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“The Race to the Bottom”

COMPETITION IN THE LAW OF PROPERTY

John V. Orth

“THE RACE TO THE bottom” is a phrase made famous in the history of the law of business associations.¹ Starting in the 1890s, New Jersey and Delaware competed for the privilege of chartering corporations (and reaping the associated economic benefits). The states engaged in a sort of Dutch auction, progressively offering better and better, that is, lower and lower, terms in their standard-form corporate charters. Eventually, New Jersey dropped out of the running, and Delaware won the race – which, of course, is why today one of the nation’s smallest states hosts

the “headquarters” of so many large corporations and why the Delaware Chancery Court is one of the world’s busiest business courts.

Competition between American states is not surprising. The single economic and social union that is the United States, legally bound up by the Full Faith and Credit Clause of the Federal Constitution,² makes it almost inevitable. The state of Nevada is an obvious example. Permissive divorce laws made it an early destination for unhappy couples,³ just as relaxed marriage requirements still make it popular with hopeful

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- 1 See, e.g., 2 JERRY W. MARKHAM, *A FINANCIAL HISTORY OF THE UNITED STATES* 58 (2002). The classic statement of the race-to-the-bottom thesis is William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 *YALE L.J.* 663 (1974). Whether the race was truly to the “bottom” is debated; whether there was even a race at all is denied. See, e.g., Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 *STAN. L. REV.* 679 (2002). The race-to-the-bottom metaphor is nowadays also used to describe and decry the effects of globalization. See, e.g., Robert J.S. Ross & Anita Chan, *From North-South to South-South: The True Face of Global Competition*, 81:5 *FOREIGN AFFAIRS* 8 (Sept./Oct. 2002) (“The absence of a mechanism establishing international labor standards is propelling the economies of the South in a race to the bottom in wages and labor conditions.”).
- 2 U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State . . .”).
- 3 In the days of the British Empire, the central authorities were particularly concerned that divergent divorce laws in various parts of the Empire would lead to people “running from place to place in search of divorces.” BRUCE KERCHER, *AN UNRULY CHILD: A HISTORY OF LAW IN AUSTRALIA* 139 (1995).

young people.⁴ Legalized gambling attracts millions of visitors annually, even as other states (and Indian reservations) have entered the field.⁵ Still the only state to allow betting on collegiate athletics and to give most of its counties the option to legalize prostitution, Nevada continues to exploit its law-making, or rather its law-repealing, advantages. It is ironic that a state so closely associated in the public mind with lawlessness and the Mob is the supreme example of the law's power to influence behavior.

Whether this competition is good or bad depends on one's point of view. The phrase "race to the bottom" obviously encodes a negative judgment, but a different label suggests a different conclusion. In a celebrated dissent, U.S. Supreme Court Justice Louis Brandeis described as "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."⁶ Although Brandeis had legal restrictions on economic competition in mind, his formula applies equally well to the removal of restraints, social as well as economic. If one approves of the result, or is

at least willing to give it a chance, "social experiment" is a happier description than "race to the bottom."

While these legal experiments are in progress, they provide a social safety valve, an outlet for those activities that are elsewhere illegal.⁷ Observation of the outcome may eventually convince other states to follow their example. In the meantime, these "social laboratories" produce "experimental law" not only for their own citizens, but also for those with the time and money necessary to travel to the appropriate legal marketplace. Of course, in a democratic society the existence of "law for the elites" – or, to be more precise, venues for elites to get the law they prefer – increases the pressure on other states to "democratize" the benefit (and not lose out on the profits). What ended the attraction of the "Reno divorce" was the adoption of relaxed divorce laws in other states. Gambling works for Nevada, providing the state with sufficient revenue to maintain a low-tax regime, thereby attracting new residents and businesses, and increasing the pressure on other states to offer gambling opportunities. Without Nevada's legislative power, Las Vegas and much of the state would still be

4 The Clark County, Nevada, Marriage License Bureau is open seven days a week 8am to midnight and 24 hours on legal holidays. No blood test is required and there is no waiting period; the fee is about \$35. FROMMER'S LAS VEGAS 2001 at 184–85 (2001). Nevadans seem to have lost their nerve when it came to toleration of same-sex marriage. Not only did Massachusetts win that race by legalizing such unions, see *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003), but Nevadans even amended their state constitution to prohibit their state from competing for the business. NEV. CONST. art. I, § 21 ("Only a marriage between a male and female person shall be recognized and given effect in this state."). See John V. Orth, *Night Thoughts: Reflections on the Debate Concerning Same-Sex Marriage*, 3 NEV. L. J. 560 (2003).

