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Why the Generation-Skipping Transfer Tax Sparked Perpetual Trusts

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WHY THE GENERATION-SKIPPING TRANSFER TAX SPARKED PERPETUAL TRUSTS

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Max M. Schanzenbach and Robert H. Sitkoff, in the work they presented at this Symposium and in their earlier work, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, provide data to support what practitioners, policymakers, and academics already believe—the generation-skipping transfer (GST) tax exemption encouraged the creation of dynastic trusts and made those states that had no Rule Against Perpetuities (RAP) and no income tax on trusts particularly attractive as sites for settlors to establish their trusts.[1] Their work with the state-level panel data assembled from annual reports to federal banking authorities by institutional trustees is impressive and provides compelling evidence of the agility of estate planners and trust departments of banks to take advantage of state laws that lower the cost of giving. Schanzenbach and Sitkoff's study attributes repeal of the RAP and the growth of perpetual trusts to the GST tax exemption. Throughout their article, however, they write about how the "GST tax sparked the movement to abolish the Rule and the rise of the perpetual trust."[2] I want to talk about the components that made up the dry tinder on which that spark fell.

The first component, a phenomenon that Schanzenbach and Sitkoff readily acknowledge, is that property owners consistently have shown a predilection for exercising dead hand control.[3] They argue, however, that their "findings cast doubt on" any inference of a "dynastic impulse" based on the recent rise of the perpetual trust, because their data show that the increase in perpetual trusts occurred after Congress enacted the GST tax.[4] I instead would contend that the GST tax exemption put a "spark" to the dynastic impulse already present. Anglo-Saxon law and culture long have embraced the idea of control of property after death and naturalize settlors' desires for it, as the earliest wills in England demonstrate. Before the Norman Conquest and after Beowulf saved his

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1 115 YALE L.J. 356 (2005).

2 *See, e.g.*, Max M. Shanzenbach & Robert H. Sitkoff, *Perpetuities of Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2468 (2006).

3 *Id.* at 2478.

4 *Id.* at 2471.

people from the dragon, Anglo-Saxons as early as the ninth century died with wills.[5] The earliest example is the Old English will of the Kentish reeve Abba, which dates after 833 and before 839.[6] Notably, it contains elaborate provisions specifying which of his family members were to receive land and who should take it after their respective deaths. Abba's will is not an oddity. Written about 150 years later, the 4000-word will (the longest of all the extant Old English wills) of the wealthy widow Æthelgifu creates successive life estates and contingent remainders in her extensive land holdings. For example, she provides:

> And the land at Standon (is to be given) to Leofsige . . . for his lifetime; and after his lifetime it is to be given to Ælfwold; and after their lifetime, to St. Albans. And they are to sing for her and for her lord's soul thirty masses and thirty psalters every year, and the monks are always to have the use of it in common.[7]

In a world of no taxes (if you will, estate planning in the first millennium), donors clearly revealed a preference for control of the disposition of their property after death. The only difference between Abba and Æthelgifu and their twenty-first century counterparts is that lawyers, over the last 1000 years, have figured out how to control property for a longer period of time through the use of trusts and discretionary powers.[8] This suggests that tax law may encourage

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[5] BEOWULF AND THE FIGHT AT FINNSBURG 1-120 (Friedrich Klaeber ed., 3d ed. 1950). The action in *Beowulf* takes place in the fifth and sixth centuries. *See* FRED C. ROBINSON, *BEOWULF* AND THE APPOSITIVE STYLE 6 (1985); ANGLO-SAXON WILLS xli (Dorothy Whitelock ed. & trans., 1930) (describing the tenth and eleventh century wills contained in this volume and indicating the edited versions of wills that can be found elsewhere). Scholars do not agree on the exact number of extant Anglo-Saxon wills. Michael D. C. Drout, *Anglo-Saxon Wills and the Inheritance of Tradition in the English Benedictine Reform*, 10 J. SPANISH SOC'Y FOR MEDIEVAL ENG. LANGUAGE & LITERATURE 5, 7 n.8 (2000). Dorothy Whitelock, in *Anglo-Saxon Wills*, has edited and translated thirty-nine wills belonging to the period between about the middle of the tenth century and the Norman Conquest in 1066. ANGLO-SAXON WILLS, *supra*. Florence Elizabeth Harmer has edited and translated two from this same period and others from an earlier period. SELECT ENGLISH HISTORICAL DOCUMENTS OF THE NINTH AND TENTH CENTURIES (Florence Elizabeth Harmer ed., 1914) [hereinafter SELECT DOCUMENTS]. In THE CRAWFORD COLLECTION OF EARLY CHARTERS AND DOCUMENTS (1895), Arthur S. Napier and William H. Stevenson have furnished another two from the same period. After Whitelock published *Anglo-Saxon Wills*, A. J. Robertson edited a few additional wills in ANGLO-SAXON CHARTERS (2d. ed. 1956). For a list of fifty-nine of the extant Anglo-Saxon wills, see Drout, *supra*, at 45-47. Michael M. Sheehan provides a useful summary of the wills, their respective dates, and from where in England they derive in THE WILL IN MEDIEVAL ENGLAND: FROM THE CONVERSION OF THE ANGLO-SAXONS TO THE END OF THE THIRTEENTH CENTURY 21-23 (1963).

