1990

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THE RULE AGAINST PERPETUITIES AND THE GENERATION-SKIPPING TAX: DO WE NEED BOTH?

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I. INTRODUCTION

Attempts to control wealth from beyond the grave are nearly as old as the law of property ownership.1 These attempts have been made for several reasons: to create and perpetuate family control; to assure continuation of an owner's cherished project after his or her death; to satisfy a primordial instinct for immortality; or, more recently, to avoid federal tax.

In response, almost from the beginning of modern real property institutions,2 there has been overt governmental recognition that it is undesirable to permit the unrestrained freeze of property ownership in the hands of subsequent owners in modes that are inflexible or obsolete.3 From the middle ages to the present, each device to establish ownership perpetually or for protracted periods has been met, either judicially or legislatively, by a countervailing device to assure free alienability.4

That process of initiative and counter-initiative which flow-

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3. These attempts to control wealth from beyond the grave are often labeled acts of "the dead hand." See Friedman, The Law of Succession in Social Perspective, in Death, Taxes and Family Property 23 (E. Halbach ed. 1977). In his essay, Professor Friedman identifies, behind historical redefinitions of the issue, a constant concern over the use of the dead hand to amass or maintain excessive wealth. Id. at 23-25.
4. Real property is historically the most significant form of wealth. By the end of the 13th century, for example, when English land law had begun to work out the doctrine of estates as the primary basis for classifying interests in land, land holding was inseparably connected with personal and political status in the community. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 25 (2d ed. 1998); see also Friedman, supra note 1, at 17.
5. See Friedman, supra note 1, at 23-25 (discussing statutes enacted to restrain creation of dynastic personal fortunes and Congress' repeated investigations of charitable foundations).
6. For a historically-oriented survey of the tension between attempts to establish perpetual control over ownership and devices to ensure free alienability, see C. MOYNIHAN, supra note 2.
erered among the states in the highest tradition of the common law now has an added dimension: federal involvement. Explicitly or implicitly, the federal government has become a participant through evolving principles of federal tax expediency.5

Federal tax provisions are designated to serve a revenue-raising function or to mitigate perceived imbalances or incongruities in the tax system. However, where federal taxation touches the passage of assets to and through succeeding human generations, the federal tax law has served as a mechanism for limiting the ability of the wealthy to continue to control their assets over periods of time which Congress has deemed unreasonable. Guided by the imperative to raise federal revenue and by the desire to limit inordinate amalgamation of wealth through inheritance, Congress utilized the tax system.6

This use of the tax system is part of one of two parallel movements which has developed in recent times: the ongoing dismantling or prevention of restraints on property alienation as a matter of state real property law, and the federal estate tax-oriented disincentives to the untaxed accumulation and perpetuation of tangible and intangible wealth. The development of these movements is apparently based on a similar societal concern: the impermissible concentration of wealth occasioned by legal rules that order the transmission of wealth as a result of death. A comparison of the two movements, wholly dissimilar in origin and application but arising from the same policy, suggests that select elements of each could be combined in one system.7

5. For a general perspective on taxation of the wealth distribution process, see Death, Taxes and Family Property (E. Halbach ed. 1977).
6. The first modern federal estate tax was enacted in 1916. 39 Stat. 777-80, 1002 (1916). (There were very less sophisticated attempts made in 1862 and 1894.) The tax on estates was part of a design to offset a decline in customs duties, then one of the mainstays of federal revenue, resulting from the European war, and "the extraordinary increase in the appropriations for the Army and Navy and the fortification of our country." H.R. Rep. No. 922, 64th Cong., 1st Sess. 1 (1916). The estate tax rate was initially graduated from 1% to 5% with a $50,000 exemption, effectively excluding a considerable majority of the population from its reach. Id. at 5. Congress deemed it just to collect the "necessary revenues . . . from the incomes and inheritances of those deriving the most benefit and protection from the Government." Id. at 3. The Supreme Court upheld the constitutionality of the estate tax in New York Trust Co. v. Eisner, 256 U.S. 345 (1921).
7. One possible explanation for the parallel development of the two systems of control without any attempt to coordinate them has been the development of two independent specialities in the areas of property law and the law of federal taxation. An indication of the gap between the two groups can best be illustrated from a note appended by Professor Barton Leach, a noted scholar in the property area, to a chapter dealing with the taxation of powers of appoint-
One of the primary methods of preventing restraints on the alienation of property is embodied in the Rule Against Perpetuities. The Rule applies its sanction in an all-or-nothing fashion; either the interest is left totally unaffected or it is entirely invalidated. One of the primary disincentives to the untaxed accumulation of wealth is the generation-skipping tax. This tax, at least to a limited extent, applies its sanction incrementally. A comparison of the two measures raises an interesting question: What if an incremental approach were applied in the perpetuities area? Also, since the generation-skipping tax in part encourages the end it is conceptually designed to discourage, namely, the appreciation in value of property held by the same family through succeeding generations, should it be revised? And if yes, could such a revised statute also further the purpose served by The Rule?

As modern readers may be somewhat less familiar with the historical antecedents of The Rule than with the generation-skipping tax, and because the development of The Rule has spanned centuries while that of the tax has yet to survive a generation, the first part of this article describes in detail the development of The Rule. Against that backdrop, the second part considers the origins of the generation-skipping tax. The final section of this article addresses the questions presented.

II. Lives in Being Plus 21 Years: The Historical Background of the Perpetuity Limitation

For centuries The Rule operated in the common law of property as the primary social device for limiting objectionable long-term control over property. The Rule, however, did not arise in a vacuum. It developed as an episodic outgrowth of centuries of action and counteraction.

After the landmark act of Parliament, "Quia Emptores," 10

8. For a discussion of The Rule Against Perpetuities, see infra notes 38-65 and accompanying text. The Rule Against Perpetuities will be hereinafter referred to as "The Rule."
10. 1290, 18 Edw. 1, ch. 1. The act was designed to preserve the feudal
the holder of a tenurial interest could not only pass the interest on to the next generation through his eldest son but he could also, during his own lifetime, substitute another for himself in the tenurial scheme.\footnote{11} This practice enabled an owner, through a voluntary transfer, to disinherit his descendants.

Almost concurrently, landowners attempted to make their tenurial holdings immune from the present holder's power to disinherit a future generation by providing that the property should pass solely to the holder's descendants.\footnote{12} These property owners intended to terminate the tenurial interest in the absence of such descendants, so that by necessary implication the present holder would be denied the power to disinherit future generations.

Early common law judges frustrated that effort by creating a new, artificial real property interest, the fee simple conditional.\footnote{13} A gift from "A to B and the heirs of his body" created a fee simple conditional; the courts construed such a gift to be conditional on B having an heir of his body. Thus, instead of the gift perpetually remaining in the hands of B and his heirs, a full alienable interest was conferred upon B as soon as he had a child who was born alive. Undoubtedly such a result often was not what the grantor intended. It did, however, further the purpose of limiting the ability of a few large families to expand and perpetuate their property ownership.\footnote{14}

overlords' rights or "feudal incidents" (such as homage, aid, marriage, relief, escheat and wardship). T. Plucknett, A CONCISE HISTORY OF THE COMMON LAW 31 (5th ed. 1956). For a discussion of feudal incidents, see C. Moynihan, supra note 2, at 15-18, 531-45.

11. Under Quia Emptores, one who had tenure under a full fee could not convey a subtenancy to another but could only provide for a successor to substitute for him in the feudal chain. See C. Moynihan, supra note 2, at 19. This paved the way for the notion of a modern conveyance by making clear that even without the overlord's consent one with a freehold tenancy in fee could effectively pass on his tenurial rights to another. \textit{Id}.