5 Today 198 federally recognized Indian tribes run 326 gambling facilities in 28 states, generating about \$10 billion annually, one-seventh of all legal gambling proceeds. Craig Lambert, *Trafficking in Chance*, HARVARD MAGAZINE 33, 40 (July–August 2002).

6 *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280, 311 (1932) (Brandeis, J., dissenting). The same advantage has been touted for the Australian Federation. The proposed constitution of the European Union describes the process with the anodyne phrase "open method of coordination." See Kalypso Nicolaidis, "We, the Peoples of Europe...", 83:6 FOREIGN AFFAIRS 97, 105–06 (2004).

7 Legalized betting on collegiate sports, restricted to Nevada by a 1993 federal law, is sometimes justified as a means of monitoring the illegal betting that undoubtedly occurs in other states and providing a legal outlet for complaints about tampering with student athletes. See CHAD MILLMAN, THE ODDS: ONE SEASON, THREE GAMBLERS, AND THE DEATH OF THEIR LAS VEGAS 186–91 (2001).

uninhabited desert.

Elites do not necessarily need to travel to take advantage of favorable legal regimes.⁸ Given the fact that money is easily transmitted within the United States, competition has broken out among the states to secure the trust business of the wealthy by offering better (that is, less restrictive) trust law.⁹ When Delaware recently repealed the Rule Against Perpetuities as applied to trusts, it freely admitted in the preamble to its statute that the purpose was to keep the state’s banks and trust companies competitive in attracting capital. Pointing the finger at “several innovative jurisdictions that have abolished the rule,” the statute recited that “[s]everal financial institutions have now organized or acquired trust companies, particularly in South Dakota, at least in part to take advantage of their favorable trust law.”¹⁰ Determined to beat these states at their own game and “maintain Delaware’s role as the most favored jurisdiction for the establishment of trusts,” the state went on to authorize the creation of self-settled spendthrift trusts that

protect the settlor’s assets from the claims of creditors.¹¹

Competition creates a “market” for laws not only between states in a federal union but also between courts of concurrent jurisdiction operating in the same state. In England before the Judicature Acts of 1873–75,¹² the three common-law courts of King’s (Queen’s) Bench, Common Pleas, and Exchequer exercised overlapping jurisdiction. Throughout the Middle Ages, a lively competition among these courts, driven by the judges’ desire to augment their incomes with fees from the litigants, had produced substantial improvements in justice.¹³ The action of ejectment, which began as a tenant’s remedy, was made available as a means to try title to land by the toleration of a convenient legal fiction; because of procedural advantages, it relegated the “proper” remedy, the writ of right, to oblivion.¹⁴ The action of trover, which began as a finder’s remedy (as its French name implies), became the means to try title to chattels by a similar fiction and won out over the ancient action of detinue,