[6] SELECT DOCUMENTS, *supra* note 5, at 3-5, 75-76.

[7] Æthelgifu, *The Will of Æthelgifu*, *in* THE WILL OF ÆTHELGIFU: A TENTH CENTURY ANGLO-SAXON MANUSCRIPT 6, 8 (Dorothy Whitelock ed. & trans., 1968). The quote in the text is Dorothy Whitelock's translation of the following lines of Æthelgifu's Will: *and lond æt standune leofsige . . . his dæg and æfter his dæge. sylle hit man alfwolde ofor heora dæg into sce albane and hy gesingon f hy for hire hlafordes s a wle ælce gere xxx. mæssana. and xxx. saltera. and æfre þa munecas his brucen gemenelice. Id.* at 9, ll. 24-28.

[8] I argue elsewhere that Æthelgifu sought both economic and spiritual goals through the creation of life estates and that to consider her will exclusively as an economic document distorts

dynastic trusts, but it does so within a context in which donors always (i.e., since they began to write wills) have been all too happy to retain control of their property after they have died. Schanzenbach and Sitkoff's study demonstrates that our culture has normalized the idea of control of property after death and supports the conclusion that the GST tax exemption influences, but does not itself generate, the attractiveness of dynastic trusts.

A second component of the dry tinder on which the GST tax exemption landed concerns the U.S. tradition of focusing on the donative power of donors and dismissing or ignoring their donees' claims to be respectable property owners. Discussions favoring dead hand control either treat the donees as invisible or they construct donees as in need of protection.[9] As Schanzenbach and Sitkoff report, since 1986, eighteen states have joined South Dakota, Idaho, and Wisconsin to abolish the RAP, and several other states are considering repeal legislation.[10] That level of endorsement of dead hand control could not happen except within a tradition that devalues donees' rights to control the property they have received. The nineteenth-century debates surrounding the spendthrift doctrine provide a classic example of how U.S. law and culture promote donative power by delegitimating donees as property owners.

The nineteenth century witnessed both the advent of the spendthrift doctrine[11] and the limited liability private corporation.[12] Both types of

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its cultural import as a spiritual practice. Mary Louise Fellows, Æthelgifu's Will As Spiritual Practice (Oct. 2005) (unpublished Ph.D. dissertation, University of Minnesota) (on file with author).

9 I am not arguing either that donees do not enjoy substantial benefits from perpetual trusts or that they oppose the trust arrangements established by their donors. On the contrary, a dynastic trust arrangement can protect beneficiaries from their creditors and allow them to enjoy significant tax benefits, which could very well allow them to pursue entrepreneurial activities more successfully. *See* T.P. Gallanis, *The Rule Against Perpetuities and the Law Commission's Flawed Philosophy*, 59 CAMBRIDGE L.J. 284, 287-90 (2000); Note, *Dynasty Trusts and the Rule Against Perpetuities*, 116 HARV. L. REV. 2588, 2603-08 (2003). With that said, however, commentators generally do not describe trust beneficiaries as vibrant capitalists. For example, Jesse Dukeminier and James E. Krier argue that "it isn't clear that the aggregate satisfaction of all class members [i.e., trust beneficiaries], present and future combined, is increased by the Rule against Perpetuities." Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1322 (2003). They say this after they ask us to consider

> the likely preferences of the mentally incompetent; of minor children; of bad money managers who lack the discipline to lash themselves to the mast; of people (maybe those same people!) hounded by creditors and vulnerable to bankruptcy; of people, supported by the state, who are beneficiaries of discretionary trusts, which the state cannot touch; of people contemplating divorce and interested in having their property out of the reach of the other half; of people who reap nice tax advantages from trusts, including spouses who benefit from the marital deduction, and beneficiaries of tax-exempt dynasty trusts, among others.