13. See id.; RESTATEMENT OF PROPERTY §§ 68-77 (1936); see also C. Moynihan, supra note 2, at 34-35; cf. T. Plucknett, supra note 10, at 550-51 (discussing conditional fees as precursor to fee tails).

14. Although the point has not been documented, the authors speculate that it is not entirely coincidental that the judges who created the result were agents of the Crown which felt threatened by a perpetuation and concentration of land holdings in the hands of the barons. Land tenures represented political power as well as the real wealth of the realm. The intended purpose of the fee simple conditional could thus be seen as a device to avoid concentrating land tenure in the hands of a relatively few families whose power might thus rival that of the King. Encouragement of land transfers, on the other hand, would tend to diffuse such holdings and limit the potentially competing power of the important feudal families.
Early dissatisfaction with judicial construction that created the fee simple conditional led Parliament (which tended to be representative of large feudal land holders) to enact a statute known by the Latin words of its preamble, ‘‘De Donis.’’\textsuperscript{15} It directed that the estate created could pass only to the direct lineals of the first taker, and that the estate would terminate if no such lineals existed. The Statute De Donis therefore gave rise to the fee tail.\textsuperscript{16}

For 200 years the Statute De Donis largely accomplished its intended purpose. Finally, in the 15th century, the lawyers of the day, with the wholehearted cooperation (and perhaps the connivance) of the judiciary, circumvented the statute’s intent.\textsuperscript{17} Through the highly fictitious and artificial use of the old common law suits of Fine or Common Recovery,\textsuperscript{18} courts held that the owner of a fee tail in possession had the power to transfer a fee simple absolute to a successor and thus destroy the subsequent interests which purportedly had been created with the fee tail.\textsuperscript{19} This was true regardless of whether such interest had remained in the donor as a reversion or had passed to another as a remainder.\textsuperscript{20}

The practical effect of the Fine or Common Recovery was to ‘‘bar the entails’’ and thereby vest a full fee simple absolute in the

\textsuperscript{15} 1285, 13 Edw. 1, ch. 1.

\textsuperscript{16} See C. Moynihan, supra note 2, at 34-37. If a donor created an estate ‘‘to A and the heirs of his body’’ it was inheritable only by his direct lineal descendants. In the absence of descendants, the estate came to an end and the interest passed to an alternately named taker by way of reversion or remainder. Moreover, it soon became possible to describe with greater particularity the heirs who could take. Thus, a donor related solely to a woman (who in the custom of the time might not be thought of as an appropriate person to receive a land tenure) might create a fee tail special by providing for an estate ‘‘to A and the heirs of his body by his wife W.’’ Again, the absence of persons meeting the described class of descendants would cause the estate thus created to come to an end.

\textsuperscript{17} See Taltarum’s Case, Y.B. 12 Edw. 4, fo. 19 (1472).

\textsuperscript{18} For a brief description of fines and common recoveries, two forms of conveyance by judicial proceeding, see T. Plucknett, supra note 10, at 613-15, 617-22.

\textsuperscript{19} See C. Moynihan, supra note 2, at 36; see also T. Plucknett, supra note 10, at 619-22.

\textsuperscript{20} Taltarum’s Case, Y.B. 12 Edw. 4, fo. 19 (1472) (discussed in C. Moynihan, supra note 2, at 36).

Thus, a gift simply ‘‘to A and the heirs of his body’’ created a reversion following the fee tail for A; the reversion remained in the transferor or passed as a part of his estate. It would also be possible for the gift to provide: ‘‘to A and the heirs of his body and in default of such heirs to B and his heirs.’’ In this instance A would still have a fee tail but the interest created for B following the termination of such fee tail would be, by definition, a remainder.
fee tail owner's successor in interest. Still later, the owner of the fee tail could create in his grantee a full fee simple by making a "conveyance to bar the entails" without resort to a fictitious law suit.21 Once the fee tail could be destroyed, it no longer played a significant role in Anglo-American property law.22

A number of other technical rules of conveyancing arose as a result of the continuing clash between those who wished to preserve their lands for future generations, and those who wished to make land freely alienable. One of these rules provided that no future interest in a freehold could be created for one other than the grantor unless the interest qualified as a remainder. By definition, a prior freehold, subject to normal termination, consisting of either a life estate or, during the historic period, a fee tail, had to precede or "support" a remainder.23 The supporting estate requirement was carried to the logical extreme of making a contingent remainder subject to destruction if the condition for its taking effect was not fully resolved by the time that such prior or "supporting" estate had terminated.24

21. See C. Moynihan, supra note 2, at 36.
22. See generally id. at 37-39. In Pennsylvania the legislature eliminated the fee tail in 1855 by mandating that all interests that would otherwise have been treated as a fee tail were automatically enlarged into a fee simple. The statutory provision is presently incorporated into the Pennsylvania Probate Code. See 20 Pa. Cons. Stat. Ann. § 6116 (Purdon 1975). It is of historic interest, however, that as early as 1799 the Pennsylvania legislature had confirmed the power of a tenant in tail to make a conveyance "to bar the entails," apparently without going through the fiction of an action of Fine or Common Recovery. See Act of 1799, 3 Sm. L. 338, § 1 (codified at Pa. Stat. Ann. tit. 21, § 13 (Purdon 1955)).

For a survey of how each state has modified the common law fee tail, see Restatement of Property §§ 79-86 (1936 & Supp. 1989). A very few states have retained the fee tail with liberal power to destroy it by conveyance to bar the entails. Most states have either (1) automatically converted attempted fee tails into fee simple absolutes or (2) permitted the interest to endure for a single generation, thus in effect conferring upon the first taker a life estate and a remainder in fee upon his children.

23. See C. Moynihan, supra note 2, at 119. Blackstone identified three requirements for a remainder: (1) it must be supported by a precedent estate which was less than a full fee; (2) it must be created out of the same instrument that created the precedent estate; and (3) it must vest instantly on the natural termination of the precedent estate. 2 W. Blackstone, Commentaries *318-21.

24. For a general discussion of the history and present status of the destructibility of contingent remainders, see L. Simes, supra note 12, at 33-42. The doctrine of destructibility of contingent remainders plays a negligible role in modern estates law. Many states have explicitly rejected the doctrine. See id. at 41-42. Even states that have not expressly repudiated it traditionally apply it only to legal contingent interests in real estate. Since most modern estates consist of investment securities and involve a trust, no question of destructibility arises. Thus, in Pennsylvania (which is generally considered as retaining the doctrine) there have been no cases decided in the appellate courts since Stehman v. Stehman, 1 Watts 466 (Pa. 1833) (contingent remainder "gone for ever"
Often the holder of a life estate was the eldest son of the donor or testator. This son would also inherit the reversion that arose through the creation of a life estate and a contingent remainder which was typically created for the donor or testator's nonexistent potential grandchildren. If, during his lifetime the eldest son could succeed in terminating his life estate, he could also destroy the contingent remainder. That would leave him with the reversion, an interest he would hold in fee simple absolute. Also, if the life tenant transferred his life estate and reversion to a third person, the two interests would then merge and extinguish the life estate, the separate interest that supported the remainder. The third person would then own a fee simple interest. Moreover, courts continued to recognize the old feudal doctrine of "tortious feoffment," an attempt by a life tenant to convey a greater interest than his tenure would support. The courts construed this to be a forfeiture of the existing tenurial interest of the life tenant. That forfeiture, in turn, would bring about the premature termination of the life estate.

