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Social Control of Wealth in Antebellum New York

William P. LaPiana*

I. INTRODUCTION

Trusts are often portrayed as the quintessential invention of the common law legal world, born of lawyerly and judicial ingenuity in the service of clients' desires to frustrate taxation by first fashioning and then discharging a rocket launcher through a loophole in a statute carefully designed end to put an end to existing tax evasion.1 More broadly, the conventional history of the trust most often portrays it as a device for the perpetuation of individual control over wealth in opposition both to governmental attempts to limit that control through taxation and to attempts by family members to control the use of inherited wealth.2 The two great nineteenth century innovations in American trust law, the spendthrift trust and the formal rule that a trust cannot be terminated by the consent of all the beneficiaries if to do so would subvert a "material purpose" for the settlor's creation of the trust, were both premised on the idea that the settlor has every right to control the enjoyment of the property the settlor has placed in trust for the benefit of the beneficiaries.3 Those two particular manifestations of the idea that the intent of the settlor controls are the products of the 1880s, yet their viability is undiminished today.

That continuing strength has manifested itself in many of the discussions of whether or not a particular state should adopt the Uniform Trust Code, promulgated by the Uniform Law Commission and offered

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1 This view of the trust informs the conventional understanding of the workings of the Statute of Uses, 27 Hen. 8 ch. 10, which sees the statute's enactment as part of Henry VIII's campaign to shore up the Crown's revenue from feudal incidents, an aim frustrated by the subsequent invention of the trust. See Cornelius J. Moynihan & Sheldon F. Kurtz, Introduction to the Law of Real Property 222 (3d ed. 2002).

2 See, e.g., Joshua C. Tate, Conditional Love: Incentive Trusts and the Inflexibility Problem, 41 Real Prop. Prob. & Tr. J. 445, 445-48 (2006) (discussing how trusts are often used to control the spending of children of wealthy families or provide incentives to effect particular behaviors or particular uses for the wealth).

3 See Broadway Nat'l. Bk. v. Adams, 133 Mass. 170, 173 (1882) (employing the concept of a spendthrift trust); Claflin v. Claflin, 149 Mass. 19, 455-56 (1889) (employing the material purpose rule).
for adoption in the states. Under its former name, the National Conference of Commissions on Uniform State Laws, the Commission was the author of the Uniform Commercial Code, its most successful effort at bringing uniformity to the laws of the states, and the Uniform Probate Code, its somewhat less successful but nonetheless influential attempt to do the same for the law of wills and probate procedure. The Uniform Trust Code has been adopted in 30 states and the District of Columbia since was promulgated in 2000 (although it has been amended several times). The UTC’s spendthrift trust provisions (sections 502-503) are a codification of existing law and its provision dealing with termination of a trust with the consent of all of the beneficiaries (section 411) requires that the termination not be “inconsistent with a material purpose of the trust” and expressly states that the existence of a spendthrift provision is not presumed to express a material purpose. The Comment to section 411 quotes from Restatement (Third) of Trusts section 65, comment d to the effect that material purposes “are not readily inferred.” The comment to the termination provision, and by extension the Restatement provision, has been widely criticized as not giving sufficient deference to the settlor’s reasons for creating the trust and the provision removing the presumption that the existence of spendthrift provision is not enough to prevent termination, that is, that its inclusion in the trust terms expresses a “material purpose,” has been so widely scorned that the Commission has placed the provision in brackets, indicating that a state can omit the provision and still adopt the “Uniform Trust Code.”

There is, however, an alternative American trust law, traces of which still exist in the law of its place of origin, New York State. The trust provisions of the Revised Statutes of 1830 were a radical transformation of the law of trusts as it then existed in the Anglo-American legal world. The Revised Statutes as a whole and the story of their adoption has not received a thorough treatment in many decades, and

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6 The portions of the Revised Statutes dealing with the law of real property which are the provisions dealt with here, were enacted in 1827 and 1828 with an effective date of January 1, 1830. See N.Y. Revised Stat. § 8 (1830) [hereinafter R.S.]. The Revised
this paper certainly is not an attempt to fill that gap. Rather, it illustrates the radical nature of the trust provisions of the Revised Statutes by examining the first case to apply them to a will contest. Some background, however, is still necessary.

II. THE REVISED STATUTES

In 1828 and 1829 the legislature enacted the Revised Statutes which had been prepared by a committee of three appointed by legislative act in 1824. The work undertaken was much more than systematization and reordering of existing statutes. The revisers, Benjamin Butler, John Duer, and John C. Spencer, submitted to the legislature an extensive revision of the law of New York which one commentator describes as "the first true revision of statute law among English speaking peoples." Some of the most dramatic changes were made in the law of real property. Many of these involved the complexities surrounding uses and their role in conveyancing. Others completely transformed the law of trusts of real property and it is those provisions examined here.

The trust provisions of the Revised Statutes are easy to summarize, although they proved difficult to put into practice. There are only two types of trust. The first class includes trusts arising by implication of law which are necessary to prevent fraud. The classic example is A provides money to B which is to be used to purchase real property. B does purchase the property but takes title in B's name without A's knowledge or consent or in violation of A's legitimate expectations. An implied trust therefore arises which requires B to convey title to A. The second class includes active or express trusts "where the trustee is clothed with some actual power of disposition or management, which cannot be properly exercised without giving him the legal estate and actual possession." The statute then authorized only four types of express trusts: 1) to sell lands for the benefit of creditors, 2) to sell, mortgage or lease lands to raise cash to satisfy legacies in wills, 3) to receive the rents and profits from lands "and apply them to the use of any person," and 4) or to accumulate the rents and profits for eventual application to the use of any person. The third sort of trust is closest to what today we identify with the idea of a trust; that is, a trust set up by one person for the benefit of another person. The object of the arrangement is to entrust

Statutes are therefore usually referred to as the Revised Statutes of 1830; that convention will be followed here.

7 1825 N.Y. LAWS. ch 324 (1909).
9 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW 309 (4th ed. 1840).
10 R.S. § 55.
the trustee with the management of property for the benefit of the beneficiary. It is a gift, often made at death, and often made by one member of a couple to the survivor or by an older generation member to relatives of a younger generation.

The limitation of these provisions to trusts of lands, of course, does not make sense in the twenty-first century. Today most private express trusts are invested in financial assets. For the revisers, however, it was land that was the source of wealth that provided a stream of income for beneficiaries of trusts. In addition, the revisers believed that the existing law of trusts was particularly pernicious as applied to trusts of real property. The law allowed the creation of what were called "formal" trusts. These trusts gave legal title to the land to the trustee but gave the beneficiaries of the trust total control over the land. It was thus possible to hide the real ownership of land behind the person of the trustee. Not only did this arrangement cause confusion in the records of title to land, but it created opportunities for deception and bedeviled the courts of equity with litigation to sort out the resulting tangles. As the Revisers themselves put it in their Notes to the statutes they proposed to the legislature,

[I]t is plainly needless to retain them ["formal trusts"]. They separate the legal and equitable estate, for no purpose that the law ought to sanction. They answer no end whatever, but to facilitate fraud; the render titles more complicated, and to increase the business of the court of chancery. They are, in truth, precisely what uses were before the statute of uses, and are liable to many of the same objections.

While not mentioned in the Revisers’ Notes, one example of the questionable use of trusts had already been addressed by legislation. It appears that while most property qualifications for voting were part of the New York Constitution prior to the adoption of the Constitution of 1821 (complete abolition required some additional legislation), the practice of temporarily enfranchising voters by transferring to them for a very short period of time sufficient freehold land to meet the requirements was a common practice. Known in England as “fagot holdings,”

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11 The situation in contemporary Boston, for example, may have been different. See Lawrence M. Friedman, The Dynastic Trust, 73 YALE L.J. 547, 554 (1964).
the practice was perceived to be common enough in New York to be addressed by legislation, prescribing a new oath to be taken by electors who must swear that they possess a freehold of sufficient value and "that I have not become such freeholder fraudulently, for the purpose of giving my vote at this election, nor upon any trust or understanding, express or implied, to reconvey such freehold during or after this election."\(^\text{15}\)

In short, the Revisers meant what they said in section 45 of Article II, "Of Uses and Trusts": "Uses and trusts, except as authorised and modified in this Article, are abolished . . . ."

