, in each case, the exercise of the testamentary special power held by *D1*, *D2*, *D3* . . . *Dn-1* was both within the scope of the power, *see supra* note 6 and accompanying text, and valid as to questions of formalities and capacity, *see supra* notes 38-44 and accompanying text.

92. Although its durational limit is that of the common law RAP testing period, the rule against accumulation of income is recognized in the United States as a common law rule independent of the RAP. *See* Gertman v. Burdick, 123 F.2d 924, 931 (D.C. Cir. 1941). As to the rule against accumulations of income in general, see BORRON, *supra* note 6, § 1466; Robert H. Sitkoff, *The Lurking Rule Against Accumulations of Income*, 100 NW. U. L. REV. 501, 503-07 (2006). In some 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 6, § 1469. The position advanced by our hypothetical beneficiary, *B*, in the hypothesized petition entails that *B* is prepared to defend the stricter interpretation for the rule of decision.

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

94. This is not an artificial feature of our hypothetical case. The "great department of modern law [that we call "conflict of laws" or "private international law"] has been built up very largely on the researches and opinions of learned writers." ALLEN, *supra* note 26, 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 8, at 12 n.16. 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." ALLEN, *supra* note 26, at 239. There is, of course, room within such a tradition for the authority of the ALI—as is attested

appointment (*pn-1*) that was granted under the terms of a trust (*tn-1*), the rule of 274(a) arguably takes precedence in determining the substantial validity of *tn* (as the intended result of *Dn-1*'s exercise of *pn-1*) over *Dn-1*'s privilege, as the settlor of *tn*, to designate "governing law" in the *tn* trust instrument;[95] and (3) that the rule of section 274(a) points, on these facts, to the law of *State N-1*. As it happens, though, (*T*'s response continues) *State N-1*, like *State N*, has long since abrogated the common law rule against accumulation of income. Thus (*T*'s response concludes), whether the forum applies its own law or that of *State N-1* under the rule of Restatement of Conflicts section 274(a), *tn*'s alleged violation of the common law rule against accumulation of income is irrelevant.

B is quick (in her reply to *T*'s responsive pleading) to acknowledge the correctness of *T*'s concession that for purposes of determining the substantial validity of *tn*, Restatement of Conflicts section 274(a) displaces *Dn-1*'s designation of governing law in the *tn* trust instrument.[96] She goes on to note that there is nothing in the Restatement of Conflicts 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 argument runs), the rule of section 274(a) points, on these facts, not to the law of *State N-1*, but, *by recursive application*, to the law of *State A*, under which, as it happens (we shall suppose), the common law rule against accumulation of income is in full vigor.

If we suppose that the law of *State N* expressly recognizes the Resulting and Perpetuities Instantiations as well as the choice-of-law rule of Restatement of Conflicts section 274(a), *B*'s argument that the relation back of special powers under the choice-of-law rule is transitive over special powers is fully mapped by the Comment to section 274(a)[97]: to the extent that the rationale for a special power's relating back for choice-of-law purposes is (as the Comment suggests) the *lex fori*'s commitment to the Resulting and Perpetuities Instantiations,[98] the transitivity of the

by the six printed volumes of the Restatement of Conflicts containing citations in the courts through June of 2015. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS *passim*.

95. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 269 cmt. k, at 160; *id.* § 270 cmt. f, at 169.

96. *See supra* note 95 and accompanying text.

97. *See supra* text accompanying note 22.

98. *See supra* subpart II.B.1.

relation back within those Instantiations (that is, for purposes of imposing resulting trusts and regulating perpetuities) is presumably a strong reason for recognizing the transitivity of the relation back for purposes of determining choice of law.

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

a. Apropos of Resulting Trusts

Like the basic idea of the Resulting Instantiation,[99] 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 legal-taxonomic discrimination between special and general powers of appointment. If *t3* in our hypothetical case had failed utterly (as would have happened if, for example, *t3* constituted a noncharitable purpose trust[100] that was, for that reason, unenforceable under the local laws of *States A*, *B*, and *C*),[101] the property that *D2* had attempted to appoint from the trustee of *t2* to the nominal trustee of *t3* could hardly have *resulted* in the sense of "jump[ing] back"[102] to *D1* or *D1*'s heirs given that *D1* 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,[103] which means that the last person in this example who owned or was entitled to own the property in question outright was *S* and that the relation back of

99. *See supra* subpart II.A.2.a.

100. 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). As to the nature of noncharitable purpose trusts in general, see 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).

101. *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 100; *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").

102. "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 58, at 288.

103. *See supra* note 56 and accompanying text.

special powers must, therefore, be transitive for purposes of imposing resulting trusts.

b. 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.[104]

Thus, no matter how large the number *n* in our hypothesized series of special powers *p1*, *p2*, *p3* . . . *pn-1* turns out to be, we know that *pn-1* is deemed to have been "created," for perpetuities purposes, on the date that *p1* was created because according to the relation back, *pn-1* was created when *pn-2* was created, and *pn-2* was created when *pn-3* was created, and the process of attribution continues back to the creation of *pn-x* = *p1*. The occurrence of a presently exercisable general power anywhere in the series *p1*, *p2*, *p3* . . . *pn-1* would reset the date of creation for any power created by the exercise of that presently exercisable general power.[105] But among special powers (or testamentary general ones)[106] 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.[107]

Like the basic idea of the Perpetuities Instantiation,[108] the transitivity of the relation back for perpetuities purposes seems to follow naturally from the local law'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[109] if it is to prevent

104. 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, for example, MICH. COMP. LAWS § 556.124(2); 20 PA. CONS. STAT. § 6104(c).

105. *See supra* note 104 and accompanying text; *supra* note 60.

106. *See supra* note 60.

107. *See supra* note 104 and accompanying text.

108. *See supra* subpart II.A.2.b.

109. I.e., powers other than presently exercisable general powers. *See supra* note 64 and accompanying text.

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.[110]

3. Reasoning from Local Law to Conflicts Again

The upshot is that our hypothetical beneficiary, *B*,[111] will argue that given the transitivity of the relation back of special powers in the Resulting and Perpetuities Instantiations, the judge, as a member of the judiciary of a state that recognizes both of those Instantiations and the rule of Restatement of Conflicts section 274(a), should acknowledge the transitivity of the relation back of special powers for purposes of determining choice of law. If, as the Comment to section 274(a) suggests, special powers relate back for choice-of-law purposes *because* they relate back in the Resulting and Perpetuities Instantiations,[112] and the relation back of special powers is *transitive* in the Resulting and Perpetuities Instantiations,[113] then presumably the relation back should be transitive for choice-of-law purposes. In that case (*B* will conclude), the rule of section 274(a) points (on our facts) not to the law of *State N-1* but to the law of *State A*, under which (*B* argues) the initial accumulation prescribed by the terms of *tn* is prohibited as a violation of the common law rule against accumulation of income rendering *Dn-1*'s exercise of *pn-1* substantially invalid to the extent of the initial accumulation.

4. Q.E.D.

Now, assuming this is a case of first impression,[114] the judge could just put her head down and agree with *B*'s reasoning. But to do so would be to ignore that *B* has, from the court's point of view, thoroughly undermined the rule of section 274(a). By hypothesis, the superior courts of *State N* have employed that rule on the persuasive authority of the Restatement of Conflicts.[115] But the Restatement of Conflicts can only

110. *See supra* text accompanying notes 64-68.

111. *See supra* subpart II.C.1.

112. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. b (AM. L. INST. 1971) (quoted *supra* text accompanying note 22).

113. *See supra* subpart II.C.2.