The Rule in Shelly's Case and the Doctrine of Worthier Title also aided the extinguishment of remainder interests. If a remainder were limited to the heirs of the life tenant, under the Rule in Shelly's Case the life tenant took both the life estate and remainder in fee simple. No rights were created in the heirs. A similar result occurred when the remainder was limited to the heirs of the donor or testator. Under the Doctrine of Worthier and estate irrevocably vests at termination of life estate). Should a case arise under modern law it seems doubtful that the doctrine would be applied, even though the Stehman case appears to be the last word on the subject.


26. See Stehman, 1 Watts 466 (Pa. 1833); C. Moynihan, supra note 2, at 135-36. Many estate planners of the day avoided such destruction by inserting in the instrument an intervening supporting estate by way of a trust to preserve contingent remainders. See id. at 137-38.

For example, after providing for a legal life estate for his son, the testator would next provide for a life estate in the name of the lawyer in trust for the life of the son. If the son destroyed his life estate in the fashion described in the text, the contingent remainder would not be destroyed because the estate held by the lawyer in trust for the life of the son would remain as a supporting estate.

27. For a general discussion of the Rule in Shelly's Case, see C. Moynihan, supra note 2, 141-50. The Rule in Shelly's Case survived into modern times and played havoc with estate plans by enlarging to a full interest that which the donor clearly intended to limit to a life estate. See, e.g., Lauer v. Hoffman, 241 Pa. 315, 88 A. 496 (1913) (purporting to apply Rule in Shelly's Case even though testator expressly declared that he did not want life tenant to have more than life interest). Today, most state legislatures have abrogated the Rule in Shelly's Case. See C. Moynihan, supra note 2, at 149-50.
Title the heirs' interest was treated as a reversion and not a remainder.\textsuperscript{28}

The rationale for all of these technical rules of conveyancing which purported to prevent a hiatus or shift in seisin was to preserve the rights and privileges of the feudal overlord. They were calculated to make it easier for him to determine who was, at any particular time, in possession of a freehold interest (seisin) and thus responsible for the feudal incidents.\textsuperscript{29} It is noteworthy, however, that most of the rules just described continued to be employed and embellished long after feudal incidents had ceased to be a significant factor in property law. The putative explanation is that these rules were preserved so that courts could check the landowners' power to impose elaborate remote future interests on land which limited its transferability. In general, these rules did operate as crude but ultimately effective checks on remote future interests which unreasonably impaired the free alienability of real property. Increasingly, however, they became less effective with the growing importance of personality, the ownership of which was never circumscribed by feudal rules.

These rules also became less effective with the increasing use of equitable interests.\textsuperscript{30} Equitable interests were enforceable only in Chancery, a court which never had accepted the formalism of the law courts.\textsuperscript{31} The Statute of Uses\textsuperscript{32} made it possible for a conveyance to create legal interests previously recognized only in equity. A new future interest, a springing use, could be created

\textsuperscript{28} The Doctrine of Worthier Title applies differently to inter vivos and testamentary transfers. For testamentary transfers the doctrine requires the heir to take by descent and not by devise because title by descent is "worthier" or better title. Where A devises land "to my son Sam" and at A's death Sam is his heir, Sam takes the land by descent, and not by devise. As applied to inter vivos transfers, the doctrine prohibits the conveyor from creating a remainder in his own heirs. \textit{See} C. MOYNIHAN, supra note 2, at 151-61. Unlike the Rule in Shelly's Case, one aspect of the Doctrine of Worthier Title has survived in modern law. \textit{See} Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221 (1919). The case involved property conveyed to a trustee. Income from the property was to go to one person for life, then to that person's heirs. While the question was ultimately one of intent, the presumed intention was that the interest following the life interest would be a reversion and not a remainder. The case, although influential, has not been universally accepted. \textit{See}, e.g., Hatch v. Riggs Nat'l Bank, 361 F.2d 559 (D.C. Cir. 1966).

\textsuperscript{29} \textit{See} C. MOYNIHAN, supra note 2, at 142-43, 153.

\textsuperscript{30} \textit{See id.} at 121 n.4 (most future interests today are equitable, not legal, interests).

\textsuperscript{31} \textit{Id.} at 171.

\textsuperscript{32} 1536, 27 Hen. 8, ch. 10. For a discussion of the historical basis for the Statute of Uses, see 4 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 49 (1924).
without a precedent estate. Another new future interest, a shifting use, shifted an interest from one estate to another on the occurrence of some condition subsequent. The Statute of Wills brought about a third new interest, an executory devise, similar to the use but created in testamentary transfers. These three new interests are referred to as "executory interests." The legal model of conveyance did not fit executory interests, and it was soon determined that they were not subject to the legal limitations of destructibility, the Rule in Shelley's Case, or the Doctrine of Worthier Title. An estate planner could thus avoid these old limitations; in addition to the creation of a trust, a skilled planner could create future interests other than contingent remainders, to which the common law restrictions still applied.

Let us consider these developments. For four centuries, two

33. A springing use is an interest without a precedent supporting estate. Such a use is to arise in the future out of the seisin of the grantors; this could occur if there were no precedent estate at all or if a necessary gap or hiatus in seisin were called for. A springing use would be created, for example, where on July 1 A enfeoffed "to B and his heirs to the use of C and his heirs beginning on August 1." There is a resulting use in A in fee for the month of July and on August 1 the use springs up in favor of C. C's use is called a springing use. See C. MOYNIHAN, supra note 2, at 174-76; see also L. SIMES, supra note 12, at 10-11.

34. See C. MOYNIHAN, supra note 2, at 175-78; see also L. SIMES, supra note 12, at 10-12. A shifting use is one which cuts short a prior use estate in a person other than the grantor. C. MOYNIHAN, supra note 2, at 175-76. A shifting use would be created, for example, where a donor makes a gift to a child but provides that if the child ever smokes or drinks alcoholic beverages, the property will automatically pass to another named donee.

35. 1540, 32 Hen. 8, ch. 1. One consequence of the Statute of Uses was the loss of the power to transmit a use estate by will. The landowning class resented this limitation. C. MOYNIHAN, supra note 2, at 189. To appease them the Statute of Wills was enacted. It gave tenants in fee simple a limited power to devise their lands by a written will. Id.


However, Pells v. Brown did not automatically cause a repudiation of the doctrine of destructibility of contingent remainders. Although executory interests were deemed indestructible, it was nevertheless held that if at the time of its creation an interest could take effect as a contingent remainder, it would not be saved by being treated as executory but would continue to be subject to the destructibility rule. See Purefoy v. Rogers, 85 Eng. Rep. 1181 (1670); see also Stehman v. Stehman, 1 Watts 466 (Pa. 1833).

This position was not universally accepted, and there were some courts that repudiated the rule of destructibility altogether by treating the interest as executory to avoid a destruction. See Simonds v. Simonds, 199 Mass. 552, 556-57, 85 N.E. 860, 861-62 (1908).

37. See, e.g., L. SIMES, supra note 12, at 39-40 (describing successive trust for life of life tenant to take effect if life tenant attempted to destroy contingent remainder by merger or forfeiture).
competing ideas of property alienation jostled for predominance while the institutions of governance and dispute resolution changed along with the economics of power and wealth. Land as the primary source of power and wealth eventually ceded its position, at least in part, to movable property and, indeed, to intangible property. At this point, one might anticipate that the feudal rationale for the attack on undue concentration of property in the hands of a few had outlived its origins.