A. Perpetuities

The revisers took an even more radical approach to another aspect of the law of trusts, limiting the control of the dead hand. Today, almost every law student learns to dread the very phrase "rule against perpetuities," and the rule's gradual abolition in this country is probably a source of satisfaction to many who have struggled with its complexities. The rule against perpetuities that is taught in the classroom today is a rule based on remoteness of vesting of future interests.\(^\text{16}\) A future interest, of course, is property. It can be analogized to a claim check. At some time in the future, a person who has the claim check can surrender it in return for the ownership of property. All trusts create future interests. There are current beneficiaries and those who will benefit in the future. The latter have future interests and in order for those interests to be valid they must "vest in interest" within a period that begins to run when the future interest is created and lasts for the length of a life or lives in being when the interest is created plus twenty-one years plus a period of gestation. A future interest is vested in interest when the person who has the interest can be identified and the quantity of property that will be received when the future interest turns into possession is certain.\(^\text{17}\) The classic example is a trust to pay the income to the creator of the trust's child for life, then to pay the income to the child's children for their lives, then to terminate the trust and to distribute the trust property to the child's then living descendants. The child's children

\(^{15}\) 1811 N.Y. L. 287 (intending to prevent frauds and perjuries at elections and to prevent slaves from voting).

\(^{16}\) Before too long the Rule Against Perpetuities may be an historical curiosity. It has been abolished in as many as 20 states and the "dynastic" trust, a trust for a family line drafted to be perpetual, or at least of many centuries duration, is now a staple of estate planning for the wealthy. See Lawrence M. Friedman, Dead Hands: A Social History of Wills, Trusts, and Inheritance Law 132-136 (2009).

have future interests in the trust income, and all of those children will be known at the child's death and the share of income to which they will be entitled will also be known. The future interest, which when it is “cashed in” will result in obtaining fee simple ownership of the trust property, however, is created in the child's descendants who are living at the death of the last to die of the child's children, and it will not be certain who will receive the trust property nor how much each person will receive until that future date. Because the child can have more children after the trust is created, the time for the termination of the trust could be the death of a person who was not alive when the trust was created. Thus the persons who will receive the trust property might be determined at the death of a person who was not a life in being and therefore the interest in the child's descendants is void ab initio.\textsuperscript{18}

It is worth repeating that the income interests in the hypothetical trust discussed above are perfectly valid under the “no remoteness of vesting” rule. The child's interest in the income vests at the creation of the trust; the child's children's interests vest when the child dies and no more children can come in to being; the class is “closed” at that time, a time which occurs at the death of the child who was him or herself a life in being when the trust was created.\textsuperscript{19} Because the Rule Against Perpetuities invalidates only the remainder, the trust will be established and will pay income to child and child's children just as the trust terms require. When the last of child's children die the trust will terminate and the trust property will most likely be distributed through the estate of the creator of the trust.\textsuperscript{20} For example, if the trust was created in the will of child's parent from the residuary probate estate, the interest representing the right to have possession of the trust property when the trust finally ends must go to parent's intestate heirs—property not properly disposed of by will must pass in intestacy. Determining who actually gets possession of the property at the termination of the trust will certainly require tracing that reversionary interest through several intermediate estates until the ultimate takers of the property are properly identified.

\textsuperscript{18} Id. at 492.

\textsuperscript{19} In the modern world, the notion that the class of a child's own children closes at child's death is obsolete. The technology of storing sperm and ova makes it possible for an individual's child to be conceived and born after the individual's death. The status of such children is generally uncertain and while there are numerous reported cases involving claims for Social Security benefits on behalf of such children as the survivors of their "predeceased" parent or parents, there appear to be no cases involving perpetuities issues. A handful of states have legislation dealing with the status of posthumously conceived children for property law purposes like inheritance. See N.Y. EST. POWERS & TRUSTS LAW § 4-1.3 (McKinney 2017).

\textsuperscript{20} McGOVERN, KURTZ & ENGLISH, supra note 17, at 492.
The revisers, however, took a different approach. They ignored vesting and focused instead on the suspension of the power of alienation. The rule was set forth in two sections of Part II, Chapter I, Article I:21

Section 14. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this Article. Such power of alienation is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed.

Section 15. The absolute power of alienation, shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of not more than two lives in being at the creation of the estate . . . .

The limitation to two lives was an innovation, directly inspired by Thelusson's Case,22 in which the English courts allowed accumulation of income and the postponement of vesting during the lives of nine persons living at the testator's death.23 The question left open by the drafting of section 14 is the meaning of “future estate.” In the example above does the term apply only to the ultimate remainder, or does it mean the income interests as well? That is a question that the first case to deal with these provisions would answer.

B. Indestructibility

But there is more. The third type of permitted trust described above, corresponding most closely to modern donative express trusts, were made indestructible by section 63:24 the right of the beneficiary of such a trust to the rents and profits of the real property in the trust “cannot be transferred by assignment or otherwise.”

In addition, section 65 states, “where the trust shall be expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees, in contravention of the trust, shall be absolutely void.” Taken together, these two provisions are the source of the “statutory spendthrift trust,” one of the distinguishing features of New York trust

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21 R.S. §§ 14, 15.
23 Parliament reacted to the result by passing the Accumulations Act, 40 Geo. III (c. 98). See HARGRAVE, supra note 22, at xviii.
24 R.S. § 63.
In addition, the prohibition on the trustees doing anything that contravenes the terms of the trust is the provision which has made New York trusts indestructible, no matter what the beneficiaries might desire.

C. Supplanting the Common Law

These provisions are indeed revolutionary. James Kent referred to "the statutory demolition of the system of trusts." Many would assume Kent to have a conservative bias, but sympathetic sitting judges said the same. In the first high court case to deal with these provisions, Chief Justice Savage refers to the express abolition of all expectant estates, uses and trusts and that the revisers and the legislature intended to effect "great and radical changes." In the course of delivering his opinion in *Hawley v. James*, one of the most important early cases applying the new statutory scheme, Judge Bronson wrote,

> To give effect to the statute in the spirit in which it was enacted, we must, as far as practicable, eradicate from our minds all that we have learned in relation to the doctrine of trusts as they existed before the late revision, and read the statute as though the particular kinds of express trusts which it specifies were now for the first time authorised by law. We may resort to the common law for definitions and rules of construction where the statute itself is deficient. But in attempting to ascertain whether any particular trust can now be created, we cannot resort to the common law, for the obvious reason that this light has been extinguished by the legislature.

The view of a more modern commentator is similar. As George Canfield put it in the Columbia Law Review in 1901, "The revisers undertook to abolish the old law of uses and trusts of real property and to establish a brand-new system, simple and intelligible after a few days' study." In the standard study of the American codification movement, Walter Cook describes the revisers' work in this area as striking "at the

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25 The "statutory spendthrift" label is not accurate. Section 57 made the income from the trust property "beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created" liable to pay the beneficiary's debts. The substance of the section appears today in N.Y. Est. Powers & Trusts Law § 7-3.4 (McKinney 2017).

26 Kent, *supra* note 9, at 310.

27 Coster v. Lorillard, 14 Wend. 265, 298 (N.Y. 1835).

28 Hawley v. James, 16 Wend. 61 (N.Y. 1836) (involving the will of Henry James, the grandfather of the psychologist William James and the novelist Henry James).

very roots of the common law.” All in all this was radical reform. And it was radical reform that was put into practice.

III. Coster v. Lorillard

A. George Lorillard’s Estate Plan

The first important case dealing with these provisions decided by the highest court of New York, the Court for the Correction of Errors, was Coster v. Lorillard in 1835. The case involved the validity of the trusts created under the will of George Lorillard who died in 1832 leaving an estate worth approximately $3,000,000 and producing an annual income of $80,000 to $100,000. The total value of the estate represented economic power equal to more than $54.4 billion in 2015 and the buying power of the annual income in 2016 dollars was between $2,280,000 and $2,860,000 although as a share of per capita GDP, which is regarded as a better measure of standard of living, the income was worth about $68,000,000 a year. This was a fortune.

