ANOTHER TRAP FOR THE WARY: WHAT WE CAN LEARN ABOUT THE RELATION-BACK DOCTRINE FROM PENNSYLVANIA'S ANTI-DELAWARE-TAX-TRAP STATUTE

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Author's Synopsis: Pennsylvania's statutory anti-Delaware-tax-trap provision, Title 20 section 6107.1(b)(3) of the Pennsylvania Consolidated Statutes, was intended to prevent the Delaware tax trap from being sprung inadvertently by holders of nonfiduciary special powers of appointment over transfer-tax-advantaged assets. But because it is sometimes beneficial for taxpayers to spring the trap, the Pennsylvania legislature attempted to preserve flexibility for planners by making section 6107.1(b)(3)'s anti-trap protection elective. Unfortunately, in that attempt, the legislature gave the election to the wrong power holder, with the result that section 6107.1(b)(3) is quite incapable of preventing the trap from springing in any case. By enacting this ineffectual protection, Pennsylvania has baited the trap; for section 6107.1(b)(3) is capable only of creating a false sense of security in those whose exercise of a nonfiduciary special power of appointment is liable to spring the Delaware tax trap on generation-skipping-transfer-tax exempt or GST-exemption sheltered assets. The practical extent of that problem, in terms of the number of cases liable to be affected, depends marginally on whether the effective date provision governing the perpetuities reform that introduced section 6107.1(b)(3) does or does not incorporate the common law relation-back principle. And therein lies an independent threat of unintended tax consequences under the Treasury's GST tax effective date regulations.

I. INTRODUCTION

As the author has had occasion to note previously,[1] any state that reforms its perpetuities law by abolishing a preexisting rule against perpetuities (RAP) has to reckon with two federal tax terrors: the "constructive addition" rules of the U.S. Department of Treasury's effective date regulations for application of the generation-skipping transfer (GST) tax[2] and the so-called "Delaware tax trap" (Trap).[3]

1. *See* James P. Spica, *A Trap for the Wary: Delaware's Anti-Delaware-Tax-Trap Statute Is Too Clever by Half (of Infinity)*, 43 REAL PROP. TR. & EST. L.J. 673, 673 (2009).

2. Treas. Reg. § 26.2601 (2004) (discussed *infra* Part V.D.1). As to that Treasury regulation's bearing on perpetuities reform, see generally Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities and the GST Tax: New Perils for Practitioners and New Opportunities*, 30 REAL PROP. PROB. & TR. J. 185 *passim* (1995).

3. I.R.C. §§ 2041(a)(3), 2514(d) (discussed *infra* Part II). As to the Trap's bearing on perpetuities reform, see generally Stephen E. Greer, *The Delaware Tax Trap and the Abolition of the Rule Against Perpetuities*, 28 EST. PLAN. 68 *passim* (2001).

Pennsylvania addressed the latter terror in Title 20 section 6107.1(b)(3) of the Pennsylvania Consolidated Statutes, which provides:

> If a power of appointment is exercised to create a new power of appointment, any interest created by the exercise of the new power of appointment is invalid if it does not vest within 360 years of the creation of the original power of appointment, unless the exercise of the new power of appointment expressly states that this provision shall not apply to the interests created by the exercise.[4]

We shall have to say a good deal about how, when, and for whom the Trap is liable to be *a trap* in order to understand just how section 6107.1(b)(3) is supposed to be helpful. But we shall ultimately conclude that section 6107.1(b)(3) is *not* helpful: the section is incapable of disarming the Trap *qua trap* because, in addition to a comparatively inconspicuous problem of over-breadth, section 6107.1(b)(3) authorizes the wrong party, *viz.*, the holder of the "new power," to determine whether or not the section applies.[5] The upshot is that the section's intended anti-Trap protection is self-vitiating.

The extent of the problem that that causes in terms of the number of cases liable to be affected is marginally less *if* the effective date provision[6] governing the 2006 Pennsylvania perpetuities-reform legislation that introduced section 6107.1(b)(3) (Reform)[7] incorporates the common law[8] principle that, for perpetuities purposes, an interest granted by the exercise of a special or testamentary general power of appointment is deemed to have been created at the time the power of appointment was created.[9] In

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4. 20 PA. CONS. STAT. § 6107.1(b)(3) (2018) (effective July 7, 2006).