Id.

10 Schanzenbach & Sitkoff, *supra* note 2, at 2466 (2006).

11 *See generally* JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY (2d

entities are based on a separation of investment responsibility and ownership. Through corporate limited liability a shareholder can engage in business without risking the financial security provided through other investments and wealth. Analogously, through a spendthrift clause, a beneficiary can engage in business and place at risk all of her or his wealth, except the beneficial interest subject to the alienation restraint. Policymakers understood both the corporation and the trust to be legal devices that the wealthy could use to concentrate their wealth and power, and for that reason both were the subject of controversy in the nineteenth century.[13] Notwithstanding their similarities, the respective arguments made on behalf of the spendthrift trust doctrine markedly differed from those made on behalf of limited liability for corporations. Whereas spendthrift trust proponents emphasized the donative freedom and autonomy rights of the donor,[14] limited liability proponents relied heavily on the "flight-of-capital" argument.[15] That is to say, the argument was made that a state should provide for corporate limited liability to stave off capital leaving the state in pursuit of more friendly corporation laws. Competition for trust deposits through liberal trust laws apparently played little or no role as

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ed., Boston, Boston Book Co. 1895); ERWIN N. GRISWOLD, SPENDTHRIFT TRUSTS UNDER THE NEW YORK STATUTES AND ELSEWHERE—INCLUDING INSURANCE PROCEEDS (2d ed. 1947); Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985); Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547 (1964).

12 *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 75-76, 291-92, n.165 (1992); E. Merrick Dodd, *The Evolution of Limited Liability in American Industry: Massachusetts*, 61 HARV. L. REV. 1351 (1948).

13 *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 194, 252-53 (2d ed. 1985).

14 In *Nichols v. Eaton*, 91 U.S. 716 (1875), Justice Miller writing for the Supreme Court in dictum focused on the power and ownership rights of the donor:

> [T]he doctrine, that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court.

Id. at 725. He went on to emphasize the donor's power by constructing the recipient of the donor's largesse as in need of protection.

> Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived.

Id. at 727.

Miller's singular focus on the right of a property owner to give away "his" property in a manner that could assure that the purpose of the gift would be achieved reflects classical legal thought. Classical lawyers understood the objective of property rules to be the fulfillment of private intentions and dispositive freedom as a legal right. Alexander, *supra* note 11, at 1230-32. For a more recent discussion of *Nichols v. Eaton*, see John K. Eason, *Developing the Asset Protection Dynamic: A Legacy of Federal Concern*, 31 HOFSTRA L. REV. 23, 39-49 (2002).

15 Dodd, *supra* note 12, at 1367.

states embraced the spendthrift trust doctrine in the late nineteenth century.

The similarities between the arguments of opponents of the limited liability corporation and the opponents of the spendthrift trust, however, are striking. Opponents of limited liability argued that it would encourage reckless management decisions and increase the likelihood of business failures.[16] This argument parallels the one made by John Chipman Gray that spendthrift trusts would lead beneficiaries to engage in reckless irresponsible behavior.[17] What is interesting is that the proponents of spendthrift trusts did not rely on corporate limited liability to support their arguments, and opponents of the spendthrift clause did not feel the need to distinguish the legal rule that allowed shareholders to leave corporate creditors unpaid. The courts and commentators apparently had difficulty seeing the relevance of corporation law, because the limited liability enjoyed by the shareholder for entrepreneurial purposes bore no connection to the trust beneficiary, who advocates of the spendthrift trust doctrine frequently described at best as vulnerable and a victim of misfortune and at worst as intemperate and licentious.[18] Self-determination and protectionism

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[16] *See* LESLIE HANNAH, THE RISE OF THE CORPORATE ECONOMY 18 (2d ed. 1983); Dodd, *supra* note 12, at 1370.