- 8 Travel is obviously necessary if actual physical presence is required, as for marriage or divorce. Gambling, too, requires a presence in the state since the Interstate Wire Act of 1960 prohibits the placing of bets over means of interstate communication, such as the telephone and internet. In some cases, personal presence may actually be a disadvantage. For trusts located in Delaware, no state income tax is levied if the beneficiaries live in another state.
- 9 There has long been competition for trust business between American states, on the one hand, and foreign nations, particularly small island nations, on the other. What foreign nations could not offer, of course, was the stability and security of American law.
- 10 1996 LAWS OF DEL., ch. 538 (amending DEL. CODE ANN. tit. 25, § 503), preamble quoted in JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 854 (6th ed. 2000). South Dakota had earlier repealed the Rule Against Perpetuities. S.D. CODIFIED LAWS ANN. §§ 43–5-4; 43–5-8. See Joel C. Dobris, *The Death of the Rule Against Perpetuities, or the RAP Has No Friends – An Essay*, 35 REAL PROP., PROBATE & TRUST J. 601 (2000); Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097 (2003).
- 11 DEL. CODE ANN. tit. 12, § 3570 ff. (2002). See John E. Sullivan III, *Gutting the Rule Against Self-Settled Trusts: How the New Delaware Trust Law Competes With Offshore Trusts*, 23 DEL. J. CORP. L. 423 (1998). Previously, spendthrift provisions were limited to trusts for the benefit of others than the settlor. GEORGE T. BOGERT, *TRUSTS* § 40, p. 155 (6th ed. 1987) (“a property owner may not create a spendthrift trust in his own favor”).
- 12 36 & 37 Vict. c. 66 (1873); 38 & 39 Vict. c. 77 (1875).
- 13 For a brief survey, see JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 32–35 (2d ed., Roland Gray ed., 1927). For a facetious summary with a serious intent, see John V. Orth, *A Reverie on Medieval Judges, Milton Friedman, and the Supreme Court’s Workload*, 69 A.B.A.J. 1454 (1983).
- 14 See 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 199–206 (1768).

also because of procedural advantages.¹⁵

In addition, the English Chancery Court, usually known as “equity,” was famously available to supplement the common law whenever the legal remedy was inadequate, leaving a legacy that survived the eventual merger in most jurisdictions of law and equity.¹⁶ The trust for a married woman’s “sole and separate use” offered wealthy fathers a means to circumvent the male-dominated common law and protect a daughter’s property from her husband and his creditors. The celebrated passage of Married Women’s Property Acts in England and America in the mid-nineteenth century made the benefits available to all married women.¹⁷

In the United States the federal system gave litigants a choice of federal or state courts in many private law actions, at least when the parties were not citizens of the same state. For almost a century after *Swift v. Tyson* (1842),¹⁸ federal judges exploited this “diversity jurisdiction” to offer litigants a national brand of commercial law. Only in 1938 did the Supreme Court in *Erie Railroad*

*v. Tompkins*¹⁹ put an end to this competition, commonly known by the bad name of “forum shopping.” Luckily for industries engaged in interstate commerce, other forces – national legal education, scholarly treatises, and uniform acts – were by then available to provide the homogenization once provided by the federal courts.

Legal competition occurs not only between states or courts; it even occurs between legal doctrines within the same jurisdiction. Where there are two different means to the same end, lawyers and judges will constantly be required to compare and contrast them, and litigants will advance one or the other as it suits their interests. It is a staple of first-year property law that *inter vivos* gifts of personal property require donative intent, delivery, and acceptance.²⁰ Of the three, delivery is the most problematic, as the cases amply attest. Left to more advanced property courses is the fact that by a mere oral declaration of trust a donor may transfer beneficial title (the only one that usually matters) without de-

15 See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 150–53 (1768).

16 See U.S. CONST. art. III, § 1 (“The judicial Power of the United States shall be vested in one supreme Court...,” *i.e.*, not in separate courts of law and equity as in England at the time); N.C. CONST. art. IV, § 13 (“There shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action...,” *i.e.*, not separate actions at law and suits in equity) (original in N.C. CONST. OF 1868 art. IV, § 1). See JOHN V. ORTH, THE NORTH CAROLINA CONSTITUTION: A REFERENCE GUIDE 112 (1993). In England the merger of law and equity was complete by 1875, but a few common law jurisdictions retained separate equity courts much longer. The Australian state of New South Wales maintained the separation until 1972. PATRICK PARKINSON, TRADITION AND CHANGE IN AUSTRALIAN LAW 157–58 (2d ed. 2001). The state of Delaware still does.