5. *See infra* Part IV.B.

6. 20 PA. CONS. STAT. § 6107.1(a)(1)–(2), (b) (discussed *infra* Part V).

7. Act of July 7, 2006, No. 98, sec. 3.1, 2006 Pa. Laws 625 (codified at 20 PA. CONS. STAT. § 6107.1 (2018)).

8. The reference here is not to the former separation of the jurisdictions of the King's or Queen's Bench, on the one hand, and the Court of Chancery, on the other (as to which, *see, e.g.*, F.W. MAITLAND, EQUITY: A COURSE OF LECTURES 15–20 (A.H. Chaytor & W.J. Whittaker eds., rev. by John Brunyate, 2d ed. 1936)), but rather to judge-made rules and principles, legal *and* equitable, applicable in common law jurisdictions since the statutory unification of law and equity in England by the Judicature Acts 1873–75. *See, e.g.*, J.E. PENNER, THE LAW OF TRUSTS ¶¶ 1.10–1.15 (8th ed. 2012) (discussing the unification of the jurisdictions in England). In this sense, "common law [is] contrasted with *statute law*" so that "equity is just another form of common law." A.W.B. Simpson, *The Common Law and Legal Theory, in* OXFORD ESSAYS IN JURISPRUDENCE 77, 77 (A.W.B. Simpson ed., 2d series 1973) (emphasis added).

9. *See, e.g.*, JOHN C. GRAY, THE RULE AGAINST PERPETUITIES §§ 514–15 (Roland Gray ed., 4th ed. 1942); JOHN A. BORRON, JR. ET AL., THE LAW OF FUTURE INTERESTS § 1274 (3d ed. 2004). The relation-back principle is discussed in detail *infra* Part III.A.

that case, the risk of someone's inadvertently and improvidently springing the Trap, on account of the Reform, is limited to exercises of nonfiduciary special powers[10] that do not "relate back"[11] within the meaning of the common law principle to dispositive events occurring on or before December 31, 2006.[12]

On the other hand, if the common law relation-back principle does *not* instruct the Reform's effective date provision, the risk of inadvertent Trap springing under Pennsylvania law attends *every post*-December 31, 2006 exercise of a nonfiduciary special power of appointment to grant or newly subject property to[13] another nonfiduciary power of appointment.[14] And in that case, the Reform offers no protection against the other federal tax terror mentioned above, the "constructive addition" rules of the Treasury's GST tax effective date regulations.[15] That poses the independent threat that, owing to the Reform, the exercise of a fiduciary or nonfiduciary special power of appointment to move assets of a trust that is "grandfathered" from GST tax to another trust (which, if done correctly, can be done without loss of grandfathered status[16]) will inadvertently bring it about that the vesting of future interests in those assets may be postponed beyond the *regulatory* RAP testing period that the Treasury has imposed to deal with *post*-GST-tax-effective-date contributions to, and modifications of exempt trusts and will thereby expose previously grandfathered assets to GST tax.[17]

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10. The narrow focus on nonfiduciary *special* powers is explained *infra* Part II.A.

11. For the relevant principle's relation to the more general "relation-back theory" of special and testamentary general powers of appointment, see *infra* Part III.A.

12. *See* 20 PA. CONS. STAT. § 6107.1(a)(1)–(2) (2018).

13. The sense in which subjecting property to an existing power of appointment may be said to "create" the augmented power is explained *infra* Part II.A.

14. The focus here on the granting or augmentation of *nonfiduciary* powers is explained *infra* Part II.A.

15. *See supra* note 2 and accompanying text.

16. *See* Treas. Reg. §§ 26.2601-1(b)(1)(v)(B)(2), 26.2601-1(b)(4)(i)(A)(2) (2004). These Treasury regulations are discussed *infra* Part V.D.1.