114. I.e., that there is no case binding on the judge as precedent whose *ratio decidendi* recognizes or 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). *See, e.g.*, CROSS, *supra* note 26, at 192.

115. *See supra* note 94 and accompanying text.

commend a choice-of-law rule on the basis that the rule is "derived from the principles stated in [Restatement of Conflicts section] 6"[116] or that it "represents an accommodation of [those principles]."[117] Surely, the principles of section 6 tell *against* section 274(a) on *B*'s interpretation.

The weight of the first three of those principles, "the needs of the interstate and international systems,"[118] "the relevant policies of the forum,"[119] and "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,"[120] depends on features of the case that we have not bothered to develop. We have not bothered to develop them because, logically, the ease with which embroidery could tilt such features against *B*'s interpretation—by, for example, stipulating that the only reason that *State A* was ever involved in our story was that *S*, who was then domiciled in a state that had already abrogated the common law rule against accumulation of income, acceded to the request of a commercial trustee organized under the laws of *State A* that she designated that state's law in the governing-law provision of *t1*[121]—neutralizes the first three section-6 principles; for:

> The court is seeking a rule [for choice of law] which, if it already has the pedigree of precedent, may have arisen in a case where the competing domestic laws were, *with relation to the facts of the transaction*, the reverse of those now before it. Moreover, the court must contemplate the use of its decision in the instant case as a precedent for the decision of some subsequent [] case which will present *still another pattern of local laws*.[122]

But the four remaining principles listed in Restatement of Conflicts section 6 are not ambivalent. Those principles are:

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

116. *See supra* note 79 and accompanying text.

117. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (quoted *supra* text accompanying note 30).

118. *Id*. § 6(2)(a).

119. *Id*. § 6(2)(b).

120. *Id*. § 6(2)(c).

121. Something *S* would be entitled to do according to the Restatement of Conflicts. *See id*. § 270 cmt. b (indicating that for purposes of settlor's designation of law to govern validity, "[a] state has a substantial relation to a trust when it is the state . . . of the place of business or domicil of the trustee at the time of the creation of the trust"); *see also supra* note 87 (regarding validity of appointment).

122. CAVERS, *supra* note 8, at 11 (emphasis added).

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.[123]

Our assumption that each of the special powers *p2*, *p3*, *p4* . . . *pn-1* was valid[124] entails that in each case, the terms of the trust (in the series *t1*, *t2*, *t3* . . . *tn-1*) that granted the power were properly construed as authorizing assets subject to the power to be appointed in further trust.[125] Apart from the relation back theory, whose application for choice-of-law purposes *is the issue*,[126] the implicit or express authorization of each of the powerholders *D1*, *D2*, *D3* . . . *Dn-1* to settle or contribute trust assets to a *further* trust surely created (from the Restatement of Conflicts' point of view) a series of "justified expectations"[127] that each powerholder would be able to designate governing law consistent with "the basic policies underlying the particular field of [trust] law"[128] reflected in UTC section 107(1) and Restatement of Conflicts sections 268 through 272.[129] "[C]ertainty, predictability and uniformity of result"[130] arguably all cut against *any* interstate or international deployment of the relation back theory: "[T]he theory is not uniformly applied and does not predict the outcome in any particular case."[131] And the strict transitivity that informs *B*'s interpretation of section 274(a) is obviously inimical to "ease in the determination and application of the law to be applied."[132]

Thus, on *B*'s interpretation, Restatement of Conflicts section 274(a) seems to violate the Restatement of Conflicts' axiom that "[a]ll choice-of-law rules should be derived from the principles stated in [section] 6."[133] And the *pièce de résistance* is that *B*'s interpretation of section 274(a) is *the Restatement of Conflicts'* interpretation of that section: *B*'s

123. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(d)-(g).

124. *See supra* note 91.

125. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. e (indicating that "[i]n the case of a special power, it is a question of construction of the donor's will whether the donee may . . . appoint upon a further trust naming new trustees").

126. *See supra* subpart II.C.2-3.

127. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(d) (quoted *supra* text accompanying note 104).

128. *Id.* § 6(2)(e). *But see infra* subpart IV.A.2 (analyzing the basic policies).

129. *See supra* note 89.

130. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(f).

131. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.4 cmt. f (AM. L. INST. 2011).

132. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(g).

133. *Id.* § 245 cmt. b; *see supra* text accompanying note 79.

interpretation follows directly from all that the Restatement of Conflicts has to say in support of section 274(a), which is just that, like *State N*, the hypothetical jurisdiction whose conflicts rules the Restatement of Conflicts restates adheres to the Resulting and Perpetuities Instantiations of the relation back of special powers.[134] 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[135]: 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*.[136]

So, our hypothetical judge will be right to conclude that from the point of view of the Restatement of Conflicts itself, the rule of Restatement of Conflicts section 274(a) is arbitrary, and that the senses in which that rule can be "applied in the decision of a case without explicit reference to the factors [listed in Restatement of Conflicts section 6] which underlie [it]"[137] or derived from or supported by analogies to local law exemplifications of the relation back[138] are merely superficial. *Quod erat demonstrandum*.[139]

134. *See supra* text accompanying notes 22-23.

135. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 27.1 cmt. j(3) (quoted *supra* text accompanying note 104).

136. *See supra* subpart II.C.2.b.

137. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (quoted *supra* text accompanying note 30); *see supra* subpart II.A.1.a.

138. *See supra* subpart II.A.1.b.ii.

139. *See supra* subpart II.B.2.b. The incoherence that we have demonstrated here is perhaps a special case of the general "misfit" between the Restatement of Conflicts' trust provisions, on the one hand, and "the rest of the Restatement's generally standards-based approach," on the other, for which Robert Niles-Weed and Robert Sitkoff have provided a causal account in terms of ALI drafting history. Robert B. Niles-Weed & Robert H. Sitkoff, *The Twenty-First Century Revolution in Conflict of Trust Laws*, 97 TUL. L. REV. 1013, 1015 (2023); *see id*. at 1021-26. But, of course, to *explain* an incoherence (casually or otherwise) is not to remove it: from a judge's point of view, explicable incoherence vitiates a rule or principle's authority as thoroughly as inexplicable incoherence does.

III. UPAA SECTION 103(2), IRRATIONALITY, AND WHAT CONSTITUTES APPOINTMENT BY WILL OF INTERESTS IN MOVABLES[140]

If we can be sure that UPAA section 103(2), on "Governing Law,"[141] is meant to address (perhaps among other things) the same problem addressed by Restatement of Conflicts section 274(a), viz., choice of law on the substantial validity of an exercise of a power of appointment,[142] then we can deduce that our hypothetical judge—who is weighing the application of section 274(a) in a case of first impression[143]—is *not* sitting in a state that has enacted the UPAA; for "[a] court, subject to constitutional restrictions, will follow a *statutory* directive of its own state on choice of law,"[144] and construed as a choice-of-law rule comparable to Restatement of Conflicts section 274(a), UPAA section 103(2) indicates that questions concerning the substantial validity of an exercise of a power of appointment are referred to "the law of the powerholder's domicile at the relevant time."[145] In that case (i.e., if she is *not* sitting in a state that has enacted the UPAA), our hypothetical judge, having come—by the particular route we have described[146]—to the conclusion that the rule of Restatement of Conflicts section 274(a) is arbitrary[147] will no doubt be interested in UPAA section 103(2) as a possible alternative; for section 103(2) evidently ignores the relation back of powers and is therefore immune to the particular form of embarrassment to which the strict transitivity of the relation back (in the Resulting and Perpetuities Instantiations) exposes Restatement of Conflicts section 274(a).[148]

A. Working Out That UPAA Section 103(2) Is Supposed to Be Comparable to Restatement of Conflicts Section 274(a)

But the scope of UPAA section 103(2) is doubtful. The section provides that

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140. Portions of this Part are based on James P. Spica, *Two Restatements of Conflict of Laws Concerning Exercises of Special Powers of Appointment*, 55 REAL PROP. TR. & EST. L.J. 347, 360-65 (2020).