17 See A.V. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 371–98 (2d ed. 1914). See also N.C. CONST. art. X, § 4 (“The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed and conveyed by her...”) (original in N.C. CONST. OF 1868 art. X, § 6); JOHN V. ORTH, THE NORTH CAROLINA CONSTITUTION: A REFERENCE GUIDE 154–55 (1993).

18 16 Pet. (41 U.S.) 1 (1842).

19 304 U.S. 64 (1938) (overruling *Swift*). See generally TONY A. FREYER, HARMONY AND DISCOURSE: THE SWIFT AND ERIE CASES IN AMERICAN FEDERALISM (1981).

20 RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY § 38, p. 84 (2d ed. 1955).

livery.²¹ The roots of the two doctrines lie in the dual sources of Anglo-American jurisprudence. Law, with its tradition of fixed rules and remedies, gave rise to the formal requirements for gifts,²² while equity, with its emphasis on intention and consequent tolerance of informality, was the home of the trust.

Maintaining the distinction between gifts and trusts has been a recurring preoccupation of judges and property scholars. In the first part of the nineteenth century, a line of English cases threatened to eliminate the legal requirement of delivery altogether by treating almost any manifestation of donative intent as a declaration of trust.²³ Sir George Jessel, himself an influential equity judge, finally put an end to this development in 1874 by ruling that "for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift shew an intention to give over property to another, and not to retain it in the donor's own hands for any purpose, fiduciary or otherwise."²⁴ In America, Professor Austin Scott, a founding scholar of the modern law of trusts, frowned on cases where

an intended gift fails for lack of delivery but courts nonetheless "torture," as he put it, "an imperfect gift into a declaration of trust."²⁵ While nominally concerned with discerning intention – to make a present gift or to create a trust – the real concern seems to be with drawing the proper legal lines.

The effect again is to create law for the elites, this time not in the sense of those with the resources to travel (or send their money) to the most attractive legal marketplace but in the sense of those with the best lawyers. The legally well advised may undoubtedly make gifts without delivery by making an express and well attested declaration that they hold legal title as trustee for the beneficiary-donee. A simple donor of a common law gift, on the other hand, must see to it that there is an actual delivery of the item itself (or at least some part or symbol of it) or risk the failure of the transfer.²⁶ The ironic result of the continued distinction is that the courts will enforce an oral declaration that A gives B the *beneficial* interest in a chattel while retaining the *legal* interest, but will not enforce an oral declaration that A gives B the *entire* interest.²⁷

21 The beneficial title acquired by the donee in a declaration of trust is in one situation inferior to the legal title acquired by the donee of a completed inter vivos gift: if the trustee disposes of the property to a purchaser for value and without notice of the equitable interest, the purchaser's title prevails over the donee's title. GEORGE T. BOGERT, TRUSTS § 165, p. 597 (6th ed. 1987) ("bona fide purchaser rule"). Of course, the beneficiary in such a situation is entitled to enforce a constructive trust on the property acquired by the trustee in exchange for the trust corpus. REST. 2D TRUSTS § 202 ("trust pursuit rule").

22 The delivery requirement in the law of gifts has very ancient antecedents and has been related to the comparable requirement in the early law of feoffments, livery of seisin. See *Cochrane v. Moore*, 25 Q.B.D. 57, 65–66 (C.A. 1890).

23 *Ex parte Pye*, 18 Ves. Jun. 140, 34 Eng. Rep. 271 (Ch. 1811); *Morgan v. Malleison*, L.R. 10 Eq. 475 (1870).

24 *Richards v. Delbridge*, L.R. 18 Eq. 11, 15 (1874).

25 1 AUSTIN W. SCOTT, THE LAW OF TRUSTS § 31, p. 321 (4th ed., William F. Fratcher ed., 1987). Scott did allow that in case the intended donee of a failed inter vivos gift reasonably relied on the prospective benefit, a constructive trust could be impressed, but he insisted that in such case "equity is not converting an imperfect gift into a declaration of trust, but is merely imposing a duty on the donor in order to prevent unjust enrichment." *Id.* § 31.4, p. 350.