That was not the case. Perhaps nothing gives more credence than the Rule Against Perpetuities to the idea that among the economic values embedded in our legal system is the concept that it is undesirable to support the unfettered accumulation of wealth through the mechanics and rubrics of the law. The Rule, invented incrementally by English courts toward the end of the 17th century, gave new life to that seemingly outdated social policy. In The Duke of Norfolk's Case the court noted:

A perpetuity is the Settlement [transfer] of an Estate . . . with such Remainders expectant upon it, as are in no Sort in the Power of the Tenant in . . . Possession, to dock by any . . . Assignment, but such Remainders must continue as perpetual Clogs upon the Estate; such do fight against God, for they pretend to such a Stability in human Affairs, as the Nature of them admits not of, and they are against the Reason and the Policy of the Law, and therefore not to be endured.

The purposes served by The Rule are several: (1) to settle the state of the law for planning purposes; (2) to provide a balance between the interest of the current owner of property to prolong his or her control over it, and the interest of the future owner to be able to put that property to his or her own use; (3) to contribute to the increased mobility of wealth in society; and (4) to permit property to be used effectively by its current owners without having the value of their interests diminished by an amount ascribable to the uncertain interests of others.

It is not the purpose of this brief historical survey to explore all phases of The Rule in detail. In broad terms, The Rule largely

38. 22 Eng. Rep. 931, 3 Ch. Cas. 1 (1681).
40. See 1 RESTATEMENT (SECOND) OF PROPERTY (Donative Transfers) 8-10 (1981) (introductory note to Part I).
ignored the distinction between interests created in compliance with the old feudal rules and those created outside of the feudal system, either through a conveyance under the Statute of Uses or through the creation of a modern beneficial interest in trust. The Rule attempted to impose a unified requirement that any condition precedent on ownership (i.e., vesting) be so created that it could not occur beyond the permissive period of a life or lives in being plus 21 years. Thus, it developed that The Rule had to be satisfied in all events, regardless of whether the interest in question was a contingent remainder or an executory interest.

On the other hand, when the interest was technically deemed to be vested even though its enjoyment was delayed, The Rule was not triggered. A possible explanation for this is that since the vested interest carried with it a power of transfer, it was not within the policy of The Rule. At first, like the rules which had preceded it, The Rule may well have been considered to be a regulation of the power to create interests which would inhibit the ability to transfer or convey a specific parcel of land. In this sense, it was a more sophisticated version of the types of limitations previously considered. However, as personal property and trusts assumed increasingly important roles, courts carried over and applied The Rule at a relatively early date to beneficial interests held in trust even though the trustee's power to convey the remainder of the trust was completely uninhibited.

It seems quite likely that the change in emphasis from a rule which limited the creation of excessive interests in a specific piece of real estate (which acted to inhibit the transferability of such property) to a rule which prevented the creation of remote interests for beneficiaries in a trust is one which developed incrementally without any overt realization that it represented a change in approach.

41. The permissive period for the rule was not fully determined in The Duke of Norfolk's Case. It was soon settled, however, as a life in being plus 21 years or, in other words, normally within the majority of a testator's grandchildren. See, e.g., Jee v. Audley, 29 Eng. Rep. 1186, 1187, 1 Cox 324, 325 (Ch. 1787), reprinted in L. Simes, supra note 36, at 571, 572.


43. See Leach, supra note 42, at 647 ("notion that a future estate can vest in interest before it vests in possession is incorporated into the Rule against Perpetuities").

Thus, the distinction between so called "vested interests" and "contingent" or "executory" ones, which was crucial in the application of The Rule, continued to be observed. This distinction continued even though the original purpose in distinguishing between vested rights, which were freely alienable, and contingent or executory interests, which traditionally were not alienable, no longer had much relevance even in those jurisdictions which continued to limit the alienability of executory or contingent interests.

While in theory The Rule was far superior to the earlier attempts at social control, it nevertheless left much to be desired. Dissatisfaction with The Rule's operation has continued to the present. That dissatisfaction seems to stem from the fact that, more often than not, The Rule invalidates interests which are not within its policy and exempts interests which are. Critics also frequently consider The Rule to be a trap for the unwary and unsophisticated drafter.

The criticism of The Rule focuses on several points. Courts during the 18th and 19th centuries firmly established the doctrine that if an interest was subject to any condition which by any possibility, no matter how remote, might come about at a distant period in time, the interest should be "remorselessly" destroyed. This was how The Rule operated, regardless of the probability of the event occurring, and regardless of the fact that a testator's expectations were frustrated on the basis of a largely theoretical scruple.

For example, an interest was destroyed whenever it was subject to a condition which was measured by the lives of children of living persons. Any living person, regardless of age or child-bearing propensity, was presumed to be capable of procreation. Thus, a gift from A, a living person, to all of his children who graduate from a given college would be invalid since it might include a child born after the gift was created and whose graduation would therefore occur more than 21 years after the death of the

45. See C. Moynihan, supra note 2, at 121-22, 197; L. Simes, supra note 12, at 279.

46. See L. Simes, supra note 12, at 254-55 (original rationale for The Rule insufficient to explain subsequent applications).

47. This position was forcefully taken by the 19th century American scholar, John Chipman Gray. See J. Gray, supra note 42, § 2 (better if Rule called "Rule against Remoteness"); id. §§ 268-278.4 (Chapter VII, "Interests, Though Alienable, May Be Too Remote").
parent.\textsuperscript{48} So too, if an interest was conditioned upon an administrative contingency,\textsuperscript{49} which according to common sense would occur within a limited period of time, it might nevertheless be destroyed if the contingency was one which had no theoretical limit. This would follow even though there was no real danger of the interest actually being too remote.\textsuperscript{50}

On the other hand, an interest carefully drafted with The Rule in mind could be made to endure for generations without a technical violation of The Rule.\textsuperscript{51} That would be true even though, as a remote interest, it would come within the policy of The Rule. Thus, a careful drafter might delay the vesting of a future interest until 21 years after the death of the survivor of an entire group of persons. So long as the group were one reasonably capable of ascertainment and all of its members were described as existing when the instrument became operative, the resulting interest would be valid even if the vesting were delayed for more than a century.\textsuperscript{52}

Clearly, this result is contrary to the policy of The Rule. Moreover, most American jurisdictions have held that reversionary interests, including remote reverters and rights of reentry, are not within the proscriptions of The Rule although their ripening


\textsuperscript{49} See R. Lynn, supra note 42, at 59-60 (discussing "the administrative contingency" as prototype demonstrating "fantastic possibilities" aspect of The Rule).

\textsuperscript{50} See Ryle v. Ryle (In re Bewick) [1910] 1 Ch. 116 (condition that beneficiaries be alive when existing mortgage on described property is completely paid off held to be unlimited as to time and hence violative of The Rule); Johnson v. Preston, 226 Ill. 447, 80 N.E. 1001 (1907) (condition precedent to vesting of estate in execution of probate of testator's will held unlimited as to time and hence violative of The Rule); see also Tullet v. Colville (In re Wood) [1894] 3 Ch. 381 (C.A.).

Some courts, however, have been willing to read a reasonable time into the condition by necessary implication and thus validate the interests. See Belfield v. Booth, 63 Conn. 299, 27 A. 585 (1893) (reading in reasonable time for condition of settlement of estate).

\textsuperscript{51} See generally L. Simes, supra note 12, at 265-66 (readily ascertainable group of living persons may be "life in being" under The Rule as long as interest will vest 21 years after death of one of them, but measuring lives must neither be so numerous nor so situated that evidence of their deaths is likely to be unreasonably difficult to obtain).