141. UNIF. POWERS OF APPOINTMENT ACT § 103(2) (UNIF. L. COMM'N 2013).

142. *See supra* Part II.

143. In the situation described *supra* subpart II.C.1.

144. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (AM. L. INST. 1971) (emphasis added).

145. UNIF. POWERS OF APPOINTMENT ACT § 103(2).

146. *See supra* subpart II.C.

147. *See supra* text accompanying notes 136-138.

148. *See supra* subpart II.C.4.

> [u]nless the terms of the instrument creating a power of appointment manifest a contrary intent[,] the *exercise*, release, or disclaimer of the power, or the revocation or amendment of the exercise, release, or disclaimer of the power, is governed by the law of the powerholder's domicile at the relevant time.[149]

One of the questions to be "governed" by the law governing the exercise of a power of appointment is certainly the enforceability of the dispositive arrangement the exercise purports to effect—in other words, the *substantive validity* of the exercise,[150] the subject of Restatement of Conflicts section 274(a).[151] Yet section 103(2) is evidently a default rule ("Unless the terms of the instrument creating a power of appointment manifest a contrary intent . . . ."),[152] and whereas it is well settled that the donor of a power has broad discretion to impose *formal* requirements for exercise,[153] the idea that the donor can simply designate, in the instrument creating the power, the law to govern the substantial validity of the donee's exercise would be a radical departure from conventional conflicts principles.[154]

Such a departure can, of course, be effected by statute, but there is a presumption against it: though precedent is subordinate to legislation as a source of law,[155] conflict of law rules "generally form part of the common law,"[156] and "[t]he presumption is for a minimum change to be effected by legislation in a common law area."[157] The legislative history—that is,

149. UNIF. POWERS OF APPOINTMENT ACT § 103 (emphasis added).

150. *See supra* note 19.

151. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(a) (AM. L. INST. 1971) (quoted *supra* text accompanying note 20).

152. UNIF. POWERS OF APPOINTMENT ACT § 103 (quoted *supra* text accompanying note 149).

153. *See, e.g.*, *id.* § 301(2)(b); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. c; RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.9 (AM. L. INST. 2011).

154. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(a) (quoted *supra* text accompanying note 20); *see also infra* subpart IV.A.2 (concerning policies underlying the law of powers).

155. *See, e.g.*, CROSS, *supra* note 26, at 165.

156. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5 cmt. c; *see supra* notes 24-25 and accompanying text.

157. 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." (citations omitted)); Heaney v. Borough of Mauch Chunk, 185 A. 732, 733 (Pa. 1936) ("[S]tatutes 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

the ULC Comment to section 103(2)[158]—does announce "a departure from older law,"[159] but the departure is supposed to accord with a "modern view,"[160] the authorities cited for which clearly indicate (as we shall see) that that "view" is concerned, not with the *validity* of an exercise (formal or substantive), but only with a necessary condition for such validity, viz., that there should have *been* an exercise.[161] The Comment reads:

> Paragraph (2) is a departure from older law . . . . Paragraph (2) adopts the modern view that acts of the powerholder should be governed by the law of the powerholder's domicile, because that is the law the powerholder (or the powerholder's lawyer) is likely to know. This approach is supported by Restatement Third of Property: Wills and Other Donative Transfers § 19.1, Comment e; Restatement Second of Conflict of Laws § 275, Comment c. It is also supported by *Estate of McMullin*, 417 A.2d 152 (Pa. 1980); *White v. United States*, 680 F.2d 1156 (7th Cir. 1982).[162]

1. Taking Cited Authority Seriously

The first two authorities cited in the Comment—*Restatement (Third) of Property: Wills and Other Donative Transfers* (Restatement of Property) section 19.1 Comment e and Restatement of Conflicts section 275 Comment c—are really only one; for the only authority cited for the former in the Restatement of Property itself, is the latter. Restatement of Property section 19.1 Comment e reads, in its entirety: "*Choice of law.* The law of the donee's domicile governs whether the donee has effectively exercised a power of appointment, unless the instrument

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extended by implication to abrogate established rules of common law." (citation omitted)); KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 119 (2013) ("Among other substantive canons . . . statutes that alter the common law should be strictly construed . . . .").

158. "[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 the Uniform Commercial Code) and Yale Univ. v. Blumenthal, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting the Uniform Management of Institutional Funds Act)); *see also, e.g.*, Harry Willmer Jones, *Statutory Doubts and Legislative Intention*, 40 COLUM. L. REV. 957, 970 (1940) (indicating role of ULC Comments in establishing legislative intent). 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, for example, 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).

159. UNIF. POWERS OF APPOINTMENT ACT § 103 cmt. (UNIF. L. COMM'N 2013).

160. *Id*.

161. *See infra* subpart III.A.2.

162. UNIF. POWERS OF APPOINTMENT ACT § 103 cmt.

creating the power expresses a different intention. See Restatement Second, Conflict of Laws § 275, Comment *c*."[163]

For our purposes, that ALI Comment is no less equivocal than UPAA section 103(2): just as we want to know whether "the exercise . . . of the power" within the meaning of section 103(2) is supposed to include the *substantial validity* of the exercise,[164] we want to know if the question "whether the donee has effectively exercised a power" within the meaning of Restatement of Property section 19.1 Comment e[165] equates to the question whether the donee has *validly* exercised the power—exercised it, that is, so as to make a valid appointment. Our heuristic assumption[166] is that it ought to be possible to tell what uniform law provisions and ALI Comments like these are supposed to be about by looking at the authority cited for them. So, the search for clarity continues to the only authority cited for Restatement of Property section 19.1 Comment e, which is Restatement of Conflicts section 275 Comment c.[167]

2. A Decidedly Narrow, If Also "Modern" View

According to its caption, Restatement of Conflicts section 275 concerns "What Constitutes Appointment by Will of Interests in Movables."[168] The section reads: "Whether a power to appoint by will interests in movables is exercised by a general bequest not mentioning the power is determined by the law governing the construction of the donee's will (see § 264), unless the donor manifested a different intention."[169] And the portion of the Comment to section 275 that is pointed by the lone citation in support of Restatement of Property section 19.1 Comment e[170] reads:

> In the absence of a provision in the trust instrument or will that the power shall or shall not be exercised by a will which does not mention the power, there is a conflict of authority on the question whether the power is exercised by a general bequest which does not mention the power . . . . *The difficulty arises only where there is no evidence as to [the donee's] intention and it is necessary to resort to a rule of construction. Most of the cases hold*

163. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.9 cmt. e (AM. L. INST. 2011).

164. *See supra* text accompanying notes 149-154.

165. *See supra* text accompanying note 163.

166. Implicit in the text accompanying notes 160-162.

167. *See supra* text accompanying note 163.

168. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 275 (AM. L. INST. 1971).

169. *Id*.

170. *See supra* text accompanying note 163.