George Lorillard was one of the sons of Pierre Lorillard, the founder of the tobacco company that bore his name for more than two centuries, and Catherine Moore. According to the reports of the cases dealing with his will, he had three brothers: Jacob and Peter, who survived him, and Blaze (spelled “Blaze” in the transcription of the codicil) who predeceased him, leaving a daughter, Maria Barstow, who survived George, and two grandchildren, children of a deceased son of Blaze, George and Blaze Lorillard. George was also survived by two children of his mother’s second marriage to Daniel Holsman, a half-sister, Catherine, wife of John Coster, and a half-brother, Daniel Holsman. The two living brothers, the niece and grand-nephews, his half siblings, and his mother were his heirs-at-law. His mother, however, died only a few

30 Cook, supra note 12, at 149. The term “common law of trusts” is not strictly accurate. Trusts are the creatures of equity and “common law” refers to the law created and applied by the English law courts as opposed to equitable principles that made up the jurisprudence of the Court of Chancery. Yet the nineteenth century lawyers, judges, and commentator who dealt with the Revised Statutes regularly referred to the common law of trusts in ways that show it was unexceptional. It may be that in the legal culture of the antebellum United States the term “common law” encompassed all of the legal rules and precedents “received” from English law.

31 14 Wend. 265.


days after George's death in September of 1832. George and his brother Peter (or Pierre) succeed to their father's tobacco business and we could say they certainly made a go of it, given the value of George's estate.

The basic plan was straightforward. Unmarried and childless, Lorillard wanted to benefit his twelve nieces and nephews of the full blood during their lives and then to have the property pass to their descendants. The will creates two trusts. The first is to hold all the testator's real estate in New York City and from the rents and profits to pay two charitable legacies, annuities to a half-brother, to children of his full-blood nieces and nephews, and to his half-blood nieces and nephews, and the remainder of the income in equal shares to his twelve full-blood nieces and nephews (who were also named executors and trustees). After the death of the last to die of the twelve nieces and nephews the trust property is to be distributed to their then living descendants. The second trust is to be funded by selling all of the rest of his real and personal property and investing the proceeds in real estate in New York City, with the rents and profits to be paid to the twelve nieces and nephews for their lives, with the same remainder as the first trust. George Lorillard's nieces and nephews and their families were going to be filthy rich, although their parents, Lorillard's siblings, were skipped over. In addition the trustees would presumably be people of great influence in New York City real estate circles, although we might wonder how well twelve people would cooperate in the management of extensive real estate holdings. The question before the court was the effect of the provisions of the Revised Statutes discussed above on the trusts created in the will.

The question remains, however, why did George Lorillard adopt this particular estate plan? Passing property to the next generation is not at all unusual, of course, and since George Lorillard had no spouse or children, his decision to benefit his siblings' descendants while giving something to his half siblings and making some charitable gifts is not at all surprising. George was the co-owner of a profitable business, but his plans do not appear to be at all related to ensuring that the next generation succeed to control of the enterprise. P&G Lorillard was almost

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34 The following is drawn from the transcription of the will and codicil in the court records accessed through Ancestry.com [hereinafter Will and Codicil] (on file with author). The provisions of the instruments are also summarized in the three opinions in the case. See Coster, 14 Wend. at 265-72.
35 Will, Article First.
36 Will, Article Second.
37 The date of the senior Lorillard's death is uncertain, although there is a persistent story that he was killed by the British during the occupation of New York City, a story repeated by the New York City Parks Department, see Belmont Playground, N.Y. City
certainly not a corporation and was more likely a partnership, whether formal or not. There were no shares of stock to give to the next generation, but even if there were the command in the will that his personal property and real property situated outside the City of New York be sold and the proceeds invested real estate in the City means that no matter how George owned his share of the family business it would not be part of the property held by his trustees. Even the snuff mill where the company carried out its manufacturing operations was at that time located in a part of Westchester County that would become part of the City of New York only much later in the nineteenth century.  

Even more interesting is the lack of a role for his brother and business partner Peter in George's plans. His other surviving brother, Jacob, was named executor and trustee along with the twelve nieces and nephews of the whole blood. Jacob does not appear to have been active in the family business, but was a tanner, and apparently as successful in turning hide into leather as his brothers were in turning tobacco into snuff and other products. He was also closely associated with the Mechanics' Bank "which, while its president, he twice delivered from serious embarrassment." A prominent abolitionist, his death was marked by a laudatory editorial in the *Colored American* of September 29, 1838 which described him as being "in principle, a true abolitionist" and as "the now sainted Lorillard." Perhaps George intended his nieces and nephews to use the wealth he left him to be more like his brother Jacob, less active in "trade" and more in philanthropic activities. It is also possible that George's death was not unexpected and that he

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38 One of the landmarks in the early history of Lorillard the business was the purchase in 1792 of a mill and the surrounding land in what is now the Bronx. *See Maxwell Fox, The Lorillard Story* 22 (1947). According to Fox, the father and sons made the decision together, despite the book including a reproduction of what Fox identifies as the earliest known advertisement for the firm dated May 27, 1789 which mentions "Tobacco & Snuff" for sale “at the Manufactory, No. 4, Chatham street [today's Park Row], near the Gaol” by Peter and George Lorillard. *Id.* at 4. The site of the mill, replaced in 1870 by a stone structure which still stands, is part of the New York City park system, the Belmont Playground, named for the Lorillard family estate that once encompassed the site. *See Belmont Playground, supra* note 37. Whether or not George held any interest in the mill and the surrounding real estate, the direction to sell his real estate outside of New York City would have required the sale of his interest in the mill.

39 *Burrows & Wallace, supra* note 37, at 345.


had already disengaged from an active role in the business. His will was made in October 1831, eleven months before his death, and it may be that he was already terminally ill and had indeed withdrawn from active life. On the other hand, in the exordium of his will George described himself as “tobacco manufacturer” and as will see very shortly, at the time he committed his estate plan to writing George Lorillard still owned an interest in the snuff mill that was an important part of the family business.

It is equally possible that George intended no slight to Peter. Peter may have been so deeply involved in running the family business that he would not have the time to deal with the real estate portfolio the trusts would hold, and Jacob appears to have been quite familiar with real estate investing. Note, too, that Jacob and George, along with the husband of their half-sister Catherine, John Coster, were the nominated executors of their mother’s will. The family may have relied on Peter to run the business while the other men of the elder generation, whether related by blood or marriage, were relied on to deal with the family’s investments. Finally, George Lorillard may have shared at least to some degree his brother Jacob’s views on slavery and abolition.

The only charitable gifts in George’s will were $20,000 to the trustees of the General Theological Seminary of the Protestant Episcopal Church and $1000 to “the trustees or Vestry of St. Philips Church (fronting on Centre Street in the Sixth Ward of the City of New York).” St. Philips Church was founded at the beginning of the nineteenth century and is the oldest historically black Episcopal parish in New York. According to a late nineteenth century sermon on the history of the parish, George Lorillard leased the land to the parish on which its first church building was erected in 1818-1819 and consecrated on July 3, 1819. The first rector of St. Philip’s, Peter Williams, Jr., the only rector during George Lorillard’s lifetime, was one of the pillars of the American Anti-Slavery Society, and although he was forced to resign by the then

42 Coster v. Lorillard, 14 Wend. 265, 272-73 (N.Y. 1835).
43 Will, Article First.
Bishop of New York, Benjamin Onderdonk, he never surrendered his principles.45