[17] Gray viewed spendthrift trusts as an inappropriate extension of the separate estate rules that included restraints on alienation for married women. GRAY, *supra* note 11, at 214, 258. The interrelationship in Gray's thinking between the individual autonomy of the donee and the disabilities of married women reflected in the separate estate trust is obvious when he states:

> The common law has recognized certain classes of persons who may be kept in pupilage, viz. infants, lunatics, married women; but it has held that sane grown men must look out for themselves, that it is not the function of the law to join in the futile effort to save the foolish and the vicious from the consequences of their own vice and folly. It is wholesome doctrine, fit to produce a manly race, based on sound morality and wise philosophy.

Id. at 243.

[18] A review of the origin of the doctrine's name leaves no doubt that the term was chosen exactly for the connotations it raises about the character of the recipient of the settlor's largesse. The phrase "spendthrift trust" was first used in the syllabus of an 1875 Pennsylvania case, *Ashhurst's Appeal*, 77 Pa. 464 (1875). By 1875, a line of cases in Pennsylvania had settled the question of whether a settlor could restrain a male beneficiary from anticipating his trust interests. The answer was clearly yes. *See* GRISWOLD, *supra* note 11, at 21-23. *Ashhurst* concerned a female beneficiary, and it was on this basis that the validity of the alienation restraint was being disputed. The court addressed the question of whether equity's provision of a trust for the separate use of a married woman precluded the possibility of a trust that protected her from her own debts as well as her husband's by relying on the dichotomy between the able donor and the incapable donee when it stated:

> If the beneficiary be a woman, surely the benefactor can protect her from her own debtors and improvidence, as well as against the debts and improvidence of her husband. That he can do this as to a man is beyond question, and no principle or policy requires any distinction in this respect between the sexes. It is true, that girls are not so often spendthrifts as boys, but they may sometimes be, and if extravagance in female dress continues as it has begun, the fortunes of girls may be as rapidly dissipated in that way, as by intemperance, gambling, and licentiousness in young men.

coexisted within classical legal thought, and the dichotomy between commerce and family was one of the ways classical lawyers mediated these sometimes conflicting ideals.[19] Gray's arguments that spendthrift clauses undermined the ideology of individual autonomy failed to prevail[20] because once the proponents situated the spendthrift debate within the familial context and invoked the hierarchical arrangements identified with family, they made it easy to subordinate the donee's rights without further explanation.[21]

Arguably, Congress's enactment of the GST tax in 1976 and reenactment of it in 1986 undermine the long tradition of promoting dead hand control of donors and dismissing the self-determination claims of donees.[22] The legislative history, however, reveals that Congress had no concern for promoting the control of recipients over the largesse of their donors. The GST tax exemption, which everyone knew would result in a "substantial increase in the establishment of generation skipping trusts . . . over what would occur in the absence of any generation skipping transfer tax at all," itself proves Congress's indifference to donees.[23] Congress could not quite bring itself to encourage outright transfers by taxing those types of transfers at lower rates.[24] Instead, it discouraged dynastic trusts with the GST tax, while at the same time encouraging them through the GST tax exemption.

Further proof of the continuing strength of the tradition of donor control emerges from the 1981 changes to the marital deduction.[25] The Revenue Act of 1948 permitted married persons to transfer one-half of their wealth to their partners tax free.[26] Congress designed the

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Ashhurst's, 77 Pa. at 468.

19 *See* Alexander, *supra* note 11, at 1250.

20 From Gray's viewpoint, spendthrift clauses reflect a protectionism ethic and interfere with the alienation of property in direct conflict with the nonintervention principle that prevailed within the laissez-faire ideology as it was understood in the late nineteenth century. *See* GRAY, *supra* note 11, at viii; Alexander, *supra* note 11, at 1238-40.

21 *See* discussion of *Nichols v. Eaton*, 91 U.S. 716 (1875), at *supra* note 14; Alexander, *supra* note 11, at 1253-54. Concern for furthering a settlor's donative intent and disregard for the rights of beneficiaries also influenced nineteenth-century courts when they adopted the rule that beneficiaries could not terminate a trust prematurely if the trust continued to have a material purpose. *See* Claflin v. Claflin, 20 N.E. 454 (Mass. 1889).