> *that the rule of construction of the state whose local law governs the creation of the trust*, which is ordinarily in the case of a testamentary trust the state of the donor's domicil, is applicable. It would, however, be more in accordance with the general principles applicable to construction to apply the rule of construction of the donee's domicil since it is his intention that is determinative. At any rate, it is to be borne in mind that a rule of construction is applicable only in the absence of evidence rebutting it.[171]

Thus, it turns out that Restatement of Property section 19.1 Comment e is based entirely on a narrow exception to the relation back of powers for choice-of-law purposes, a highly specialized choice-of-rule-of-construction rule (described in Restatement of Conflicts section 275)[172] whose application, when it is needed, is logically prior to that of Restatement of Conflicts section 274. Analytically, Restatement of Conflicts section 275 Comment c and, therefore, Restatement of Property section 19.1 Comment e have nothing to do with either "questions of substantial validity"[173] or with "questions of formalities and of the capacity of the donee";[174] they have to do with the question of *whether there has been an exercise (of the power in question) at all* when (1) a testamentary power granted by the terms of a trust may have been exercised by a residuary clause or general bequest not mentioning the power, (2) the trust instrument granting the power does not indicate whether the power can or cannot be exercised without a specific reference, and (3) the law that governs the construction of the trust instrument is different from the law that governs the construction of the donee's will.[175]

3. Giving Relative Insignificance Its Due

Thus, if the expression of Restatement of Property section 19.1 Comment e were confined to what is actually warranted by its avowed basis in Restatement of Conflicts section 275 Comment c,[176] Restatement of Property section 19.1 Comment e would read (something like):

> *The law of the donee's domicile governs whether the donee will be presumed to have exercised a testamentary power of appointment over movables granted by the terms of a trust when the power may have been*

171. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 275 cmt. c (emphasis added).

172. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.1 cmt. e (AM. L. INST. 2011) (quoted *supra* text accompanying note 163).

173. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(a).

174. *Id.* § 274(b).

175. *See id.* § 274 cmt. f.

176. *See supra* text accompanying note 163.

> *exercised by a residuary clause or general bequest not mentioning the power and the trust instrument granting the power does not indicate whether the power can or cannot be exercised without a specific reference.*[177]

And that means that if the expression of UPAA section 103(2) were confined to what is actually warranted by *its* avowed basis in Restatement of Property section 19.1 Comment e and Restatement of Conflicts section 275 Comment c,[178] UPAA section 103(2) would read (something like):

> *Unless the terms of the instrument creating a power of appointment manifest a contrary intent, the law of the powerholder's domicile governs whether the powerholder will be presumed to have exercised a testamentary power of appointment over movables granted by the terms of a trust when the power may have been exercised by a residuary clause or general bequest not mentioning the power and the trust instrument granting the power does not indicate whether the power can or cannot be exercised without a specific reference.*[179]

As far as it goes, that understanding of UPAA section 103(2) would be entirely consistent with the ULC Comment's announcement that "Paragraph (2) [of section 103] is a departure from older law";[180] for we know from Restatement of Conflicts section 275 Comment c that as of the time that Comment was written,

> [m]ost of the cases [held] that the rule of construction [as to whether a testamentary power "is exercised by a general bequest which does not mention the power" is that] of the state whose local law governs t*he creation of the trust*, which is ordinarily in the case of a testamentary trust the state of *the donor's domicil* . . . .[181]

It would also be entirely consistent with the second of the two cases that, according to the ULC Comment, "also support[]"[182] the rule of section 103(2), *White v. United States*.[183] The question in *White* was "whether the

177. Spica, *supra* note 140, at 364. *But see* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 19.1 cmt. e (quoted *supra* text accompanying note 163); *infra* text accompanying notes 188-190.

178. *See supra* text accompanying note 162.

179. *But see* UNIF. POWERS OF APPOINTMENT ACT § 103 (UNIF. L. COMM'N 2013) (quoted *supra* text accompanying note 149).

180. *Id*. § 103 cmt. (quoted *supra* text accompanying note 162).

181. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 275 cmt. c (AM. L. INST. 1971) (emphasis added) (quoted *supra* text accompanying note 171).

182. UNIF. POWERS OF APPOINTMENT ACT § 103 cmt. (quoted *supra* text accompanying note 162).

183. 680 F.2d 1156, 1160-62 (7th Cir. 1982). *See supra* text accompanying note 162.

residuary clause [in a decedent's will] operate[d] as an exercise of the [decedent's general] power"[184] in the circumstances contemplated by Restatement of Conflicts section 275.[185] There, the court (which cited section 275 among other authorities)[186] held that the applicable rule of construction was that of the state of the decedent's domicile.[187]

4. Textural Intransigence

But, of course, what our authority-tethered reformulation of UPAA section 103(2)[188] *cannot* be reconciled to is (1) section 103(2)'s purported treatment of the "release, or disclaimer of the power [in question], or the revocation or amendment of the exercise, release, or disclaimer of the power"[189] and (2) the implication that there could be a "relevant time [for determining the powerholder's domicile]"[190] other than the powerholder's death. These are matters with which Restatement of Conflicts section 275 Comment c[191] and therefore Restatement of Property section 19.1 Comment e[192] simply have nothing to do—these matters do not present any analogous "difficulty [that] arises only where there is no evidence as to [the donee's] intention and it is [therefore] necessary to resort to a rule of construction."[193]

That means that we cannot interpret UPAA section 103(2) as being directly concerned with the narrow question of whether a release or disclaimer of a power or the revocation or amendment of an exercise, release, or disclaimer has been *attempted* as opposed to broader questions including whether a given such attempt is *valid*.[194] And because there is nothing to suggest that the section's concern with the *exercise* of a power is any narrower than its concern with a release or disclaimer of a power or the revocation or amendment of an exercise, release, or disclaimer, we have to conclude that despite the lack of any support in the authorities

184. *White*, 680 F.2d at 1158.

185. I.e., the circumstances described *supra* text accompanying note 175.

186. *White*, 680 F.2d at 1158.

187. *Id*. at 1160.

188. *See supra* text accompanying note 179.

189. UNIF. POWERS OF APPOINTMENT ACT § 103 (UNIF. L. COMM'N 2013) (quoted *supra* text accompanying note 149).

190. *Id*.

191. *See supra* subpart III.A.2.

192. *See supra* subpart III.A.1.

193. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 275 cmt. c (AM. L. INST. 1971) (emphasis added) (quoted *supra* text accompanying note 171).

194. *Cf. supra* text accompanying note 161 (distinguishing validity of exercise from a necessary but insufficient condition for such validity).

adduced by the Comment to section 103(2), section 103(2) is intended to provide a choice-of-law rule governing, among other things, the substantial validity of such an exercise and is, to that extent, supposed to be comparable to Restatement of Conflicts section 274(a).

B. Proof of Incoherence

We have to conclude also, though, that from the ULC's point of view, UPAA section 103(2) is arbitrary; for according to the ULC, section 103(2) is supposed to accord with a certain "modern view" that is supported by authority,[195] but as we have seen, the rule of section 103(2) cannot be formulated in terms of what is actually warranted by the authority in question.[196] That authority supports a narrow exception, described in Restatement of Conflicts section 275, to the relation back of powers on which Restatement of Conflicts section 274(a) is based.[197] But the ULC (misled, perhaps, by a very loose formulation in the Restatement of Property)[198] has evidently mistaken that narrow *exception* (to the relation back of powers in choice of law) for a wholesale *rejection*. There is no authority whatever for the wholesale rejection; there is no "modern view" with which section 103(2) actually accords.

IV. A WAY FORWARD

We now know that our hypothetical judge—who is weighing the application of Restatement of Conflicts section 274(a) in a case of first impression[199]—is not sitting in a state that has enacted the UPAA.[200] We know too that her jurisprudential interest in UPAA section 103(2) as a possible, relation-back-free alternative to Restatement of Conflicts section 274(a)[201] will have been disappointed[202]: she will have come to the

195. UNIF. POWERS OF APPOINTMENT ACT § 103 cmt. (quoted *supra* text accompanying note 162).

196. *See supra* subpart III.A.2-4.