Whatever led George Lorillard to write the will he executed in October of 1831, the codicil to the will executed in December of the same year and also admitted to probate changed his estate plan in ways that more clearly benefitted his relatives, especially Peter Lorillard’s son Peter, Jr. By the terms of the codicil, Uncle George gave Peter, Jr. “his heirs and assigns forever, in fee simple, all my one half part of the lands and snuff mills belonging to me and my brother Peter Lorillard” as well as George’s half interest in other lands outside of New York City owned by him and Peter, Sr. as well as George’s “part of the lands and mill site” in Patterson, New Jersey. The gift to Peter, Jr. also included George’s house on Chatham Street (now Park Row) in Manhattan and the leasehold lot of ground on which it stood. Whatever George Lorillard expected to be the outcome of the direction in his will to sell his land outside of the City of New York, two months later the codicil made it clear that his share of the real estate involved in the family business, along with his house located on the same street as the company’s store, would belong to his brother and partner’s eldest son. The devises in the codicil were made conditional on Peter Jr’s. paying to the executors and trustees of the will $25,000 within two years of his uncle’s death.46 That payment would then become part of the trust created by Article Second of the will and benefitting all of George’s nieces and nephews (“the Article Second trust”). Peter, Jr. also had to agree to pay an annuity of $200 a year for ten years to one of George’s maternal cousins. Should Peter, Jr. not agree to make the $25,000 payment and to pay the annuity, the codicil directs the executors to sell the lands involved and to add the proceeds to the Article Second trust.47

45 Burrows & Wallace, supra note 37, at 559. Rev. Williams’ father, Peter Williams, Sr., was born into slavery and was purchased by tobacco merchant James Aymar. The elder Williams, who bought his freedom after the Revolution, became an expert cigar maker and an important figure in the Methodist church in New York while maintaining a successful tobacco business. Id. at 398. Whether the tobacco business is part of the link between George and Jacob Lorillard, the Williamses father and son and black religious institutions in New York is a question that is worth further investigation. There is little doubt that at least some of the tobacco P&G Lorillard and Company turned into snuff and other products was raised by slave labor in the United States—Peter and George were involved in litigation over the failure to deliver to New York tobacco they had purchased in Virginia, a failure caused by the British blockade of Chesapeake Bay during the War of 1812. See P&G Lorillard v. Palmer, 15 Johns. 14 (N.Y. Sup. Ct. 1818), rev’d, Palmer v. Lorillard, 16 Johns. 348 (N.Y. 1819).

46 Using the relative share of GDP measure referred to supra note 32, $25,000 in 1831 is equivalent to $429 million in 2015. See Measuring Worth, https://www.measuringworth.com/.

47 Codicil, Article First.
The codicil also disposed of other real estate outside of the City of New York that the will had directed the executors to sell. A grandnephew, grandson of George’s deceased brother Blaze and also named George, received a life estate in a farm in Westchester County. After the life tenant’s death the land is to be sold and the proceeds added to the trust created by the will. The same grandnephew was given fee simple ownership of 506 acres of land in Oswego County. Another of Blaze Lorillard’s grandsons, also named Blaze, received a life estate in a farm in the town of Pelham in Westchester County and fee simple ownership of another tract of land in Oswego County of 472 acres. The land subject to Blaze’s life estate is to be sold after his death and the proceeds added to the trust created in the will.

Article Sixth gave George’s niece Eleanora Spencer, Peter, Sr.’s, daughter, “all my horses, cattle, waggons [sic.], and all my farming utensils that are used upon my farm and all my household furniture, beds, bedding and books.” Under Article Seventh, George’s niece Maria Barstow, Blaze’s daughter, received a life estate in two farms in Westchester County “at present under the care of Robert Barstow,” presumably her husband, and a life estate in lands and mills in Westchester “at present leased to Robert Barstow.” As with the lands in which his grandnephews were given life estates, the lands Maria was to enjoy for life were to be sold after the life tenant’s death and the proceeds added to the Article Second trust.

The codicil also modified the interests in the trusts of his niece Maria Barstow and his nephew Jacob Lorillard, Jr. “[O]ne-half part of the share or proportion of the rents, income and profits of [George’s] estate” that would otherwise have been paid to Maria during the seven years after George’s death is to be invested by the trustees in a separate fund and the trustees are to pay or apply the property in their discretion to or for the use of Maria’s children. During the same seven year period, the entire share of same rents, income and profits that would have been paid to George’s nephew Jacob, his brother Jacob’s son, is to be set aside by the trustees as a separate fund to be paid to Jacob or applied to the use of his children. Jacob may not have had children at the time the codicil was executed—the provision provides that if he has no children or if his children die “without such money having been applied to their use,” the trustees are given authority to distribute it to Jacob or to divide it among his then surviving sisters. Finally, the codicil gave annuities of $500 to the sons of his half-brother Daniel Holsman (his

48 Codicil, Article Second.
49 Codicil, Article Third.
50 Codicil, Articles Fourth and Fifth.
51 Codicil, Article Eighth.
52 Codicil, Article Ninth
daughters received identical annuities in the will) to be paid out of the Article First trust.\textsuperscript{53} The only relative completely left out was George's half-sister Catherine, married to John Coster. Whatever the motivation for the codicil, it expands the pool of those benefitting immediately from the Article First trust, the source of all of the annuities, and devises fee simple ownership of real property outside of New York City to male members of the next generation, and perhaps most importantly gives Peter Lorillard, Jr. the opportunity to purchase land critical to the functioning of the family business. In addition, some of the George's nieces receive life estates in real estate located outside of New York City, real estate that would have been sold under the provisions of the will and added to the Article Second trust. We can only speculate to what degree the changes wrought by the codicil were deigned to prevent opposition to the estate plan.

While much of the "why" is speculation, one thing is certain. When considered in the abstract, the trusts created by George Lorillard's will were not exactly the sort of trusts the Revisers intended to destroy, or rather, they did not exhibit the vices the new statutes were designed to suppress. For the Revisers, and presumably for the legislators who made the Revised Statutes the law of New York, trusts were dangerous to the polity because they created a class of rentiers who had not responsibility for the management of the property which supported them. This aspect of the new trust law is examined in the discussion of the opinions of the judges in the Court of Errors. The trusts under George Lorillard's will, however, were to be managed by the beneficiaries who were also the trustees. With the exception of the annuitants whose annuities were charges on the trust created with the real property in New York City George owned at death, the persons who would benefit from the income generated by the real estate held in the trusts were the same people who would hold title to the real estate and be responsible for the leases and other transactions that would make the property productive of income. Some of his nieces and nephews were adults. Perhaps Uncle George wanted to give them responsibility for their own financial security as well as requiring them to work together to manage his share of the

\textsuperscript{53} Codicil, Article Tenth. See MEASURING WORTH, https://www.measuringworth.com/ (last visited July 3, 2017). Using this calculator figured that a share of per capita GDP is the equivalent of $340,000 in 2015 dollars. Therefore the $500 annuity was not insubstantial.
family fortune. In addition, his nieces, should they marry, would have a source of income free from the control of their husbands.

Again, some qualification is necessary. It is possible, even likely, that the management of the Lorillard family real estate holdings involved agents and others whose only relationship with the owners of the real estate was that of employer and employee rather than a family relationship. And, as we will see, the fact that the trustees who were also the beneficiaries were capable of managing these extensive real estate investments was seen as one more reason why the trusts violated the new statutes. Finally, there were no doubt practical reasons for placing the real estate in trust rather than parceling it out in fee simple ownership to the trust beneficiaries. Splitting up George’s existing real estate would likely require dividing existing plots as well as valuing them accurately so that each beneficiary under the will received appropriate value. What was once a portfolio of real estate investments managed as a whole would become separate holdings. Instead of the intended beneficiaries sharing in a large pool of income producing property, the benefit any one beneficiary received from Uncle George’s estate would depend both on which parcels they received and how well their individual property was managed. His nieces’ property would also come under control of their present or future husbands unless individual trusts were created for them. Numerous relatively small trusts with a single investment each might not have appealed to George Lorillard. His desire to give annuities to some of his family members was also made much easier to accomplish by creating a large trust, income from which would fund the annuities easily. The will provision directing the sale of his personal property would still operate but the executors would have to distribute cash to the beneficiaries and it does seem that George Lorillard really did prefer long term investments to be in real estate.