22 The Tax Reform Act of 1976, Pub. L. No. 94-455, § 2006, 90 Stat. 1520, 1879–90, contained a GST tax that Congress later repealed retroactively when it enacted another form of GST tax in 1986. Tax Reform Act of 1986, Pub. L. No. 99-514, §§ 1431–33, 100 Stat. 2085, 2717–32.

23 *Generation-Skipping Transfer Tax: Hearing Before the H. Comm. on Ways and Means*, 98th Cong. 335, 338 (1984) (statement of Raymond H. Young, Chairman, Generation-Skipping Transfer Tax Subcommittee, Boston Bar Association) [hereinafter Young Testimony].

24 *See id.* (proposing "a tax incentive in favor of non-generation skipping transfers, namely, a credit or rate reduction for all non-skipping transfers").

25 This discussion relies heavily on the work of Lily Kahng. *See* Lily Kahng, *Fiction in Tax*, *in* TAXING AMERICA 25 (Karen B. Brown & Mary Louise Fellows eds., 1996).

26 Revenue Act of 1948, ch. 168, §§ 361, 371–372, 62 Stat. 110, 117–121, 125–127.

deduction to resemble community-property treatment for married persons in common-law states making outright transfers to their partners.[27] A transfer in trust generally did not qualify for the marital deduction unless the donee spouse obtained control over the ultimate disposition of the trust property through a general power of appointment.[28] As Lily Kahng has written, Congress premised the marital deduction on an assumption that paralleled the fiction it adopted for income splitting. For income splitting, it relied "on the fiction that husbands and wives shared their incomes."[29] For the marital deduction, it relied on the fiction that "husband and wives wanted to share, and actually did share, their wealth."[30] As Lily Kahng further writes,

> [t]he assumption underlying the marital deduction was mistaken in a crucial respect: husbands did not want to share their wealth with their wives. They wanted to retain control over their wealth through dower transfers [those in which the spouse received only an income interest for life], but dower transfers did not qualify for the marital deduction.[31]

What cannot be denied, however, is that whatever the flaws were in the design of the marital deduction in the view of practitioners, their clients, and many policymakers, the federal law "strengthened married women's property rights by providing a tax incentive for husbands to transfer wealth to their wives."[32] This is one example in which the tax law focused on the donee and created incentives to increase a donee's power to control the ultimate disposition of property received from a donor.

The recognition and respect for donees proved temporary. In 1948, Surrey wrote about marital unity and argued that the law should only tax transfers when the property leaves the marital unit.[33] In 1950, he went on to describe donee wives as unworthy of ultimate control of their husband's property.

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27 *See* S. REP. NO. 80-103, at 27-28 (1948).

28 I.R.C. §§ 2056(b)(5), 2523(e) (2000).

29 Kahng, *supra* note 25, at 33.

30 *Id.*

31 *Id.*

32 *Id.* at 35. Stanley S. Surrey, who was the Tax Legislative Counsel for the Treasury Department during the time of the 1948 enactments, expressed the views that many had at the time when he wrote:

> [T]he splitting of estates and gifts simply rode in unheralded and uninspected on the coattails of splitting of income.... The impact upon estate planning, upon the disposition of property within the family, is immediate and startling. Yet on passage of the Act, only a relative handful of attorneys close to the theater of operations even approached awareness of what these provisions involve, and it will be many months or even years before operative understanding of all of their ramifications is achieved by tax practitioners.

Federal Taxation of the Family—The Revenue Act of 1948, 61 HARV. L. REV. 1097, 1117 (1948).

33 *Id.* at 1162.

> Basically the sorry mess we now face resulted from the illicit alliance in 1948 of transfer tax reduction and community property concepts. . . . The husband has to choose between tax savings through releasing his hand from the control of the property on his wife's death and the risk that when she dies some alien hand will be guiding her actions.[34]

Donor spouses finally were able to enjoy tax savings and retain control when the Economic Recovery Tax Act of 1981 made a mere income interest for life in a donee spouse deductible (i.e., a qualified terminable interest in property (QTIP)).[35] Although the legislative history justifies the change by referring to the married couple as the appropriate taxpaying unit,[36] as Lily Kahng writes, the "fiction of marital unity . . . camouflages the true purpose of the QTIP rules. The QTIP rules eliminated the antidower incentive inadvertently created by the 1948 marital deduction, which enabled husbands to reap the benefit of the marital deduction while retaining dead hand control of their wealth."[37] It may have taken over thirty years, but eventually the strong tradition for dead hand control prevailed. The history of the marital deduction under the transfer tax law makes clear that no one should infer that Congress intended to restrain dead hand control through the GST tax enacted five years earlier than the QTIP and reenacted five years later than the QTIP.