\textsuperscript{52} See Public Trustee v. Villar (In re Villar) [1929] 1 Ch. 243 (C.A.) (sustaining interest which deferred vesting until 20 years after death of last descendant of Queen Victoria who was alive at testator's death).
might be delayed for generations.\textsuperscript{53} Logically this might be justified by treating the reversionary interest as something which the donor did not create but that which was left in him when he conveyed less than all he had. Regardless of that logic, however, reversion was remote interests that operated as serious impediments to title. Therefore, The Rule is simultaneously over- and under-inclusive. Also, a so-called vested future interest which will pass in enjoyment at a remote period of time might be theoretically transferable but have little market for its present sale at a reasonable price.

Although the classic ideal was that The Rule should be applied "remorselessly" to invalidate interests which in theory were too remote, this ideal has never been followed literally. Through construction, courts have frequently avoided some of the harshest results of a violation of The Rule. Occasionally this was done in order to preserve the main features of the testator's plan, and occasionally to rescue careless drafters from their own blunders. Almost whenever possible, courts have construed interests as vesting within the period of The Rule to avoid a violation.\textsuperscript{54} In addition, they have severed valid from invalid interests and only invalidated the remote interests while permitting the remainder of the disposition to stand.\textsuperscript{55} This result was, of course, subject to the limitation that it would not be applied when such partial validity would do greater violence to the intention of the donor or testator than would striking the entire plan.\textsuperscript{56} Moreover, an interest expressed on the basis of two alternative conditions, one of which

\begin{itemize}
\item \textsuperscript{53} See Institution for Savings v. Roxbury Home for Aged Women, 244 Mass. 583, 139 N.E. 301 (1923) (possession of reverter); see also Pruner's Estate, 400 Pa. 629, 640, 162 A.2d 626, 632 (1960) (held that executory devise violated The Rule, but court noted that reversion and possibility of reverter following base fee or fee simple determinable are not subject to The Rule).
\item \textsuperscript{54} See, e.g., Loring v. Blake, 98 Mass. 253 (1867) (upon testator's death, son's interest in estate vests despite potential "unborn widow" problem arising from creation of trust for any spouse of testatrix's children who die subsequently).
\item \textsuperscript{55} See Caitlin v. Brown, 68 Eng. Rep. 1319, 11 Hare 372 (V.C. 1853); see also American Sec. & Trust Co. v. Cramer, 175 F. Supp. 367 (D.D.C. 1959) (sustaining gifts to some subclasses even though gifts to other subclasses were invalidated as too remote). This practice is sometimes referred to as "vertical separability." In re Harrah's Estate, 364 Pa. 451, 72 A.2d 587 (1950).
\item \textsuperscript{56} Under the doctrine of "infectious invalidity," if a partial acceptance of the plan would create such a discrimination that a full intestacy would be more consistent with the testamentary intention, the court may refuse to give effect to a part of the plan and invalidate the entire disposition. See In re Morton's Estate, 454 Pa. 385, 312 A.2d 26 (1973) (distribution of entire estate by intestacy to avoid inequality among testator's descendants); see also Taylor v. Dooley, 297 S.W.2d 905 (Ky. 1956) (absolute gift to son which does not violate The Rule.
\end{itemize}
was valid and the other too remote, could be sustained, and the invalid alternative ignored as surplusage if the valid condition occurred.57

Finally, courts have held that actual events which occur between the creation and the exercise of a power of appointment control over theoretical possibilities.58 In other words, although measurement would ordinarily be from the time the power was created, as to events which occurred between the creation of the power and its exercise, actual events would control the question as to whether or not the interests created by the exercise of the power of appointment violated The Rule. A similar approach had also been applied when a trust was created inter vivos but the settlor retained the power to revoke it during his or her lifetime.59 Consequently, in many instances in which the hardship attendant upon a literal application of The Rule has been ameliorated by construction, courts have in reality permitted actual events rather than remote possibilities to control the disposition. This practice is known as the wait-and-see approach.60

More recently, many modern jurisdictions have gone even further to avoid invalidating an entire interest when there is a technical violation of The Rule. At the turn of this century, courts began exercising a power to alter or amend an instrument to make it comply with The Rule when such an alteration or amendment would come closer to the testator’s intention than would traditional destruction of the interest. This power, frequently falls along with remote trust for daughter’s family which violates The Rule when testator exhibits intention to treat son and daughter’s progeny equally).

57. See Sears v. Coolidge, 329 Mass. 340, 342-43, 108 N.E.2d 563, 565 (1952) (so far as gift depends upon alternative event which satisfies Rule it is good); Quinlan v. Wickman, 235 Ill. 39, 47, 84 N.E. 98, 40 (1908) (same).


59. Sears, 329 Mass. at 340, 108 N.E.2d at 563 (trust which reserved power of appointment to settlor, remainder after termination of trust to “youngest surviving grandchild of mine who shall be living at my death,” was valid when no other grandchildren were born and settlor could have limited class of remainder to living grandchildren anytime before his death).

60. See generally L. Simes, supra note 12, at 269-75 (discussing modern trend of wait-and-see approach).
misnamed "cy pres,"61 is based on equitable principles.62 Thus, if A were to create a trust for the benefit of the children of B (a living person) conditioned on such children surviving to age 30, some courts would reduce the age qualification to 21 so that the beneficiary would be required to qualify within the permissible time of the life of B plus 21 years.63 Many scholars, legislatures and a few courts have opted spontaneously for an even more thorough reform. They have either advocated or adopted the position that no interest should be stricken as violative of The Rule unless it has in fact failed to vest before the permissive period has expired.64

The obvious problem is the planning uncertainty involved when a valid-invalid determination analysis is coupled with a wait-and-see determination date. The wait-and-see analysis may well be an overreaction to the excessive formalities previously outlined in applying The Rule.65 Nevertheless, if there is a discernible social purpose in controlling the creation of remote interests in long-standing trusts, and if The Rule is not triggered until the end of the permissive period (which may easily exceed a century), certainly The Rule fails to further the requisite social purposes.

61. See id. at 275 (naming this power "cy pres"). In a strict sense, the cy pres power operates only on charitable trusts. G. BOGERT, TRUSTS 520 (6th ed. 1987) (cy pres power "is confined to charitable trusts"); In re Rood Estate, 41 Mich. App. 405, 415-18, 200 N.W.2d 728, 734-36 (1972) (before applying power court must find valid charitable trust); Restatement (Second) of Trusts § 399 (1959) (defining doctrine). The power's name derives from the French "cy pres comme possible" ("as near as possible"). G. BOGERT, supra, at 520. The usage has extended to describe instances of effectuating a grantor's intention concerning other property interests.

62. See Edgerly v. Barker, 66 N.H. 434, 465-66, 31 A. 900, 911 (1891); see also In re Estate of Chun Quan Yee Hop, 52 Haw. 40, 43, 469 P.2d 183, 185 (1970) (The Rule, as judge-made, is subject to judicial change).

63. See Chun Quan Yee Hop, 52 Haw. at 46-47, 469 P.2d at 187 (where will expressly provided that "trust shall cease and determine upon the death of my wife . . . or thirty" years from testator's death, court reduced 30 years to 21 in order to bring trust within The Rule). The Hawaii court uses the term "equitable approximation" as well as "cy pres." Id. at 46 & n.8, 469 P.2d at 187 & n.8.