Coster, 14 Wend. at 271. George Lorillard realized that not all of his nieces and nephews would necessarily be adults at the time of his death; the will authorized a minimum of three executors and trustees who were not minors or non-residents of New York to execute the trusts, and at his death eight of the twelve trust beneficiaries and nominated executors and trustees were of full age. Id. at 272.

The terms of both trusts expressly provided that the interests of the nieces and grand-nieces who were current and remainder beneficiaries of the trusts would be paid to them for their separate use and benefit, free from “the control, liabilities or engagements of their husbands.” Will, Article First. Such provisions were effective under New York law both before and after the Revised Statutes. See Norma Basch, In the Eyes of the Law: Women, Marriage and Property in Nineteenth-Century New York 76 (1982).

The devises of real estate in the Codicil often include the name of a lease or the name of the person who has the “care” of the land.
Whatever the reasons George Lorillard had for making the will he did, it was all for naught. The entire arrangement was torn down by the trust provisions of the Revised Statutes.

B. The Litigation

The case began as a bill in chancery brought by Jacob as executor and trustee as well as executor of his mother’s will (if the will were invalid part of George’s property would pass to his mother as one of his heirs) and by seven of the nieces and nephews named as executors and trustees asking for a decree from the Chancery Court stating that the trusts in the will were valid and ordering them to be carried out. The eighth niece who was of age refused to join in the suit and she, the minors named as executors and trustees, John Coster and his wife (George’s half-sister Catherine), Peter Lorillard, George’s brother, George’s half-brother Daniel Holsman, and George and Blaze Lorillard (George’s grand-nephews, the children of a predeceased child of his predeceased brother Blaze) were named as defendants. The defendants are all persons who are George’s heirs in intestacy and they may also have been beneficiaries of George’s mother’s will and thus would take through her will whatever she received as George’s heir. In addition, George’s niece Maria Barstow, the daughter of his predeceased brother Blaze and his grandnephews George and Blaze were heirs in their own right and presumably preferred to see the trusts fail. The infant trustees and executors, of course, could not join in the action to have the will construed and the trusts held valid, but they would have to be bound by any final decree and apparently under the existing procedural system they would have to be defendants, even though their interests were aligned with their adult siblings and cousins and with Jacob. Peter Lorillard was also a defendant, but again, even if he wanted his brother’s will to be carried out as written he had no standing to bring an action to have it declared valid but had to be bound by any decree so holding and was therefore nominally a defendant.

The case was tried twice: once before the Vice-Chancellor\textsuperscript{57} and again on appeal before the Chancellor who upheld the validity of part of the income interests in the twelve nieces and nephews.\textsuperscript{58} The legal reasoning is complex, but the basic holding was that, first, the prohibition on undue suspension of the power of alienation and the voiding of future estates that caused a prohibited suspension did not apply to present interests like the income interests in the trusts under George’s will and, second, that nothing in the Revised Statutes prevented the creation of a

\textsuperscript{57} Lorillard v. Coster, 5 Paige Ch. 172, 173 (N.Y. Ch. 1835).

\textsuperscript{58} Coster, 14 Wend. at 272.
trust for any number of beneficiaries who have a present interest. The Vice-Chancellor did express his opinion in dicta that the remainders in the trusts under the will were invalid because they would vest only after the death of the last of the twelve nieces and nephews and therefore suspended the power of alienation for more than two lives.

The Vice-Chancellor's decision was appealed to the Chancellor, Reuben Walworth. The Chancellor was no friend of the perpetuation of inherited fortunes. His opinion on the appeal leaves no doubt where he stands. "The present case," he wrote, "is a striking illustration of the wisdom of these restrictions upon the power of rendering real property inalienable for a long period of time." George Lorillard's trusts would prevent the divisions of the real property they held for many decades and in the meantime to give to a few of the nephews and nieces, who may chance to live the longest, an enormous and constantly increasing income; while the descendants, not in esse at the death of the testator, of such of the nephews and nieces as happen to die first, will be left without a shilling out of the proceeds of this immense estate for their education and support, during the continuance of the trust, although presumptively entitled to a large share of the property after the death of the whole of the twelve nephews and nieces.

Even more striking was Walworth's strong statement of the primacy of society over the individual's desire to control property after death.

Nothing can be more repugnant to the principles of a republican government than the perpetuation of large and overgrown estates, long after those, by whose industry and prudence such estates have been acquired, have been laid in their graves. The natural right, however, of disposing of, as well as enjoying all earthly possessions, necessarily terminates with our lives. And whatever power of disposition or control we are permitted, by anticipation, to exercise over our acquisitions after that time, is merely a favor conferred upon us by some positive regulation of society. No one, therefore, should be encouraged, or even allowed, to make an unnatural and capricious disposition of his property by will, without regard to the situation and probable wants of those who are the proper objects of his bounty, for the mere purpose of rendering such property indi-
visible and inalienable for a long period after his death; because such a disposition of his property, by will, is a serious injury to the community, which has granted to him the privilege of disposing of the accumulations of his life in this manner.64

One might assume at this point that the Vice-Chancellor would be reversed, and indeed he was, but not in a way that destroyed the trusts and reduced George's estate to intestacy.65 The Chancellor had a different idea. He analyzed the income beneficiaries' interests in the two trusts as tenancies in common with cross remainders. That meant that when the first niece or nephew died, the remaining eleven would enjoy one-eleventh of the decedent's share of the income of the trust.66 When the next beneficiary died the trust must end because then the two-life permissible period of suspension of the power of alienation would be at an end. Presumably at that time the trust property would pass to George's heirs because the will made no other disposition of the property other than to the trusts.

This result, of course, made no one completely happy, and the Chancellor's decision was appealed to the Court of Errors of the State of New York.67 The Court of Errors was the highest court of the state until the Constitution of 1846 abolished it and created instead the Court of Appeals, still the highest court of New York. The Court of Errors was unusual among the highest courts of the states in its membership. It was composed of the president of the state senate, the senators, the chancellor, and the judges of the Supreme Court.68

The high court decided that the new rules completely destroyed George Lorillard's estate plan. There were five opinions in the Court of Errors. All agreed that under the English common law, indeed under the law of New York as it stood before the Revised Statutes, the trusts in the will were completely valid and indeed unexceptional.69 The classic rule against perpetuities was not violated. The remainders following the nieces' and nephews' interest in the income of the trusts are not vested during the existence of the income interest because the takers of the trust have to be living at the death of the last of the twelve to die, but when all of the twelve are dead, the trust property will be distrib-

64 Id. at 225.
65 See id.
66 Id. at 230.
67 Coster v. Lorillard, 14 Wend. 265, 278 (N.Y. 1835).
69 Coster, 14 Wend. at 369.
uted to their descendants. The vesting is delayed only for the lives of the twelve and since they were all living at their uncle’s death all is well.

But under the Revised Statutes all is not well. There was much discussion about the application of the provisions of sections 14 and 15 to trusts. One of the arguments made to uphold the trusts was that the language voiding every “future estate” meant that only future estates, the name the new statutes gave to future interests, the existence of which suspended the power of alienation, were void. The court held, however, that the statute subjected every interest in the trusts it permitted to the suspension rule. The life income interests therefore violated the rule. Because the interests of the twelve as beneficiaries are inalienable under section 63 and because as trustees they cannot alienate so as to destroy the trusts—to do so would violate their duty as trustees to administer the trusts according to their terms and therefore be completely void under section 65 as an action in contravention of the trust—the power to alienate is suspended for all twelve lives and the statute is violated.

In addition, a majority of the court held that the trust itself was invalid because it was not one of the four varieties authorized in section 55. The only authorized trust that could encompass the Lorillard trusts was the third, a trust to “to receive the rents and profits of lands and apply them to the use of any person during the life of such person.” As originally submitted by the revisers to the legislature, the rents and profits were to be applied “to the education and support, or support only of any persons.” In the course of legislative debate the section was amended and as passed allowed application of the rents and profits for “The education and support, or either” of any person. Some three months after passage, in 1830, the language defining the third type of trust was amended again and the word “use” was substituted for the phrase referring to education and support. The five judges of the Court of Errors who authored opinions were not of one mind on the meaning of the provision.