26 Actual delivery of the donated chattel may be excused if it is too bulky or if, for some good reason, it is not at hand, but some symbol of it must be actually delivered. RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY § 41, p. 102 (2d ed. 1955). The legal fiction of "constructive delivery" was the common law's way of mitigating the harshness of the delivery rule.

27 See C.B. Labatt, *The Inconsistencies of the Laws of Gifts*, 29 AM. L. REV. 361, 368 (1895).

The alternative of a declaration of trust has not been altogether without effect on the law of gifts. The delivery requirement is subject to constant pressure not only from the increased value now assigned to intention but also from the existence of a parallel gifting procedure that never required delivery.²⁸ Recent Restatements of the Law reflect the current ambivalence. While the Restatement (Second) of Property officially takes no position on whether a gift may be effective without delivery, it does take note of the fact that “a beneficial interest in personal property can be conferred on another person by an oral declaration of trust even though there is no delivery” and suggests that “the law should recognize, to the extent it has not already done so, that a completed gift of personal property may be accomplished without a delivery by proof of the donor’s manifested intention to make a gift.”²⁹ The Restatement (Third) of Trusts straddles the same divide. To the black-letter rule that “[i]f a property owner intends to make an outright gift *inter vivos* but fails to make the transfer that is required in order to do so, the gift intention will not be given effect by treating it as a declaration of trust,” the reporter appends the subversive comment that “the preferred interpretation in marginal cases of this type is not that the property owner was merely expressing an intention to make a gift in the future but rather that the owner intended a

declaration of trust.”³⁰

This tension is unlikely to be easily resolved. The judges, who created the delivery requirement in the first place, are reluctant to abandon it not only because of their professional attachment to traditional doctrine but also because it gives them added flexibility in the administration of justice. As one court that had occasion to consider the alternatives put it: “Obviously, it would be neither advisable nor wise to abrogate the requirement of delivery in any and all cases of intended *inter vivos* gifts, for to do so, even under the guise of enforcing equitable rights, might open the door to fraudulent claims.”³¹ The delivery requirement, in other words, provides another line of defense against ambiguous or self-serving testimony about donative intent.

A similar competition, but one with far greater consequences, has affected gratuitous transfers at death. Ordinarily effected by the last will and testament, the intergenerational transfer of wealth may also be arranged through an ever-lengthening list of alternatives. The modern will, the product of statutes beginning in the sixteenth century,³² generally requires a writing, signed by the testator and attested by two witnesses. Recognized centuries before the first Statute of Wills, the joint tenancy in land with its associated right of survivorship long provided an alternative legal means for arranging succession at death.³³ The development

28 See Sarajane Love, *Imperfect Gifts as Declarations of Trust: An Unapologetic Anomaly*, 67 KY. L.J. 309 (1979); Chad A. McGowan, *Special Delivery: Does the Postman Have to Ring at All? The Current State of the Delivery Requirement for Valid Gifts*, 31 REAL PROP., PROBATE, & TRUST J. 357 (1996).

29 REST. 2D PROP. DONATIVE TRANSFERS § 31.1, comment k. This is true, but only in the sense of a gift of the beneficial interest.

30 REST. 3D TRUSTS § 16 (2), comment d.

31 *Hebrew Univ. Assoc. v. Dye*, 223 A.2d 397, 401 (Conn. Superior Ct. 1966) (upholding gift by finding delivery of written instrument). Cf. *Hebrew Univ. Assoc. v. Dye*, 169 A.2d 641 (Conn. Superior Ct. 1961) (finding insufficient evidence of express declaration of trust).

32 See KENELM EDWARD DIGBY, *AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY* 377–92 (5th ed. 1897) (tracing legislation from 1530 to 1837).