197. *See supra* subpart III.A.2.

198. *See supra* notes 176-177 and accompanying text; *see also* Spica, *supra* note 140, at 363-65 (analyzing the Restatement of Property's interpretation of the Restatement of Conflicts).

199. In the situation described *supra* subpart II.C.1.

200. Based on our conclusion, *supra* subpart III.A.4, that UPAA section 103(2) is intended to address (among other things) the same problem addressed by Restatement of Conflicts section 274(a), viz., choice of law on the substantial validity of an exercise of a power of appointment. *See supra* text accompanying notes 141-145.

201. *See supra* text accompanying notes 146-148.

202. By the conclusion, *supra* subpart III.B, that *from the ULC's point of view*, UPAA section 103(2) is arbitrary.

conclusion that UPAA section 103(2) is no less arbitrary from the ULC's point of view[203] than Restatement of Conflicts section 274(a) is from the ALI's[204] and, therefore, no more attractive jurisprudentially as a way of determining choice of law in our hypothetical case.

A. Motivation to Adjust the Choice-of-Law Deployment of the Relation Back Theory Rather Than Reject It

On the other hand, the judge's examination of UPAA section 103(2) has not left everything as before because in addition to being incoherent (in the sense of being arbitrary from its promulgator's point of view), UPAA section 103(2) compares quite unfavorably to what is *attempted* (albeit not achieved) in Restatement of Conflicts section 274(a).

1. Justification for Unique-Reference, Jurisdiction-Selecting Choice

For one thing, because UPAA section 103(2) is not actually supported by the legal authorities cited for it,[205] its appeal (as far as the ULC informs us) depends entirely on consequentialist reasoning[206] about what "law the powerholder (or the powerholder's lawyer) is likely to know."[207] That means that section 103(2) is devoid of the relative jurisprudential attractiveness of "formal reasoning,"[208] which is acknowledged in the distinction between the Restatement of Conflicts' two concepts of choice-of-law rules,[209] let alone the philosophically welcome prospect—held out (albeit unrealized) by the Restatement of Conflicts' explication of section 274(a)—that unique-reference, jurisdiction-selecting choice-of-law rules[210] (like section 274(a) and

203. *See supra* subpart III.B.

204. *See supra* subpart II.C.4.

205. *See supra* subpart III.A.1-3.

206. 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).

207. UNIF. POWERS OF APPOINTMENT ACT § 103 cmt. (UNIF. L. COMM'N 2013) (quoted *supra* text accompanying note 162).

208. "[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." Harris, *supra* note 206, at 170.

209. *See supra* subpart II.A.1.a.

210. *See supra* subpart II.A.1.b.

UPAA section 103(2))[211] can sometimes be derived from or supported by analogies to local law.[212] The rule of UPAA section 103(2) is therefore not nearly as attractive as legal thinking about choice of law as the rule of Restatement of Conflicts section 274(a) *would be* if it were coherent.

2. Protection of Basic Policies Underlying the Particular Field of Law

What is more important, though, is that UPAA section 103(2) obviously threatens what must be a "basic polic[y] underlying the particular field of law"[213] concerning powers of appointment in a jurisdiction that, like our hypothetical *State N*, has a RAP.[214] The relevant policy is that the exercise of a power of appointment, when *possession* of the power does not itself vest equitable ownership,[215] should not be allowed to postpone the vesting of future interests for longer than the donor of the power herself could have arranged without interposing the power.[216] That is (as we have seen) the reason for the Perpetuities Instantiation and for the relation back's transitivity *in* that Instantiation.[217]

Yet suppose that a domiciliary of *State N*, *SN*, is prevented, as far as *State N* is concerned, by a rule like that of Restatement of Conflicts section 270(a) (prohibiting a choice of law that "violate[s] a strong public policy of the state with which, as to the matter at issue, the trust has its most significant relationship"),[218] from selecting the law of *State O* to govern the validity of an *inter vivos* "dynasty" trust, *tD*, that *SN* is creating to hold movables located in *State N* for beneficiaries domiciled in *State N*, because, unlike *State N*, *State O* has abrogated the RAP. If *State N* adheres to the rule of UPAA section 103(2), *SN* can simply grant to a

211. As to the exercise of a special power of appointment, for example, Restatement of Conflicts section 274(a) points uniquely to the law that determines the validity of the trust granting the power. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(a) (AM. L. INST. 1971) (quoted *supra* text accompanying note 20). As to the exercise of *any* power of appointment, UPAA section 103(2) points uniquely to "the law of the powerholder's domicile at the relevant time." UNIF. POWERS OF APPOINTMENT ACT § 103(2) (quoted *supra* text accompanying note 149).

212. *See supra* subpart II.A.1.b.ii.

213. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(e) (quoted *supra* text accompanying note 123).

214. We know that *State N* has a rule against perpetuities because we know it adheres to the Perpetuities Instantiation. *See supra* text accompanying note 97.

215. *See supra* note 64 and accompanying text.

216. *See, e.g.*, GRAY, *supra* note 53, § 514; BORRON, *supra* note 6, § 1274.

217. *See supra* Parts II.A.2.b, II.C.2.b.

218. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270(a) (regarding "Validity of Trust of Movables Created Inter Vivos").

domiciliary of *State O* a power to appoint the assets of *tD* to a trust having the same terms for the benefit of the same beneficiaries but subject to governing law that does not enforce a RAP. In that case, the power's exercise will make *State N*'s RAP irrelevant to *tD*, *as far as State N is concerned*, without otherwise altering *SN*'s dispositive arrangement.[219]

Absent a relaxation of its policy regarding the RAP itself,[220] it is hard to see why *State N* would adopt a choice-of-law rule regarding powers of appointment that could so easily be used to subvert the state's attempt to regulate remoteness of vesting. We seem to want a choice-of-law rule for the substantial validity of exercises of special powers (at least)[221] that is capable, on facts such as these (at least),[222] of yielding a unique (as opposed to *alternative*) reference[223] to the law of "the state with which, as to the matter at issue, the trust has its most significant relationship"[224] *regardless* of whether that state happens to be "the powerholder's domicile at the relevant time."[225]

B. The Project of Adjustment

These reflections will suggest to our hypothetical judge that an adjustment to the *attempt* of the Restatement of Conflicts, in section 274(a), to bring the relation back theory of powers to bear on choice of law would be preferable to the abandonment of that attempt à la UPAA section 103(2). The same reflections suggest that a suitable adjustment will be (1) transitivity-restricting, so as to avoid or limit the embarrassment of policy to which the unrestricted transitivity of the relation back (in the Resulting and Perpetuities Instantiations) exposes

219. For, again, UPAA section 103(2) provides that "[u]nless the terms of the instrument creating a power of appointment manifest a contrary intent[,] . . . the exercise . . . is governed by the law of the powerholder's domicile at the relevant time," UNIF. POWERS OF APPOINTMENT ACT § 103 (UNIF. L. COMM'N 2013) (quoted *supra* text accompanying note 149), and by hypothesis, *State O* has no RAP as of the time of the powerholder's exercise.

220. We shall consider such a relaxation *infra* subpart IV.B.1.

221. As we have seen, the Perpetuities Instantiation covers testamentary general powers of appointment as well as special powers. *See supra* note 60.

222. The facts here do not implicate the transitivity of the relation back over successively generated special powers of appointment. *Cf. supra* subpart II.C.1 (describing a case that does involve such transitivity).