Up to now, I have suggested that the GST tax was a spark that fell on the historical traditions of dead hand control and of disregard for the claims of donees to control property they receive from their donors, and together they renewed interest in perpetual trusts. I believe two other phenomena were also in play in the late eighties and continue to influence the heightened interest in perpetual trusts today. One of those phenomena concerns the RAP itself. I think it is fair to say that, when Congress enacted the GST tax in 1986, it did not contemplate widespread repeal of the RAP. It probably underestimated, as most of us did, the implications of the 1986 promulgation and subsequent widespread enactment of the Uniform Statutory Rule Against Perpetuities (USRAP). USRAP, with its ninety-year waiting period, crystallized the perpetuities rule.[38] No longer was it a complex rule that

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[34] Stanley S. Surrey, *An Introduction to Revision of the Federal Estate and Gift Taxes*, 38 CAL. L. REV. 1, 14 (1950).

[35] Pub. L. No. 97-34, § 403, 95 Stat. 172, 301-05 (1981) (codified at I.R.C. §§ 2056(b)(7), 2523(f)).

[36] S. REP. NO. 97-144, at 29 (1981); H.R. REP. NO. 97-201, at 52 (1981); 1981-2 C.B. 352, 412; STAFF OF JOINT COMM. ON TAXATION, 97TH CONG., 1ST SESS., GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981, at 233 (Comm. Print 1981).

[37] Kahng, *supra* note 25, at 37.

[38] UNIFORM STATUTORY RULE AGAINST PERPETUITIES, 8B U.L.A. 223 (2001). Gregory Alexander and I are currently co-writing an article about the codification of common law concepts in which we consider the unintended consequences of uniform laws in the wills and

only the most sophisticated lawyers really understood and could apply with ease. Now it was a user-friendly rule that did not involve the telling of outlandish tales of either fertile octogenarians or precocious toddlers having children.[39] Although the statute in fact is more complex than a quick read might suggest, because section 1 of the Act provides that the ninety-year waiting period only applies to those dispositions for which the common law RAP is not met, the codification nevertheless creates the appearance that all you have to do under USRAP is count ninety years and see whether all the interests had either vested or failed. Once USRAP embraced a ninety-year period, policymakers could begin to digest the possibility that, if you could wait ninety years, you could wait 190 years or 380 years or forever. USRAP itself became a part of the dry tinder on which the GST tax fell to spark perpetual trusts. Simplification and codification of the RAP made repeal widely and easily imaginable.

The last component of dry tinder that has contributed to the increase in perpetual trusts is that estate planning has taken on many aspects of commerce.[40] The current debates in the states concerning perpetuities repeal and the related issue of asset protection trusts replicate the nineteenth-century arguments put forward by proponents of limited liability corporations. "Flight-of-capital" arguments dominate the discussion and the distinction between the hearth (family matters) and the marketplace (business transactions) has broken down.[41] The RAP has stood as a recognition that donees are property owners. That idea is vanishing as it is overtaken by "flight-of-capital" arguments

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trusts area.

[39] *See* W. Barton Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 992 (1965) (precocious toddler); W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 643 (1938) (fertile octogenarian); *see also* Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023, 1027 (predicting that "[a]t the end of 90 years" attorneys will not be willing to determine whether the common law RAP validates the interest and that they "will rise (almost in unison, with only the dissent of some antiquarians) and formally abolish the Rule at that point in time.").

[40] Joel C. Dobris, *The Death of the Rule Against Perpetuities, or the RAP Has No Friends—An Essay*, 35 REAL PROP. PROB. & TR. J. 601, 651-52 (2000) (footnotes omitted).

> Clearly, estate planning has become an industry. This has come about for several reasons, including the pressure on lawyers in firms to produce more income, the inclusion in the estate planning process of business people as well as learned professionals, and the increase in the stakes caused by the passing of enormous sums from the Depression Generation to the Baby Boomer Generation.

Id.