65. For a discussion of these formalities, see supra notes 42-52 and accompanying text.
III. THE GENERATION-SKIPPING TAX: A FEDERAL PERPETUITIES RULE

The Internal Revenue Code imposes a generation-skipping tax on certain devolutions of interests in trusts to generations remote from the grantor.66 Unlike The Rule, the generation-skipping tax does not invalidate multi-generation transfers; it simply makes them more expensive. However, the added expense of the tax indirectly discourages the extraordinary accumulation of property in the hands of related persons over an extended period of time.

Like The Rule to some extent, the generation-skipping tax is the product of legislative application of the underlying policy against Homeric concentrations of wealth through the manipulation of settled legal rules that control inheritance.67 Its development time has been somewhat shorter, however: seven decades rather than seven centuries.68

The Internal Revenue Code addresses transfers of property by inheritance on three fronts. It imposes an estate tax on transfers of property occasioned by death,69 a gift tax on inter vivos transfers,70 and a generation-skipping tax applicable to interests in trust that span several generations which, but for that tax, would not incur federal estate tax.71

As noted at the outset of this article,72 the modern estate tax was crafted in 1916 as a revenue-raising device, but with a view to providing a disincentive for the unfettered and tax-free accumulation of wealth. At that time, many but not all of the states had inheritance taxes, and the rates varied considerably among those that did.73 The result was an enticement to the wealthy to shop for the cheapest domicile in which to die. In 1924 Congress

67. For a discussion of this policy against the concentration of wealth, see supra notes 2-4 and accompanying text.
68. The first estate tax in the United States was adopted in 1916. See supra note 6. The Rule was an outgrowth of the development of the law of real property and estates which began in the Middle Ages. See C. Moynihan, supra note 2, at 25-26.
70. Id. §§ 2501-2524.
71. Id. §§ 2601-2663.
72. See supra note 6.
73. As of 1912, 38 states had enacted inheritance tax provisions. See P. Ross, INHERITANCE TAXATION (1912). For a compilation of state provisions then in effect, see id. at 391-778.
amended the estate tax to allow a finite credit for state inheritance taxes. As a result, states that did not have an inheritance tax adopted one, and most states geared their rates to the maximum amount allowable as a federal credit. Considerable uniformity among the states resulted.

Early on, tax planners noted that inter vivos gifts were an effective way around the federal estate tax. In 1924 Congress enacted a gift tax to solve the problem. In 1942 the Code was amended to solve the problem raised by the estate tax disparity in treatment between community property and separate property states. In 1948 a marital deduction was added as another equalization device.

However, a rate differential between the tax on inter vivos gifts and transfers at death continued to provide an incentive for wealthy persons to make gifts during their lives. In 1976 Congress restructured the Code to provide a unified tax regime for inter vivos gifts and estates. In general the estate tax base includes gifts made during life, and gift tax paid is taken into account in determining estate tax liability. The generation-skipping tax was also introduced in that year.

As noted above, the estate tax is levied on the transfer of an interest in property occasioned by the death of its owner. The

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74. Revenue Act of 1924, ch. 234, § 301(b), 43 Stat. 253, 303 (current version at I.R.C. § 2011 (West 1989)).
76. Revenue Act of 1942, ch. 619, §§ 402(a)-(b), 403(a), 404(a), 56 Stat. 798, 941-42, 944 (previously codified at I.R.C. § 811(d)(s), (e)(2), (g)(4) (Supp. 1941-42)). However, these provisions were short-lived, being repealed in 1948. Revenue Act of 1948, ch. 168, § 351(a), 62 Stat. 110, 116.
81. Section 2001(a) of the Internal Revenue Code of 1986 provides: 'A tax is hereby imposed on the transfer of the taxable estate . . . .' I.R.C. § 2001(a) (West 1989). (Hereafter, section references are to the Internal Revenue Code of 1986). Section 2051 defines the taxable estate as the gross estate minus deductions. Id. § 2051. Section 2031 defines the gross estate as the value of all real or personal property to the extent provided for in §§ 2031-2046. Id. § 2031. Sec
termination of a life estate was not considered a transfer for either estate or gift tax purposes.\textsuperscript{82} As a result, it was possible to avoid or postpone estate tax with a trust that provided for successive life estates. In addition, under the pre-1977 Code rules, a beneficiary of a trust that extended beyond his or her own life could have the economic benefits that were the near equivalent of ownership of trust assets without being considered the owner for estate transfer tax purposes.\textsuperscript{83}

Those two factors—prolonged tax deferral and present economic control—made generation-skipping trusts an attractive device for persons wealthy enough to be able to set aside significant assets in trust. In contrast, moderately well-to-do persons were not normally in a position to alienate substantial assets in trust form and so were stuck with the estate tax as their assets passed from generation to generation.

The 1976 Act\textsuperscript{84} established a separate tax that was not dependent upon the existence of a transfer in the estate tax sense. Instead, the tax was imposed on the downstream shift of an interest or power in trust property, a life estate, or remainder, from the generation below the grantor to a succeeding generation.\textsuperscript{85}

However, the 1976 generation-skipping tax proved to be unduly
difficult to administer, and in some instances it could be avoided through effective planning. As a result, the 1986 Act\textsuperscript{86} revamped the mechanism, and the 1988 Act\textsuperscript{87} refined it.

To recapitulate with more particularity, the federal estate tax imposes a tax at rates which graduate from eighteen percent to fifty-five percent of the net estate after deductions for debts, administrative expenses and so forth.\textsuperscript{88} The tax structure includes a credit against the federal estate tax which has the effect of rendering tax free the first $600,000 of the net estate.\textsuperscript{89} Any amounts that pass solely to or for the benefit of a surviving spouse are exempt from estate tax, provided that they would be considered taxable to the estate of the surviving spouse should he or she still own those assets at the time of death.\textsuperscript{90} Gifts will qualify for this treatment if they are inheritable interests or, in some cases, if on receiving them the executor elects to treat them for estate tax purposes as though they were inheritable.\textsuperscript{91} Qualified gifts to qualified charities also enjoy a tax exemption.\textsuperscript{92}

The estate tax is levied on assets that pass directly as a part of the probate estate. It is also imposed on most will substitutes in which, although an inter vivos gift in form, the decedent has retained significant property interests during his lifetime.\textsuperscript{93}

\textsuperscript{88} The highest rate is temporarily set at 55% until 1993, at which time the permanent rate of 50% is phased in. I.R.C. § 2001(c) (West 1989).
\textsuperscript{89} Id. § 2010.
\textsuperscript{90} Id. § 2056.
\textsuperscript{91} Id. § 2056(b)(7)(B)(V).
\textsuperscript{92} Id. § 2055.
\textsuperscript{93} The question as to what types of inter vivos transfers are to be included as a part of the estate for estate tax purposes is an exceedingly complex one, covered by several sections of the Code. In general, the Code provides for the inclusion of property in the estate for tax purposes when the donor has retained: (1) a life interest either for himself or for those over whom he retains a power of appointment, id. § 2036; (2) a power to revoke the transfer, id. § 2038; (3) an interest only effective with reference to the donor's death coupled with a reversionary interest valued in excess of 5% the value of the gift, id. § 2037; or (4) rights of ownership over certain annuities or life insurance proceeds, id. §§ 2039, 2042. In addition, where the donee of a general power of appointment has the power to appoint either to himself, his creditors, his estate or creditors of his estate, the property is included in his estate. Id. § 2041. The Code makes special provisions with respect to joint owners. In the absence of a gift tax return at the time of the creation of a joint interest, the entire amount is taxed to the individual whose funds contributed to its creation when he is the first to die. Id. §§ 2012, 2040. Moreover, the presumption is created when one co-owner dies that his funds were used to acquire the interest, and the burden is on the surviving co-owner to establish the contrary. Id. § 2040.
The federal gift tax was designed to fill a gap in the taxation of the wealth distribution process.\textsuperscript{94} The present tax purports to adopt the same rates as the estate tax.\textsuperscript{95} The rates operate somewhat differently, however, since the federal gift tax is computed on a tax-exclusive basis rather than a tax-inclusive basis.\textsuperscript{96} The tax credit previously referred to in connection with the estate tax\textsuperscript{97} is also available for the gift tax.\textsuperscript{98} However, it is a unified credit in the sense that to the extent that the decedent's estate claims the credit for gift taxes, it is no longer available for estate tax purposes.\textsuperscript{99} In further effort to coordinate the two taxes, a taxable gift made during the lifetime of the taxpayer is included in the computation of the size of the estate for purposes of determining the applicable graduated estate tax rate.\textsuperscript{100} The marital and charitable deductions referred to\textsuperscript{101} in connection with the estate tax are equally available for the gift tax.\textsuperscript{102}