Chief Justice Savage clearly believed that section 45 of the Revised Statutes meant what it said: “Uses and trusts, except as authorized and modified in this Article, are abolished.” He cited the notes of the revisers in which they stated that the purpose of the provision in section 55

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70 Id. at 266.
71 Id. at 386.
72 Id. at 318.
73 Id. at 321.
74 Id.
75 Id. at 265.
76 R.S. § 45.
limiting express trusts of real estate to the four categories enumerated
above was to allow the creation of trusts only where the trustees must
necessarily have both the title to the real estate and possession of it.
The revisers judged trusts in which the beneficiaries have an interest in
the lands held in trust to be pernicious. Such trusts complicate title to
land, create unnecessary law suits, and impair the alienability of land.
The revisers concluded that only trusts in which the trustees had real,
active duties to perform should be allowed and that beneficiaries should
have only the right to enforce the trust; they should not have an interest
in the trust property itself.77 In the Chief Justice’s view, the revisers
clearly believed that trusts in the third category, “to receive the rents
and profits of lands” and apply them to the education or support of any
person were generally created to provide for the education of a minor,
to provide a married woman with an income outside of the control of
her husband, or for the support of “a lunatic or spendthrift.”78

The Chief Justice was confident that the subsequent action of the
legislature in removing the reference to education or support and re-
placing it with “use” did not expand the classes of persons for whom
such trusts could be created.79 Nor did replacement of “education or
support” with the word “use” sanction the creation of a trust like the
trusts in the Lorillard will which are supposed to collect the rents from
the real property and simply pay over what is left after paying the annui-
ties to the twelve nieces and nephews.80 First, a trust to receive the
rents and profits of real estate and to pay them over to beneficiaries was
“known at common law, and was of course abolished with all other
trusts.”81 Second, the Legislature’s substitution of the phrase “apply to
the use of”82 must be understood in the context of the revisers’ reasons
for limiting the sorts of express trusts that can be created. The common
law trust to receive and pay over rents and profits of real estate gave the
beneficiaries of the trust an interest in the real estate. That is exactly
the situation the revisers sought to eliminate from the law of New
York.83

Senator Maison also held the Lorillard trust to be outside of the
bounds erected by the Revised Statutes. He agreed with Chief Justice
Savage that the Legislature intended to limit the creation of trusts of
real estate to receive and pay over rents and profits to those situations in

77 Coster v. Lorillard, 14 Wend. 265, 322-23 (N.Y. 1835).
78 Id. at 321.
79 Id. at 321-22.
80 Id. at 321.
81 Id. at 322.
82 Id.
83 Id. at 322.
which the beneficiaries are incapable of caring for themselves.\textsuperscript{84} The provision in section 63 forbidding a beneficiary from transferring his or her beneficial interest in the trust was an integral part of the scheme designed to insure that the beneficiaries could not lose the protection given them by the creator of the trust.\textsuperscript{85} In addition, it was abundantly clear that George Lorillard's twelve nieces and nephews were not the sort of persons for whom trusts could be created. Far from being incapable of caring for themselves, they were to be their own trustees. It would be their responsibility to manage a vast fortune. The conclusion was obvious: "This trust is not, then, in this view of it, such a trust as was designed to be authorized by the statute."\textsuperscript{86}

Senator Young was even more adamant about the nature of the beneficiaries of the trusts authorized by the third clause of section 55:

What class of individuals need the aid of trustees to deal out to them, from time to time, for their support for life or a shorter term, or in other words, to apply to their use the rents and profits of land? The greatest part of mankind would feel themselves degraded by being placed in such a situation; by being excluded from all control over property. . . . It is apparent, then, that it was not intended by the Legislature that trusts of this description should be create to subserve the ordinary wants of the community."\textsuperscript{87}

The persons such trusts are to serve are those the revisers mentioned: "Persons of imbecile minds, females who have married unfortunately, dissipated sons, the aged and infirm" who cannot manage property for themselves.\textsuperscript{88} Young admitted that the Revised Statutes do not require the creator of a trust to "specify the incapacity of the beneficiaries for whom the trust is created."\textsuperscript{89} The law will presume that the beneficiaries fit the description. That presumption cannot be indulged in this case, however. First, as Senator Maison noted, George Lorillard's making his nieces and nephews trustees shows that as beneficiaries they "are perfectly competent to have the charge and management of property."\textsuperscript{90} In addition, the income involved is so large that the trust "could not be designed merely for the support of the bene-

\textsuperscript{84} Id. at 352.
\textsuperscript{85} Id. at 353.
\textsuperscript{86} Id. at 355.
\textsuperscript{87} Id. at 377-78.
\textsuperscript{88} Id. at 378.
\textsuperscript{89} Id. at 381.
\textsuperscript{90} Id.
SOCIAL CONTROL OF WEALTH

His conclusion was clear: "To give effect to the trust would be to pervert and prostrate the statute." This interpretation of the word "apply" seems to be closer to the intent of the revisers. Their report on their work was widely disseminated, and they stated quite clearly that the purpose of the third type of trust was to allow the creator of the trust to care for those who could not care for themselves—femmes covert, minors, the incapacitated and spendthrifts. The limitation of the purposes of such trusts to education and support fit with that aim. The question was whether the substitution of the word "use" changed the meaning. Senator Young certainly thought not: "The only object of the statute, as has been shown, was to authorize this trust for the benefit of those who were destitute of the will, the discretion or the power to manage property for themselves." Justice Nelson, however, believed that the Lorillard trusts were valid under section 55. The substitution of "use" for "education and support" meant that the Legislature accepted that the person creating the trust could regulate how the trust was to be administered. In other words, "the mode of applying the rents and profits, as well as the amount of them" is not limited by any purpose expressed in the statute but rather "rests in the discretion of the person creating the trust." The statute allows the creation of a trust to pay over rents and profits in any amount, including all of them, for the use of the beneficiary as the beneficiary decides.

Although he found the trusts to be valid under section 55, Justice Nelson believed the trusts violated the rule against the undue suspension of the power of alienation and therefore were totally invalid. The more important point is that he arrived at the conclusion that the trust was valid under section 55 through construing the Legislature’s intention as shown by the substitution of "use" for "education or support." He was as confident as his colleagues that the Revised Statutes created a completely new system. "It must be remembered," he wrote, "that no trusts now exist in the State out of this 2d article [of the Revised Statutes]. . . . They are now the creature of the statute; and to be sustained by the court, must not only be in conformity to the provisions authorizing their creation, but subject to the restrictions the statute has im-

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91 Id.
92 Id.
93 Id.
94 Id. at 267.
95 Id. at 332.
96 Id.
97 Id. at 350.
98 Id. at 321.
posed." There simply is no other source of the law of trusts other than the Revised Statutes.

The final member of the court to deliver an opinion was Senator Tracy. He believed that the Lorillard trusts were clearly allowed by section 55. The amendment replacing “education or support” with “use” was intended to allow trusts which simply pay over the rents of profits of real estate to the beneficiaries. Senator Tracy was the only one of the five members of the court writing an opinion who cast the slightest doubt on the complete supplanting of the common law by the Revised Statutes. He believed that it was possible to sustain the interests of the nieces and nephews by considering the trusts as creating an interest in one-twelfth of the income for life in each of the nieces and nephews. Such was the common law and “I should be sorry to think,” he wrote, “the Revised Statutes have made such unreasonable and mischievous innovation upon the common law.” Yet he too believed the trust violated the prohibition on suspension of the power of alienation for longer than two lives and voted to invalidate the trusts.

The limitation of trusts to those purposes was again one of the radical provisions of the revised statutes. It is not surprising then that Senator Young, so certain on this subject, was the judge most direct in praising alienability. In his view, the common law has been “molded to allow the aggregation of wealth in the hands of an aristocracy, [by allowing] exclusion from alienation in perpetuity or for long periods of years, by remainders, trusts, uses and powers, to gratify the vanity of the possessor and the pride of the recipient.” Those provisions, in his view, “are regulations diametrically opposed to those principles of equality upon which our government is founded.”