223. *See supra* subpart II.A.1.b.i.

224. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270(a) (AM. L. INST. 1971). *See supra* text accompanying note 218.

225. UNIF. POWERS OF APPOINTMENT ACT § 103 (UNIF. L. COMM'N 2013) (quoted *supra* text accompanying note 149).

Restatement of Conflicts section 274(a),[226] and (2) *homely* in the sense that it can be derived from or supported by analogies to local law so as to preserve the justification for unique-reference, jurisdiction-selecting choice of law that is implicit in such a procedure.[227]

1. Adjustment by Accident[228]

Such an adjustment could result just from changes in local law affecting "the basic policies underlying the particular field of law"[229] concerning powers of appointment. Here, we are obviously talking about *marginal* rather than wholesale changes in the relevant local law: a jurisdiction that has completely abrogated both the Resulting and Perpetuities Instantiation of the relation back theory will have, according to the Restatement of Conflicts, no self-regarding reason whatever to adopt the rule of section 274(a).[230] But we can imagine a weakening of a state's commitment to the transitivity of the relation back of powers on account of a supervening policy that does not displace the local law commitment to such transitivity altogether but rather limits it so as to yield a one-relation-back-*per*-power rule in some circumstances, for some powers granted by the terms of trusts.

There is a provision of the USRAP that might arguably foot the bill and that we can involve in our hypothetical case of first impression[231] by supposing that *State N* has enacted the USRAP and that *tn* is not a testamentary trust but rather a funded *inter vivos* trust to which *Dn-1*'s exercise of *pn-1* contributes an addition (of the assets appointed from *tn-1*). In that case, we have drawn, as far as *State N* is concerned, an exception to the common law transitivity of the relation back of special powers for perpetuities purposes;[232] 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,"[233] and those principles are expressly said to include the relation back

226. *See supra* subpart II.C.4.

227. *See supra* subparts II.A.1.b.ii, IV.A.1.

228. Portions of this subpart are based on Spica, *supra* note 16, 359-61.

229. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(e) (quoted *supra* text accompanying note 123).

230. *See* Spica, *supra* note 16, at 362-65.

231. Described *supra* subpart II.C.1.

232. I.e., the transitivity described *supra* subpart II.C.2.b.

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

of special powers,[234] 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 the nonvested property interest or power of appointment in the original contribution was created."[235]

Thus, as far as *State N*'s local law is concerned, if a beneficiary of trust *tn*, *TnB*, has, as of the time just before *Dn-1*'s death, under the terms of *tn*, a nonvested beneficial interest in or a special or testamentary general power of appointment over the assets of *tn*, and *Dn-1* exercises her testamentary special power *pn-1* by appointing the assets of *tn-1* to the trustee of *tn* so as to subject those assets to the terms of *tn*, then *TnB*'s resultant interest in or special or testamentary general power over the assets contributed from *tn-1* is "created," for perpetuities purposes (that is, for purposes of the USRAP),[236] not as of the time *p1* was created—as would be true under the common law rule[237]—but as of the time *TnB*'s interest in or power over the original *res* of *tn* was created.[238]

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 *tn*, in this, our latest example, was created by the exercise of a special power of appointment);[239] (2) that according to the legislative history,[240] 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;[241] and (3) that any given choice-of-law rule is as likely to point, in any given case, to the law 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

234. "[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.

235. *Id*. § 2(c).

236. The USRAP displaces the RAP in the enacting jurisdiction. *See id*. § 9.

237. *See supra* note 104 and accompanying text.

238. *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES § 2(c).

239. For in that case, *TnB*'s interest in or power over the original *res* of *tn* will relate back to the date of creation of the power whose exercise created *tn*. *See id*. § 2(a) (discussed *supra* notes 233-234 and accompanying text).

240. I.e., the official ULC Comment to USRAP section 2. *See supra* note 158.

241. *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES § 2 cmt.

back of powers in the Perpetuities Instantiation).[242] 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 of Conflicts section 274(a).

T, on the other hand, will insist that the USRAP's deviant transitivity reflects an important determination that as a matter of the basic policies underlying the Perpetuities Instantiation,[243] 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. That opens (*T* will admit) the possibility of a coordinated use of successive powers to effect a change in governing law that could subvert *State N*'s attempt to regulate remoteness of vesting,[244] but the USRAP's deviant transitivity itself threatens that attempt (*T* will point out) by allowing an appointment to a "previously funded trust"[245] to reset the beginning of the wait-and-see period to the date of the previously funded trust's inception.[246] The eminently practical relaxation of policy reflected in the USRAP's deviant transitivity (*T*'s argument goes) warrants that it should be enough for the donee of an exercised special power and her immediate appointee(s)[247] to reckon the substantial validity of the exercise under the law that determines the validity of the trust that granted the exercised power *determined*, for conflicts purposes, *without regard to whether that trust was itself created by the exercise of a special power of appointment*.[248]

But even if our hypothetical judge is inclined to agree with *T*, she is bound to see that from the point of view of the *source* of the choice-of-

242. *See, e.g.*, CAVERS, *supra* note 8, at 11 (quoted *supra* text accompanying note 122).

243. I.e., "the basic policies underlying [that] particular field of law" concerning powers of appointment within the meaning of RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(e) (AM. L. INST. 1971) (quoted *supra* text accompanying note 123).

244. By elaboration of the simpler scheme described *supra* subpart IV.A.2.

245. UNIF. STATUTORY RULE AGAINST PERPETUITIES § 2(c) (quoted *supra* text accompanying note 235).

246. *T*'s point here will be illustrated by our hypothetical case itself if we assume that *tn* was created any time *between S*'s creation of *t1* (*see supra* subpart II.C.1) and *Dn-1*'s death.

247. *See supra* notes 127-132 and accompanying text.

248. I.e., determined (in the case of a trust of movables) under the rules of *Restatement* section 269 or section 270 (regarding 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 (indicating that the rule of section 269 is subject to and, therefore, must give way to the rule of section 274); *see also id.* § 270 cmt. f, at 169 (indicating same in respect of the rule of section 270).

law rule in question,[249] the result of *T*'s argument is accidental: there is nothing in the Restatement of Conflicts to suggest that section 274(a) should apply only if the hypothetical jurisdiction whose conflicts rules the Restatement of Conflicts restates has enacted the USRAP or has otherwise adopted a policy such that the transitivity of the relation back of powers—in the Perpetuities Instantiation or, perhaps, in the Resulting Instantiation[250]—is sometimes liable to be sacrificed to administrative convenience.

2. Purposeful Adjustment

The judge is therefore likely to seek a more *forward* way forward, a more *radical* homely reason to restrict the transitivity of the relation back of powers for choice-of-law purposes.[251] And it may occur to her to look closely in this connection, at the factor listed in Restatement of Conflicts section 6 that the transitivity of the relation back (under section 274(a)) perhaps seems most to offend, viz., the "justified expectation[]"[252] of each powerholder in the series *D1*, *D2*, *D3* . . . *Dn-1*[253] that she could designate governing law—consistent with the basic policies underlying UTC section 107(1) and Restatement of Conflicts sections 268 through 272—by virtue of her authority to settle or contribute trust assets to a *further* trust.[254] When our hypothetical settlor, *S*, settled *t1*,[255] for example, she evidently authorized *D1* to do much more than just "designate recipients of beneficial ownership interests"[256]: she also authorized *D1* to create a further power of appointment, *p2*, and *to name trustees* (i.e., to create *t2*). And if *S* did not expressly grant these additional powers, then because she did not expressly rule them out, the law inferred them.[257] This is suggestive in light of the presumptive privilege to designate governing

249. *See supra* note 94 and accompanying text.

250. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. b (quoted *supra* text accompanying note 22).

251. *See supra* text accompanying notes 226-227.

252. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(d) (quoted *supra* text accompanying note 104).

253. In the hypothetical case of first impression described *supra* subpart II.C.1.

254. *See supra* notes 124-129 and accompanying text.

255. *See supra* subpart II.C.1.

256. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.1 (AM. L. INST. 2011) (defining "power of appointment").

257. *See id.* § 19.14 (describing permissible appointments by exercise of special power of appointment).

law that the Restatement of Conflicts accords the settlor of a trust[258] *apart from the preemptive force of section 274(a)*.[259]

a. The Relation Back Theory as Analytical Token for Donee Privilege as Well as Constraint

There is nothing in the nature of the relation back theory as a general theoretical proposition of the common law[260] that prevents its use as an argument and justification for claims of donee *privilege* as well as constraint: all of the cases that count as evidence for the relation back theory by evincing *constraints* on a donee's ability effectively to exercise a special or testamentary general power of appointment in the Resulting and Perpetuities Instantiations also evince that the donor of a power of appointment can confer on her donee the ability to designate recipients of beneficial ownership interests and (derivatively at least) the ability to create further powers of appointment and to name trustees.[261] The *relation* of the relation back is bilateral: the donee's ability to exercise a certain power of appointment is limited in respect of the donor thereof *because* (the theory goes) the donee *received that power* from the donor.

Thus, constraint on the donee's exercise of the power is the *verso* of a leaf the recto of which is the power itself. Indeed, one finds in the analytical jurisprudence[262] of Jeremy Bentham, an "astonish[ingly]" detailed[263] deployment of the idea of the relation back that focuses heavily on the *licensing* aspect of legal powers generally; for Bentham explained what he called "investitive" and "divestitive" rights—legal powers to

258. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 268-272 (AM. L. INST. 1971) (describing settlor's presumptive privilege to designate law governing validity and administration of trust as well as construction of trust's terms); *see also supra* note 89 (describing same).

259. Except, that is, for the indications in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 269 cmt. k and § 270 cmt. f that when a trust *tn* is created by the exercise of a special power of appointment *pn-1* that was granted under the terms of another trust *tn-1*, the rule of 274(a) takes precedence in determining the substantial validity of *tn* (as the intended result of the exercise of *pn-1*) over the presumptive privilege of the donee of *pn-1*, as the settlor of *tn*, to designate, in the *tn* trust instrument, the law governing the validity of *tn*. *See supra* note 95 and accompanying text.

260. *See supra* note 75 and accompanying text.

261. *See supra* notes 255-257 and accompanying text.

262. 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).

263. "[S]o far as I was concerned, there was much unfinished business concerned with legal powers, and I was *astonished* when I subsequently came to . . . find how much of it had already been attempted by Bentham." H.L.A. HART, *Legal Powers*, *in* ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 194, 196 (1982) (emphasis added).

change the legal position of others (what Hohfeld identified by the "correlates" *power-liability*)[264]—as *legislative* delegations of *privileges*, which, if exercised, implement and, thus, *relate back* for their legal consequences to the delegating source of law.[265] Bentham even hit on the metaphor of *writing back into* or *filling in blanks*[266] *left in* the relevant authorization:

> 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.[267]

i. License and the Transitivity of Implication

Attention to the *licensing* (as opposed to *constraining*) aspect of the relation back of powers suggests that Restatement of Conflicts section 274(a)'s fixation on "the law which determines the validity of the trust [granting the power in question]"[268] is contrary to analogy. If granting a power of appointment presumptively entails granting a power to create a trust,[269] and the power to create a trust presumptively entails a power to designate the law governing the validity of that trust,[270] why should granting a power of appointment not presumptively entail granting a power to designate governing law? If the donor of a power of appointment is to be viewed as leaving blanks[271] where she herself would otherwise have indicated the transferee(s) of property, whether the property would

264. *See* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 50-57 (Walter Wheeler Cook ed., 1964). "In my view Bentham is a more thought-provoking guide than Hohfeld." H.L.A. HART, *Legal Rights, in* ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 162, 162 (1982).

265. *See* JEREMY BENTHAM, OF LAWS IN GENERAL 80-91 (H.L.A. Hart ed., 1970); HART, *supra* note 264, at 170.

266. *See supra* note 61 and accompanying text.

267. 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 61 (similarly deploying metaphor of filling in blanks).

268. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(a) (AM. L. INST. 1971) (quoted *supra* text accompanying note 20).

269. And it does. *See supra* note 257 and accompanying text.

270. And it does *except for the preemptive force of section 274(a)*. *See supra* notes 258-259 and accompanying text.

271. And she is. *See supra* note 61 and accompanying text.

be transferred in trust, *and, if so, what law would govern the validity of that trust*, why should she be viewed as leaving blanks suitable only for naming transferees and indicating whether the transfer is to be in trust?

ii. Symmetrical Disanalogy

The *constraint* imposed (as opposed to *license* conferred) on the donee by Restatement of Conflicts section 274(a)'s fixation on "the law which determines the validity of the trust [granting the power in question]"[272] is also disanalogous. As we have seen, there is a need for constraint on the choice of law in this context, a need that is directly linked to the policy of local law advanced by the Perpetuities Instantiation: a state that wants to regulate remoteness of vesting does not want to allow *either* the get-go of the perpetuities testing (or wait-and-see) period *or* the permissible choice of law governing vesting of future interests to be affected by the interposition of a power of appointment.[273] But by pointing uniquely to "the law which determines the validity of the trust [granting the power in question],"[274] section 274(a) *sticks* the donee with the *donor's* choice (affirmative or otherwise) of governing law whenever the donor had alternatives from which to choose.[275] Whereas, as far as the Perpetuities Instantiation is concerned, the donee of a special (or testamentary general)[276] power of appointment can postpone vesting for as long as the perpetuities period—measured from the date of the *creation* rather than the exercise of her power—will allow *regardless* of when future interests would vest according to the *donor's* provisions (if any) for takers in default.[277]

b. A Better Choice-of-Law Analogy to the Perpetuities Instantiation?

The confluence of these reflections on the licensing and constraining aspects of the relation back of powers suggests a compound, alternative analogy to the Perpetuities Instantiation accessory to the rule of Restatement of Conflicts section 274(a):

272. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274(a) (quoted *supra* text accompanying note 20).

273. *See supra* subpart IV.A.2.

274. *See supra* note 272 and accompanying text.

275. *See, e.g.*, *supra* note 121 and accompanying text.

276. *See supra* note 60.

277. *See supra* subpart II.A.2.b.