The gift tax also contains one additional feature, an annual exclusion.\textsuperscript{103} A taxpayer may, in any single year, make a $10,000 gift ($20,000 if married and his or her spouse consents)\textsuperscript{104} to each beneficiary who has received an unqualified present interest.\textsuperscript{105} That is, the first $10,000 (or $20,000) is not included in the gift tax base.

Finally, as the last step in its coordinated effort to tax the wealth distribution process attending the death of the property owner, Congress instituted the generation-skipping tax. That tax


\textsuperscript{95} I.R.C. § 2502 (West 1989).

\textsuperscript{96} Id. In other words, in the computation of the gift tax the amount of the tax which is paid by the donor is not added to the amount of the gift for tax purposes. On the other hand, under the estate tax the tax is levied on the gross amount without any deduction for the estate tax imposed. Id. § 2001.

\textsuperscript{97} See supra note 89 and accompanying text.

\textsuperscript{98} I.R.C. § 2505 (West 1989).

\textsuperscript{99} Id. §§ 2001, 2010, 2505.

\textsuperscript{100} Id. § 2001.

\textsuperscript{101} See supra notes 90-92 and accompanying text.

\textsuperscript{102} I.R.C. §§ 2522, 2523 (West 1989).

\textsuperscript{103} Id. § 2503(b).

\textsuperscript{104} Id. § 2513 (gift by one spouse treated as made one-half by each spouse).

\textsuperscript{105} Id. § 2503. A difficult question sometimes arises as to what constitutes a present gift which is eligible for the annual exclusion. For a general discussion of the problem, see F. Rothman & L. Levin, Probate Law and Taxation of Transfers, Trusts and Estates §§ 2014-2015 (1980 & Supp. 1986).
was the result of a conscious effort to achieve a result akin to that to which The Rule was directed.

Congress was concerned with the ability and proclivity of the wealthy to avoid the generation-by-generation impact that the estate tax had on persons who were unable to tie up substantial assets in the form of a generation-skipping trust.\textsuperscript{106} When Congress enacted the generation-skipping tax it looked to the effect of The Rule which limited the duration of trusts.\textsuperscript{107}

Therefore, both the generation-skipping tax and The Rule have the same purpose: they seek to coerce property owners to arrange their affairs so that transfers of property will occur after their deaths. While the aim is the same, the penalty for failure to comply differs. With the generation-skipping tax, the absence of an actual transfer event gives rise to a deemed transfer event and the wealth passing downstream is diminished by the amount of the tax.\textsuperscript{108} Under The Rule, the penalty is to void the arrange-

\textsuperscript{106} In its explanation of the rationale for the generation-skipping tax, the 1976 Senate Report pointed out:

[One] purpose of the Federal estate and gift taxes is . . . to raise revenue . . . in a manner which has as nearly as possible a uniform effect, generation by generation . . . [That policy is] best served where the transfer taxes . . . are imposed, on the average, at reasonably uniform intervals. [That policy is] frustrated where the imposition of such taxes is deferred for very long intervals, as is possible, under present law, through the use of generation-skipping trusts.

. . . .

Generation skipping . . . reduces the progressive effect of the transfer taxes, since families with moderate levels of accumulated wealth may pay as much or more in cumulative transfer taxes as wealthier families who utilize generation-skipping devices.

. . . [T]he committee . . . believes that the tax laws should be neutral and that there should be no tax advantage available in setting up trusts. Consequently, the committee amendment provides that property passing from one generation to successive generations in trust form should, for estate tax purposes, be treated substantially the same as property which is transferred outright from one generation to a successive generation . . . .

\textsuperscript{107} The 1976 Senate Report noted:

Currently, all States (except Wisconsin and Idaho) have a rule against perpetuities which limits the duration of a trust. . . . [I]n general, such laws require that the ownership of property held in trust must vest in the beneficiaries not later than the period of the lifetime of any "life in being" on the date of the transfer, plus 21 years (and 9 months) thereafter.

\textit{Id.} at 19.

\textsuperscript{108} Deemed transfer events include taxable distributions, taxable terminations and direct skips. \textit{I.R.C. § 2611(a)} (West 1989). The generation-skipping tax is imposed upon the taxable amounts of these deemed transfers. \textit{Id.} §§ 2601, 2621-2623. For a discussion of the taxation of direct skips, see infra notes 112-15 and accompanying text.
ment and thereby recast it in a form in which alienation is not impermissibly fettered. As a result, under the current generation-skipping provisions, if a testator purports to create successive life estates for various generations, the tax would be triggered on the death of each successive generation having a life estate even though the interest of the life tenant was not inheritable and therefore not subject to an estate transfer tax.

Moreover, the tax is levied on "direct skips." This means that even if a prior generation receives no life interest, a generation-skipping tax is triggered by a direct gift to a person who is more than one generation below the donor whose parents are alive at the time of the gift. The tax is levied as each generation becomes entitled to distribution, and it is at the highest available estate tax rate, currently fifty-five percent.

Congress' overt embrace of the public policy against allowing economic perpetuities in the transfer tax area was not all-encompassing. The 1986 Act revision of the generation-skipping tax provided an exemption of up to $1 million for each individual transferor who makes a generation-skipping transfer. To implement the exemption, specific property is identified as exempt and thereafter all subsequent appreciation in value of that exempt property is immune from the generation-skipping tax.

For example, assume the grantor transfers $1 million in trust for his or her grandchildren and allocates the full amount of her exemption to the trust. Thereafter, no part of the trust will ever be subject to the generation-skipping tax, even if it eventually appreciates in value ten-fold.

The exclusion is obviously at complete odds with the general policy of the generation-skipping tax, and it can be expected to encourage long-lasting inflexible trusts, with The Rule as their

113. Id. §§ 2612-2613.
114. Id. §§ 2611(a)(1), 2612(b).
115. Id. §§ 2641, 2001(c). As previously noted, the highest rate is scheduled to be reduced automatically under current law after 1992. Id. § 2001(c).
118. Id.
only temporal limitation. And because, at least as Congress viewed it, only the wealthy can be expected to tie up assets of the magnitude required to take full advantage of the exclusion, the provision points firmly in the direction of encouraging undue accumulation of wealth in the hands of a few.