The legislature did the right thing in limiting trusts to those required to protect the weak, promoting their fitness for that purpose by making the trusts destructible, and limiting their existence with the anti-suspension rule. All these changes were clearly made because the result of the adoption of the Revised Statutes is “that the common law, in reference to real property, to its tenure and transmission, with all their incidents, is wholly abolished.”

99 Id. at 333.
100 Id. at 393-95.
101 Id. at 394.
102 Id. at 393-95.
103 Id. at 396.
104 Id.
105 Id. at 372.
106 Id.
107 Id. at 369.
As we have seen, not all the judges who gave opinions were as adamant as Senator Young, but they all found the Revised Statutes to be the only relevant source of law and all twenty-four members of the court voted to reverse the decree of the Chancellor partially upholding the life interests in the trusts because in the view of all the judges the life interests unduly suspended the power of alienation. With the decision in Coser v. Lorillard the radical nature of the Revised Statutes at least as applied to trusts of lands was confirmed. The result was that George Lorillard's fortune passed outright to his heirs—his surviving siblings, the children of predeceased siblings, and through his mother's estate perhaps to his half-siblings as well and his dream of keeping his fortune intact for his grandnieces and nephews was frustrated, a result he could have obtained under the common law.

IV. THE LEGAL SEQUEL

Within less than two decades the radicalism of the trust law embodied in the Revised Statutes was greatly lessened. Application of the suspension rule and the two life limit to present interests survived. Trusts that would have been perfectly acceptable under the classic rule against perpetuities remained void in New York, and unlike the classic rule against the remoteness of vesting the suspension rule directly limited the duration of a trust. After Coser a New Yorker could create a testamentary trust to endure for the lives of a child and a child's child living at the testator's death but the trust could not last through the lives of grandchildren born after the testator's death as it could under the classic rule which invalidates only the remainder vesting after the death of the last grandchild to die. In addition, under the classic rule the invalidity of the remainder does not affect the preceding income interests; only the remainder is invalid. That means that after the death of the last of the testator's grandchildren the trust property would most likely pass to the estates of those persons who were the testator's intestate heirs and the property might end up in the hands of the descendants in whom the testator attempted to create the invalid remainder. The trust would have endured for the lifetimes of the child and the child's children even if some of the latter were born after the trust was created. Of course

108 Id. at 389. The provisions of the Codicil making outright devises of real estate and creating life estates in other parcels of real estate were also held invalid because they were so closely connected to the invalid trusts.

109 There was no disagreement, however, about the validity of the two charitable bequests which were therefore paid to the designated recipients. In addition, the lower court decrees finding valid the annuities charged on the Article First trust were not appealed as to all the annuities so some of them were indeed paid. Perhaps needless to say, the arrangements for the paying of those annuities led to litigation. See Lorillard v. Lorillard, 4 Abb. Pr. 210, 23 Barb. 528 (N.Y. Sup. Ct. 1857).
under the Revised Statutes a testator can create a trust for a married daughter which would keep the property out of the hands of her husband and give it directly to her children on her death. And even George Lorillard could have gotten something of what he wanted had he created separate trusts for each niece and nephew, although his fortune would not necessarily have been administered as a single entity for all of their lives.

Where change did come before the Civil War was in the meaning of the word “apply” in the definition of the third type of permitted trust of lands. The exclusion of a trust which simply pays its income to the beneficiary was litigated again and again until in 1849 the still new Court of Appeals gave a definitive answer in favor of the ability to create such trusts.\(^{110}\) The interpretation given in *Coster* was the subject of much criticism. James Kent put it succinctly:

> If this construction be correct, what inconveniences have been produced by the statutory demolition of the system of trusts? Who would be a trustee, and be bound to look into, and judge of, and pay all the expenditures of a married woman, or of an absent friend, or of the aged and infirm, who stood in need of the agency of a trustee?\(^{111}\)

The criticism was made more biting by another quirk of the Revised Statutes. One of the effects of the provision which gave the trustee both the legal and equitable title to the trust property and gave the beneficiary only the right to enforce the trust in the court was that the beneficiary could not be his or her own trustee.\(^{112}\) If that were nevertheless to happen and the trustee were also the only income beneficiary, then the beneficiary would hold all of the interest in the trust income and the trust would merge out of existence. Consider the parent who wishes to create a trust for a married daughter in order to keep the property out of the control of her husband, or the parent or other relative who wishes to create a testamentary trust for a child simply because the inalienability of the child’s interest makes it immune from creditors at least to the extent there is no “surplus” the creditors can reach under section 57, another delightful effect of the Revised Statutes. The requirement that the trustee, who must be someone other than the beneficiary, “apply” the property could be as burdensome as Kent describes it. All the creator of the trust wished to do is to create an income stream for the beneficiary that will be his or hers alone to control and that cannot be reached by creditors. Perhaps it would be more difficult to find a

\(^{110}\) See generally Leggett v. Perkins, 2 N.Y. 297 (1849).

\(^{111}\) Kent, *supra* note 9, at 310.

\(^{112}\) See generally id.
willing trustee if the job required seeing to the use of money distributed from the trust. Indeed, the practical difficulty in finding a trustee willing to take on the responsibilities of trusteeship under this provision is also raised by the author of a long series of articles on codification in The American Jurist. 113

Influenced or not by arguments addressed to practical effects, the then new Court of Appeals changed the law by its decision in Leggett v. Perkins in 1849.114 Gerardus Post died in 1833. His will created trusts of one-fifth of his estate for each of his two daughters. At a daughter’s death the trust property is to pass to her “lawful issue.”115 The trustee is to “pay over to them [the daughters] respectively . . . the rents, interests, or net income thereof . . . .”116 In his majority opinion, Judge Gardiner held that the trusts were within the third subdivision of section 55.117 He came to that conclusion for several reasons, including the language of the statute and practical difficulties of the sort alluded to by Kent. Perhaps more significantly, he is quite clear that the enactment of the Revised Statutes did not create the law of trusts anew:

The statute in reference to express trusts is merely permissive. It creates nothing. We might infer from the argument addressed to us, that the legislature had in the first instance annulled all trusts, and then preceded to a new creation. It is more correct to say that they abolished all that they have not recognized as existing. The trusts preserved have their foundation in the common law, and their effect is to be determined by the application of common law principles. . . . When a trust is created of this nature [a trust to apply rents and profits to the use of any person], it is recognized as existing with all its common law incidents. The relation of the donor and trustee, the power of the former and the duty of the latter, are precisely what they were by the common law.118

Under the common law the donor may define the trustee’s duties and that includes the ability to direct the trustee to pay over the trust income to the beneficiary. The statute, according to Gardiner, “says nothing of the discretion of the trustee; it speaks only of the power of the creator of

114 2 N.Y. 297.
115 Id.
116 Id. at 305.
117 Id. at 324.
118 Id. at 307.
The statute does not compel the creator to rely on the discretion of the trustee.

Gardiner goes on to construe the words of the statute, in particular "apply," insisting that it means simply to give the income of the trust to the beneficiary and does not necessarily imply that the trustee must have discretion in deciding how much of the income is to be distributed. But most significant is Judge Gardiner's answer to the argument that a trust in which the trustee must simply pay over the rents and profits of the real property held in trust is the sort of "formal" trust which the revisers were determined to destroy because it was merely a way of masking the trust ownership of real property. In the Coster case Chief Justice Savage stated that a trust to "receive and pay over" the rents and profit of realty was exactly the sort of formal trust the revisers wished to end and supported his argument by noting that such a trust was perfectly permissible under the common law but was "abolished" with all other common law trusts. According to Judge Gardiner, such a trust "is essentially active in all its particulars. It was so at the common law, and is so now." In other words, it could not fall under the Statute of Uses and be "executed" out of existence. Gardiner's conclusion is all the more significant because the Revised Statutes enacted its own version of the Statute of Uses as sections 47 and 49:

Section 47. Every person, who, by virtue of any grant, assignment or devise, now is, or hereafter shall be entitled to the actual possession of lands, and the receipt of the rents and profits thereof, in law or in equity, shall be deemed to have a legal estate therein, of the same quality and duration and subject to the same conditions, as his beneficial interest.