(1) For the same reasons of policy that a grant of a special power of appointment entails, unless the donor provides otherwise, a power to appoint in trust,[278] a grant under the terms of a trust *t1*, of a special power *p1* that permits appointment in further trust entails that unless the terms of *t1* provide otherwise, and *regardless of whether t1 was itself created by the exercise of a special power of appointment*, if *p1* is exercised to create a further trust *t2*, the *donee* of *p1* may choose the law to govern *t2* consistent with the rules of Restatement of Conflicts sections 268 through 272; *provided*, however,

(2) That whenever a trust *t2* is created by the exercise of a special power of appointment *p1* that was granted under the terms of a trust *t1*, a choice of law to govern the validity of *t2* pursuant to Restatement of Conflicts section 269 (for testamentary trusts) or 270 (*inter vivos*) is respected for choice-of-law purposes, only if the *donor* of *p1*, "*determined under general principles of property law*,"[279] *could have* made the same choice consistent with Restatement of Conflicts sections 269(b)(i) or 270(a) *in the light of circumstances existing at the time p1 is exercised*.[280]

V. CONCLUSION

We shall not work this proposal out in detail here—the road to this point has already been a long one. It will suffice for now to point out that the proposal bids fair to satisfy all of the preferences for choice of law in the circumstances address by Restatement of Conflicts section 274(a) that our hypothetical judge has formed along the way. For one thing, the proposal is based entirely on analogies to the *local law*[281] of the forum (as it is assumed to be by the Restatement of Conflicts),[282] thus securing the jurisprudential attractiveness as justification for unique-reference, jurisdiction-selecting choice of law that the Restatement of Conflicts'

278. *See supra* note 257 and accompanying text.

279. To borrow the USRAP's tag for referring to the Perpetuities Instantiation. *See supra* notes 233-234 and accompanying text (emphasis added).

280. By analogy to the principle that 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*, the 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*. *See supra* notes 70-71 and accompanying text.

281. *See supra* notes 278, 280 and accompanying text.

282. *See supra* subpart I.A.2; *infra* text accompanying note 300.

attempts (unsuccessfully) to provide by its explication of the rule of section 274(a).[283]

The proposal also promises to disarm the threat we have identified to "the basic policies underlying the particular field of law" (within the meaning of Restatement of Conflicts section 6)[284] without invoking the *unrestricted* transitivity of the relation back of powers in the Resulting and Perpetuities Instantiations that embarrasses Restatement of Conflicts section 274(a).[285] On the facts of our hypothetical case of first impression,[286] the initial inquiry would be whether our hypothetical settlor, *S*, *could have* selected the law of *State N* to govern the validity of trust *tn* consistent with Restatement of Conflicts section 269(b)(i) *in the light of circumstances existing at the time pn-1 was exercised* by *Dn-1*'s will (i.e., at the time of *Dn-1*'s death).[287] If *S* could not have done that (because the selection of *State N* in those circumstances would "violate a strong public policy of the state with which, as to the [accumulation of income], [*tn*] has its most significant relationship"),[288] we might (on a plausible implementation) ask the same question about the law of *State N-1* in light of the circumstances existing at the time *pn-2* was exercised by *Dn-2*, and go on in the same way until either (1) we found a state in the series *State B*, *State C*, *State D . . . State N-1* that *S could have* selected in the relevant hypothetical situation as of the relevant time or (2) we arrived (metaphorically) back at *State N-x = State A*.

The risk that we should have to travel (metaphorically) by the transitivity of the relation back, all the way to *State A* will, of course, be affected by the circumstances in which the law of *State A* came to govern the validity of the trust *t1*. If we assume, for example, that the only reason that *State A* was involved was that *S*, who was then domiciled in a state that had already abrogated the common law rule against accumulation of income, acceded to the request of a commercial trustee organized under the laws of *State A* that she designate that state's law in the governing-law provision of *t1*,[289] the chances are much improved that someone in the donee series *D1*, *D2*, *D3 . . . Dn-1* will have made a selection, pursuant to Restatement of Conflicts section 269, of law to govern the validity of one

283. *See supra* subpart IV.A.1.

284. *See supra* subpart IV.A.2.

285. *See supra* subpart II.C.2-4.

286. Described *supra* subpart II.C.1.

287. *See supra* subpart II.C.1 and text accompanying note 280.

288. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 270(a) (AM. L. INST. 1971). *See supra* subpart IV.A.2.

289. *See supra* note 121.

of the trusts in the series *t1*, *t2*, *t3* . . . *tn-1* that *S could have made* in the light of circumstances existing at the time of the relevant donee's death.[290]

But those chances are also improved, *in any case*, by the proposal's analogy to the "general theoretical proposition[] of the common law"[291] according to which, for perpetuities purposes, the words of an appointment by means of a special power are interpreted in the light of circumstances existing at the time of the power's *exercise*.[292] Things change over time in ways that will affect the balance of the policy factors listed in Restatement of Conflicts section 6 that "underly"[293] sections 269 and 270. The strict transitivity of the relation back of powers in the Resulting and Perpetuities Instantiations makes Restatement of Conflicts section 274(a) indifferent to such change and thereby exposes the section to the embarrassment of policy, according to the factors listed in section 6, that initially set our hypothetical judge off on the search for an alternative choice-of-law rule.[294] Under the proposal, the relation back is transitive at any given time, only to the extent needed *at that time* to protect "a strong public policy of the state with which, as to the matter at issue, the trust has its most significant relationship,"[295] and such a policy will always determine the balance of the factors listed in section 6.[296]

We are leaving many questions unanswered here. The proposal sketched above requires the construction of a hypothetical choice situation the elaboration of which will require us to decide, for example, whether the death of the "*donor* of *p1*, '*determined under general principles of property law*'"[297]—*S* in our hypothetical case of first impression—will foreclose inquiry about whether that donor "could have made [a certain] choice . . . in the light of circumstances existing at [any] time"[298] *after her death* and, if not, how we are to conceive the donor's posthumous existence. And quite apart from implementation of the proposal, our analysis has been artificially *pure* in the sense that we have sat our hypothetical judge in a jurisdiction that fully satisfies the Restatement of Conflicts' assumptions about local law, a jurisdiction that

290. *See supra* note 287 and accompanying text.

291. *See supra* note 75.

292. *See supra* note 280 and accompanying text.

293. In the sense described *supra* text accompanying note 30.

294. *See supra* subpart II.C.4.

295. *See supra* note 288 and accompanying text.

296. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (AM. L. INST. 1971) (quoted *supra* text accompanying note 30).

297. *See supra* text accompanying note 279.

298. *See supra* text accompanying note 280.

is fully committed, that is, to the Resulting and Perpetuities Instantiations:[299] a more "organic" theory[300] will have to reckon with the fact that the only remnant of the Perpetuities Instantiation in the current law of many states is an anti-Delaware-tax-trap provision.[301]

We must be content for now, to regard such matters as loose ends; for we have not offered to argue fully for the proposal here.[302] Our arguments for it have been only such as were picked up along the way of our principal errands, which have been to show that we need a new choice-of-law rule for the situations contemplated by Restatement of Conflicts section 274(a)[303] and to show that UPAA section 103(2) will not do the job.[304] Our latest excursion[305] has only been to associate those negative conclusions more concretely with the relatively constructive observation that whereas UPAA section 103(2) is really just "dogma"[306] in the sense anathematized by the Restatement of Conflicts,[307] Restatement of Conflicts section 274(a) can be viewed as a failed attempt to do something—viz., to derive or support a choice-of-law rule by ordinary methods of legal reasoning from *local law*[308]—that is suggestively tied, at least on a *pure* theory of jurisdiction-selecting choice of law,[309] to the most fundamental problem of jurisprudence[310] that choice of law poses for a judge sitting in a case of first impression.

299. *See supra* text accompanying note 97.
300. In the sense described *supra* note 51.
301. *See* Spica, *supra* note 16, at 364-65.
302. *See supra* Part I.
303. *See supra* Part II.
304. *See supra* Part III.
305. *See supra* Parts IV and V.
306. Wechsler, *supra* note 27, vii-viii (quoted *supra* text accompanying note 81).
307. *See supra* subparts II.B.2.a., III.B, and IV.A.2.
308. *See supra* subparts II.A.1.b and IV.A.1.
309. *See supra* note 51; text accompanying notes 299-300.
310. *See supra* subpart II.A.1.b.ii.