Lest it be thought that the exclusion is the whimper of the generation-skipping tax's bang, consider that $1 million compounded daily at 10% will reach $10 million in approximately twenty-four years. Or, in the alternative, assume that a grantor establishes a trust, funds it with $1 million, and designates the trust assets as exempt. The trust has five beneficiaries. The cash is used to buy a $5 million life insurance policy on the life of a person as to whom there is an insurable interest, the more elderly the better. When he or she dies, the insurance proceeds are distributed equally to the five beneficiaries, each of whom sets up a trust funded by his or her $1 million, designates the trust for his or her individual generation-skipping tax exclusion, and goes in search of an elderly potential insured.

IV. So What?

Logic could lead one to argue that a social policy device first sculpted to prevent the aggregation of assets in the hands of several hundred noble families at a time when London, the largest city in the common law world, had less than 10,000 inhabitants, has outlived its justification. While certain ownership behavior patterns were politically and economically undesirable for a feudal sovereign, these patterns do not present a clear danger in our modern society. However, that forty-eight states have The Rule firmly embedded in the body of their current law, and Congress has recognized it as a rationale for the generation-skipping tax, suggest that the policy remains vital.

In other words, even today property held under alienation strictures improperly detracts from the mobility of wealth to meet the needs of current owners where those needs could not have been forecast by the original owner. In addition, taxing the devolution of control of wealth from one generation to another without regard to the legal formalities of transfer causes each generation to contribute to the satisfaction of the national federal tax burden with greater uniformity and equality.

120. For a discussion of Congress' consideration of The Rule in enacting the tax, see supra note 107 and accompanying text.
There is an implicit quantitative assumption involved in applying this policy. The larger the amount of wealth that can be accumulated or restricted within the present frameworks of the tax system and The Rule, the greater is the presumed level of societal concern. When the amount involved is relatively small, arguably no substantial public interest is impaired, even if the amount is tied up over an inordinate period of time. This is plainly the congressional perception as expressed in the $10,000 (or $20,000) annual gift tax exclusion, and in the $600,000 unified credit exclusion. Both of these exclusions are techniques for narrowing the tax base and thereby focusing the brunt of the tax on the very wealthy, who are most likely to accumulate undue wealth.

For the purposes of The Rule, it is more difficult to pinpoint a manifestation of the same de minimis approach. On its face, The Rule is an all-or-nothing sanction: The Rule either is or is not violated. A case may fall within the prohibition of The Rule even though the amount involved is so small that its public policy impact is minimal. However, the judicial response to The Rule has been to create subtle and frequently tortuous constructions in aggrieved cases, perhaps in an attempt to balance individual welfare against the tug of the formal policy.121

In a sense, the generation-skipping tax is also an all-or-nothing sanction. After overreaching the limits of the available exemptions, a single rate is applied.122 No gradations are available.

Both The Rule and the tax can “cut,” but when they do it is with a very dull blade. Undoubtedly that is the result of the failure to clearly articulate, in other than a historical or highly reactive manner, the policy that underpins both.

Is there a better way to address the perceived goals of the policy? Since The Rule and the generation-skipping tax have the same policy target, why sustain both? What if a single system could be devised that is sensitive to the degree of the public interest involved while it continues to further the desired policy?

A taxing scheme seems to be particularly suitable for such a system. The tax rate might vary based not only upon the amount involved but also upon the potential length of time that the trust

121. See, e.g., Belfield v. Booth, 63 Conn. 299, 27 A. 585 (1893) (court refused to “presume” that administration of 14-year trust could last seven years and possibly violate The Rule).

122. For a discussion of the generation-skipping tax rate and the available exemptions, see supra notes 114-18 and accompanying text.
or other device for tying up the property is likely to remain in effect. This procedure might call for a merger of the present estate, gift and generation-skipping taxes, and the total abandonment of The Rule.

Instead of a generation-skipping tax at one stiff rate, graduated rates could apply based on the number of generations which stand between the beneficiary and the original testator or donor. Moreover, any exemption might be temporarily limited in time to a single generation so that, regardless of amount, the tax would be triggered for future generations. The tax rate might be set ultimately to reach a confiscatory level so that it would operate similarly to the flat prohibition of The Rule. But to account for the direct proportional relationship between the amount involved and the degree of societal concern, the tax would only reach that point in graduated stages. It would thus be incrementally more expensive to tie property up through several generations and the disincentive would increase with the potential amount involved.

In the case of direct skips or gifts directly to a junior generation (whose ancestors remain alive), an additional surcharge of twenty-five percent of the normal tax might be levied for each generation skipped, beginning at the immediate succeeding generation of the testator’s or donor’s children (or the equivalent generational level). Again, this tax structure might maintain a limited exemption for a single generation. If the gift were of successive interests to several generations, such as a trust which provides income in turn for children, grandchildren and beyond, the present generation-skipping tax might be retained so that as each generation succeeds to the trust interest a new tax would accrue, calculated at the same graduation rate as though the gift had been given directly to such beneficiaries from the settlor or testator.

There remains the problem of the creation of an interest of potentially indefinite duration on the occurrence of a condition which has no stated outside time limit. Historically, an alternate gift made in the event that the first taker’s line of lineal descendants expired would have created such an interest. A gift for a special purpose such as a direct charitable gift which provided that the gift was to pass to an alternate beneficiary if the charitable purpose failed could also have created such an interest (through the termination of the charitable beneficiary, for example, or its disqualification from charitable status under existing Code rules).

Part of this problem might be eliminated through construction. Thus, a court might read into such a gift a reasonable time
Rule states another, plecrease control any approach, with interest then all which want be received mainders ciary ernmental to tie sary to necessary authority, or existent If that actually tax might statutory expired. after 1990 entire
too modern frequent comforta
to tax burden imposed would become prohibitive in any event. The suggested reform would shift primary responsibility for control to the federal government’s tax sector. In view of the increase in geographic mobility, as evidenced by the fact that people tend readily to change their domiciles from one state to another, the degree of uniformity that such a shift would produce is entirely desirable.

A uniform rule of the sort proposed here would cost the states nothing, and their domiciliaries would gain the benefit of being able to plan their affairs by reference to only one set of

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123. For a discussion of destructibility of contingent remainders and the Rule in Shelley’s Case, see supra notes 23-27 and accompanying text.
complex rules instead of two. The federal government would lose no revenue; indeed a revenue gain might well occur. True, the Internal Revenue Service would have the responsibility of administration, but that burden would be an incremental rather than an exponential increase over that which it currently bears under the present generation-skipping tax.

The resulting tax statute would be complex. But from the standpoint of the property-owning taxpayers affected, or more precisely their professional advisors, at present both The Rule and the generation-skipping tax are separately complex, particularly when The Rule itself is not uniform in its manifestations among the states, and the effective planner for mobile clients must now attempt to foresee which states' rules might apply in the future.

The first modern income tax act was titled "An Act To . . . provide revenue for the Government, and for other purposes."124 Since then, Congress has enthusiastically embraced the "other purposes" warrant to regulate through the Code diverse affairs ranging from international commercial morality125 to the collection of child support payments in arrears under state law.126 Therefore, it is not a quantum leap to use the federal tax structure to further the public policy of regulating the alienation of property presently in the hands of future decedents. Such a system, it is submitted, would curb unacceptable modes of excess wealth accumulation without unduly restricting socially acceptable processes of wealth distribution under established rules of inheritance.

125. I.R.C. §§ 162(c), 952(a)(4) (West 1988 & Supp. 1989) (bribes and "grease" payments paid to foreign government officials); id. §§ 952(a)(3), 999 (income from foreign country engaged in international boycott).
126. I.R.C. § 6402(c) (West 1989).