Section 49. Every disposition of lands, whether by deed or devise hereafter made, shall be directly to the person in whom the right to the possession and profits, shall be intended to be invested, and not to any other, to the use of, or in trust for, such person; and if made to one or more persons, to the use of,

119 Id. at 308.
120 Id. at 309.
121 Id. at 311.
122 Coster v. Lorillard, 14 Wend. 265, 322 (N.Y. 1835).
124 Section 47 remained in the New York statutes until 1997 when its descendant, N.Y. Estates Powers & Trusts Law section 7-1.1, was repealed and a new section 7-1.1 enacted bringing the law of New York on the merger of interests held in trust into conformity with the overwhelming majority of United States jurisdictions. The principal effect of the old statute was to prevent an individual from being sole trustee of a trust created for the individual's benefit. See Wetmore v. Truslow, 51 N.Y. 338 (1873).
or in trust for, another, no estate or interest, legal or equitable, shall vest in the trustee.\footnote{125}

The language of these sections seems to invalidate the sort of trust Gardiner describes, and it certainly does when read in the context of the trust law created by the Revised Statutes. If trusts are only to be created to those who cannot take care of themselves, then if someone is to have the complete enjoyment of property the property should be conveyed to him outright. Trustees exist only to take care of those who cannot help themselves.

Judge Bronson dissented vigorously. The judge held firm to the views he expressed as a member of the Court of Errors in the \textit{Hawley} case.\footnote{126} In his view the legislature has completely abolished the common law of trusts of land, and “if the authority to make this trust cannot be found in the statute, it does not exist.”\footnote{127} The trust created in Gerarus Post’s will suspends the power of alienation because the beneficiaries cannot convey their interests. The Revised Statutes limit the duration of such trust to two lives and also limit the purposes for which trusts can be created to those situations in which outright ownership by the beneficiary is not possible—minors, married women whose property is controlled by their husbands, imbeciles and lunatics. In more general terms, trusts which suspend the power of alienation are to be allowed only where they are necessary to the protection of persons who cannot manage wealth for themselves. In short, “it is not the policy of our law to enable men to tie up their estates, where no valuable end is to be attained by it.”\footnote{128}

Even more revealing is the description of the disasters that will come about from allowing the creation of a trust in which the trustee must pay over the income to the beneficiary. According to Judge Bronson in some case simply paying over the money to the beneficiary will not be applying it to the beneficiary’s use as the statute requires:

If [the beneficiary] is a lunatic, or is spending the money in gaming and drunkenness, while his wife and children are suffering from cold and hunger, it would be a breach of the statute

\footnote{125}{\textsuperscript{125} The current version of this provision is \textsc{N.Y. Est. Powers & Trusts Law} \textsection{7-1.2} (McKinney 2017) which applies, as its predecessor did quite soon after its adoption, to disposition of both real and personal property. The application of the Revised Statutes to all trusts was accomplished by the judiciary and is a story for another day.}

\footnote{126}{See \textsc{Leggett}, 2 \textsc{N.Y.} at 321 (Bronson, J., dissenting); \textsc{Hawley v. James}, 16 Wend. 61, 147-48 (N.Y. 1836) (holding that the legislature had restricted trusts to beneficiaries under disability, or at least to cases where the trustee had discretion in applying the income).}

\footnote{127}{\textsc{Leggett}, 2 \textsc{N.Y.} at 323.}

\footnote{128}{\textit{Id.} at 326.}
trust to put the money in his hands. And yet under the trust we have here, the trustee could not withhold a single dollar and apply it himself to the relief of the suffering family.129

In addition, the Revised Statutes in section 57 allow creditors of the beneficiary to obtain an order from the appropriate court for the payment of the sums owed them from "the surplus of such rents and profits, beyond the sum that may be necessary for the education and support" of the beneficiary.130 According to Bronson, "when the statute is followed in making the trust," that is, when the word "apply" means that the trustee must have discretion in using the rents and profits for the beneficiary, "the trustee will have the right to prefer the claims of honest tradesmen, mechanics and laborers, to the demands of harlots, gamblers, and sharpers."131 But if the trustee must passively pay over the rents and profits "the trustee has no such power."132 For Judge Bronson, to allow the creation of a trust which would simply pay over its income the beneficiary subverted the entire statutory scheme.

The decision in Leggett clearly limited the potentially radical effect of the Revised Statutes on the law of trusts.133 If Judge Bronson is taken as exemplifying the views of those who favored limitations on the creation of trusts, then the decision in Leggett represents a triumph of the desires of the owner of property over social limitations on the use of property. That triumph, however, came about not through a gutting of the statutes, but of a reading of arguably ambiguous language in the statute. Clearly the amendment which substituted the word "use" for "education or support" muddied the waters considerably. The most striking aspect of Gardiner's argument, however, is the blithe assertion that the legislature did not abolish the common law of trusts in enacting the Revised Statutes.

V. Conclusion

There are many factors that can be identified as playing some part in the Court of Appeals' opinion in Leggett. Between the decisions in Coster and Leggett New York adopted a new constitution. Among the most important provisions of that new frame of government was a thorough reform of the state's judiciary. Not only was the Court of Errors abolished along with all the lower courts, but the judges who staffed the

129 Id. at 325.
130 R.S. § 57.
132 Id.
133 Fowler, supra note 13, at 144-45 (noting that the construction of section 55 in Leggett and subsequent cases, "tolerates a species of naked or passive permanent trusts not originally contemplated by the revisers").
new courts were to be elected rather than appointed by the governor with the approval of the legislature. In addition, the economy suffered badly in the late 1830s and early 1840s. One of the effects of the economic dislocation was a growing dissatisfaction with government expenditures on internal improvements (in modern terms, "infrastructure") which helped to bolster, if not create, a belief in a narrow role for government which might seem incompatible with restrictions on the disposition of wealth. Some of these events outside of the world of legal reasoning and judging had some effect on what courts decided. Yet the language of the opinions remains and shows that it was difficult if not impossible to completely supplant in lawyers' minds common law concepts and rules by the enactment of a comprehensive statute, a code.

There is another lesson in this one small example of the fate of a radical abolition of common law rules and concepts and the substitution of a code in a fundamentally common law jurisdiction. All the opinions in both cases construe the statute; that is, the judges attempt to find the meaning of the words, in this case "apply to the use," in section 55 and "future estate" in sections 14 and 15, that the legislature intended. In addition, however, the judges were concerned with policy. The members of the Court of Errors who gave opinions in Coster all acknowledged the primacy of the legislature's choice of what sorts of trusts would be allowed under the Revised Statutes. Judge Gardiner's opinion in Leggett, however, explicitly made a policy choice. He disagreed with the limitation of trusts to those whose beneficiaries are not competent to handle their own affairs. "Every one knows," he wrote, "that there are individuals in every society, who are neither imbecile nor profligate, nor united with those who are so, who could properly dispose of fixed income, and yet who ought not, from prudential reasons, to control the capital out of which it is raised."

In a sense, this comment shows that the judge is substituting his judgment for that of the legislature. This willingness on the part of judges to understand their power as extending to substituting their policy choices for those of the legislature is an important factor in understanding the fate of codes in the United States. It goes hand in hand with the reluctance to accept the legislature's power to totally abolish the common law and rewrite the rules on a clean slate. In some ways

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135 Id. at 7. The difference between New York's Democrats and Whigs in this period as the difference between those who believed that society would naturally find its moral balance and those who believed that government had a duty to "shape the social condition of the people."

136 Leggett, 2 N.Y. at 313-14.
these two beliefs are connected. Throughout the nineteenth century the common law was seen by many lawyers and judges as embodying the total experience of society. Its rules had grown out of customary usages (although the relationship between "custom" and "law" is a complex one) and in some way embodied the very essence of a properly organized society. In the post-Civil War period in the United States the belief in the connection between the common law and the proper organization of society would become even more pronounced.\textsuperscript{137} It was strong enough, however, to contribute to the partial undoing of perhaps the most heroic effort at codification attempted in the nineteenth century United States.