[41] *See* Robert T. Danforth, *The Role of Federalism in Administering a National System of Taxation*, 57 TAX LAW. 625, 633 (2004); Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2097-98 (2003); Dobris, *supra* note 40, at 605-06; Dukeminier & Krier, *supra* note 9, at 1315-16; Charles D. Fox IV & Michael J. Huft, *Asset Protection and Dynasty Trusts*, 37 REAL PROP. PROB. & TR. J. 287, 324 (2002); Verner F. Chaffin, *Georgia's Proposed Dynasty Trust: Giving the Dead Too Much Control*, 35 GA. L. REV. 1, 2 (2000).

put forward primarily by local bankers and lawyers.[42] When Raymond Young, then the chairman for the Generation-Skipping Transfer Tax Subcommittee for the Boston Bar Association, warned Congress in 1984 that the exemption approach would "result in a substantial increase in the establishment of generation skipping trusts," he also warned it that "bank trust departments, financial planners, lawyers and others will be aggressively marketing and advising establishment of million dollar generation skipping trusts."[43] He appreciated then that estate planning had taken on many of the trappings of the marketplace. As prescient as Young was, however, not even he appreciated that the business of estate planning would include efforts to persuade state legislatures to repeal the RAP.[44]

Dead hand control, dismissiveness of donees' rights to control property, USRAP, and the commercialization of estate planning all worked together with the GST tax exemption to increase the interest in perpetual trusts that Schanzenbach and Sitkoff have documented.[45] Like Schanzenbach and Sitkoff's article, my commentary on perpetual trusts is backward looking and leaves unanswered the question of whether the appetite for perpetual trusts will continue into the foreseeable future and beyond. If, as the staff of the Joint Committee on Taxation has proposed, Congress amends the law to eliminate the generation-skipping tax advantages of perpetual trusts[46] or if Congress permanently repeals the estate tax and the GST tax, Schanzenbach and Sitkoff's thesis suggests that the growth in perpetual trusts may subside.[47] With interest in perpetual trusts having been sparked, however, one wonders whether the stakeholders in the business of estate planning will continue to find reasons to promote the continuation of existing trusts and create more of them. At the end of their article,

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[42] *See* Schanzenbach & Sitkoff, *supra* note 2, at 2477 n.49 (discussing the role of transactional lawyers in law reform efforts).

[43] Young Testimony, *supra* note 23, at 338.

[44] *Id.* at 336 (referring to dynastic trusts lasting only as long as the RAP permits).

[45] Joel C. Dobris has suggested yet some other components of the dry tinder that support the increased interest in perpetual trusts. For example, Dobris describes the emergence of many perpetual arrangements, such as nonprofit foundations and pension trusts, in which we "accept big pools of capital existing for indefinite periods of time as benign, at worst, and beneficent, at best" and the good feelings the culture generally feels toward the wealthy. Dobris, *supra* note 40, at 610, 614-18. His various explanations for the decline of the RAP in recent years tend to have a broader economic and cultural sweep than the components of dry tinder I have set forth in this commentary. Taken together with the four phenomena I have outlined, his analysis strengthens my argument that the GST tax spark fell on a good deal of dry tinder.

[46] *See* STAFF OF JOINT COMM. ON TAXATION, 109TH CONG., OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES 392-95 (Comm. Print 2005), *available at* http://www.house.gov/jct/s-2-05.pdf.

[47] *See* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 501, 901, 115 Stat. 38, 69, 150 (2001) (repealing the estate and generation-skipping transfer taxes after December 31, 2009 and reinstating those taxes after December 31, 2010).

Schanzenbach and Sitkoff appear to raise an alarm about perpetual trusts. They indicate that liberal rules of trust modification and termination, along with trust provisions allowing each generation of beneficiaries to decide to continue the trust or bring it to an end through the exercise of non-general powers of appointment, are necessary to control the potential problems that perpetual trusts create.[48] Whether these tools will prove sufficiently robust to address anticipated and unanticipated problems remains uncertain. In any case, the need for estate planners to rely on these anti-perpetuity mechanisms suggests that even the most ardent supporters of perpetuity trusts actually may have far more moderate goals than assuring that donors can control the disposition of their property and avoid taxation of it for centuries upon centuries. If that is true, it may be more accurate for us to view the recent quest for perpetuity trusts as nothing more than quixotic.

[48] *See* Schanzenbach & Sitkoff, *supra* note 2, at 2497 n.111.