33 See John V. Orth, *Joint Tenancy Law*, Plus ça Change, 5 GREEN BAG 2D 173–80 (2002). A joint tenancy in land is not an exact alternative to a will, because a present interest vests in the cotenant at the creation

of modern banking and the invention of the joint and survivor bank account generalized this to include personal property in the form of deposits, so much so that these accounts have been dubbed the "poor man's will."³⁴ Modern brokerage houses offer the same option for investment accounts. The insurance industry pioneered the pay-on-death contract, and the federal government adopted this attractive feature for United States savings bonds. A few states allow a death beneficiary to be named in a deed of land.³⁵

It is the trust, however, that has become the ultimate "will substitute."³⁶ As befits its equitable origin, the trust may be created with few formalities and allows great flexibility. During life, a settlor may transfer assets into a revocable trust, reserving a life estate and specifying future interests; if unrevoked at death, the trust then disposes of the property. Modern estate planners, astute not to lose the ambulatory potential of testamentary dispositions, generally add a "pour-over will," which transfers to the trust any assets remaining in the settlor's sole name at death. Trust law is typically elite law. The revocable-

trust-pour-over-will arrangement is for well advised, usually wealthy clients. Without competent advice, settlors of small trusts, often of the do-it-yourself variety, sometimes forget to keep their trust documents current and end up with improperly titled property and poorly maintained records, resulting in unnecessary expense and occasionally unintended dispositions.³⁷

As with inter vivos gifts, the simultaneous existence of a less formal means to the same end has placed tremendous pressure on the more formalized alternative. If simpler will substitutes are available, how can statutory will formalities that might defeat intention be justified? In fact, wills law is now subject to searching criticism and a movement is underway in favor of disregarding "harmless error" in execution, permitting "substantial compliance" with the formalities, or simply granting the judiciary a power to dispense with the necessary forms.³⁸

Labels encode conclusions. They do not (or should not) dictate them. The "race to the bottom" is competition to get to a destination we do not wish to reach, while "social experiments" sound at once scientific and

of the estate.

34 See *In re Estate of Michaels*, 132 N.W.2d 557 (Wis. 1965). See also Note, *Disposition of Bank Accounts: The Poor Man's Will*, 53 COLUM. L. REV. 103 (1953). Unlike the joint tenancy in land, no interest passes to a donee "co-depositor" at the creation of the account, only a power to draw on deposited funds, which explains why the federal gift tax is not imposed until an amount is actually withdrawn by the non-depositing party.

35 See, e.g., KAN. STAT. ANN. § 59-3501; OHIO REV. STAT. 5302.22.

36 The trust, in its guise as a "use," was available before the first Statute of Wills to provide a functional alternative in equity. See KENELM EDWARD DIGBY, AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY 330-33 (5th ed. 1897). It is an irony of history that the trust (use) was a will substitute before there were wills, and that, after centuries of eclipse by the will proper, it has resumed this role.

37 See, e.g., *Austin, Trustee v. City of Alexandria*, 574 S.E.2d 289 (Va. 2003) (holding ineffective a second transfer by a settlor who had previously transferred the same property into a revocable trust); *Secor Investments v. Anderegg*, 71 P.3d 538 (Or. 2003) (illustrating the distinct legal personalities of the settlor as an individual and as the trustee of a self-settled inter vivos trust); *First Nat'l Bank of Bar Harbor v. Anthony*, 557 A.2d 957 (Me. 1989) (holding ineffective an apparent attempt to revoke a revocable inter vivos trust by a will).

38 See UNIFORM PROBATE CODE § 2-503 (harmless error); John H. Langbein, *Substantial Compliance With the Wills Act*, 88 HARV. L. REV. 489 (1975). See also John V. Orth, *Intention in the Law of Property: The Law of Unintended Consequences*, 8 GREEN BAG 2d 59 (2004).

courageous. Competition is probably inevitable in a federal system, and may well be desirable. Rather than worry about whether we are in a race to somewhere-or-other, we should concentrate our attention on the end we want to attain, then on the means to get there. “Law for elites” has an unwholesome sound in a democracy; only a “savage race,”

as Tennyson so memorably put it, deserves “unequal laws.”³⁹ But equal laws do not necessarily serve everyone equally well. Seeking the least common denominator, commentators and judges may well be distracted from the real project of providing formal requirements appropriate to the transaction and its likely participants. *JB*

39 Alfred Tennyson, *Ulysses* (1842) l. 4.