17. *See* Greer, *supra* note 3, at 73. *Cf.* James P. Spica, *Spilt to Last: Longevity Planning for Tax Advantaged Trusts Under a New Statutory Decanting Regime in Michigan*, 48 REAL PROP. TR. & EST. L.J. 35, 67 (2013) (describing protection of GST tax grandfathered status of "special appointee trusts" under Michigan's Personal Property Trust Perpetuities Act). The Treasury's regulatory RAP and the risk of inadvertent loss of GST tax grandfathered status are discussed *infra* Part V.D.

II. THE DELAWARE TAX TRAP

'Delaware tax trap'[18] is the colloquial name for Internal Revenue Code (Code) section 2041(a)(3) and its gift tax counterpart, Code section 2514(d), which provide that assets subject to a power of appointment (first power) are included in the power holder's (*H*'s) transfer tax base (gift tax base or gross estate depending on whether the triggering exercise of the power is effectively testamentary) to the extent *H* exercises the power:

> by creating another power of appointment [over the assets in question] which under the applicable local law can be validly exercised so as to postpone the vesting of [future interests in the assets], or suspend the absolute ownership or power of alienation of such [assets], for a period ascertainable without regard to the date of creation of the first power.[19]

Thus, the Trap assumes that applicable local law limits the period during which the vesting of future interests can be postponed or the power of alienation suspended. The Trap also assumes that, under that law, when one power of appointment, p_1, is exercised so as to grant a second power of appointment, p_2, the date of the creation of p_1 may or may not be determinative of the remotest date on which interests granted by exercise of p_2 must vest (if at all, to be valid) or assets appointed by exercise of p_2 must become transferable within the meaning of an applicable rule against suspension of absolute ownership or the power of alienation.[20] If the date of p_1's creation is determinative, the Trap is not sprung; but if the date of p_1's creation is irrelevant (in determining the remotest date on which p_2-spawned interests must vest or p_2-appointed assets must become transferable), the Trap is sprung, and the assets subject to p_2 are included in the transfer tax base of the holder of p_1 upon the granting of p_2.[21]

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18. We shall use single quotation marks throughout in the way logician's do "to construct a name for the [marked] expression." ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT 6 n.4 (1990). We shall use "[d]ouble quotes [sic] . . . in the many looser ways quotation marks can be used, often to mention a word and use it in the same breath." *Id.* Thus, in the portion of the text that this note tags, we are not *using* the expression that appears in single quotation marks; we are *referring to it* as a name.

19. I.R.C. § 2041(a)(3) (2018) (being estate tax version of Trap). *See also id.* § 2514(d) (being gift tax version).

20. For the rejection of an alternative interpretation of the Trap that might seem to be implied in Delaware's statutory anti-Trap provision, DEL. CODE ANN. tit. 25, § 504(a) (2014), *see* Spica, *supra* note 1, at 681–82.

21. *See supra* note 19 and accompanying text.

A. The Trap qua Trap

The Trap is not a trap for the holder of a general power of appointment[22] because what the Trap threatens is just the inclusion of the value of assets subject to the "first power" in the federal transfer tax base of the holder of that power, and assets subject to a general power of appointment are included in the power holder's federal transfer tax base in any case—that is, without regard to the Trap.[23] Thus, concern for unintended transfer tax consequences that may occur *because of the Trap* focuses on exercises of special powers of appointment[24]: if a given "first power" within the meaning of the Trap is a general power, the inclusion of assets subject to the power in the power holder's transfer tax base is, for *that* reason, a *fait accompli*.

Our focus under the Trap is also narrowed to *nonfiduciary* powers of appointment. Though the Code is not explicit on the point, legislative history indicates that the Trap was not meant to be triggered when the *second power* in question (i.e., the power spawned by the "first power") is a purely fiduciary power of appointment, such as a trustee's discretionary power to invade principal.[25] And we know that the *exercise* of such a

22. A "general power" is a power of appointment whose permissible appointees include the donee, her estate, her creditors, or the creditors of her estate. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.3 (AM. L. INST. 2011). The "donee" of a power of appointment is the person to whom the power is granted—the *holder* of the power. *See, e.g.*, *id.* § 17.2(b).

23. *See* I.R.C. §§ 2041(a)(1)–(2), 2514(a)–(b).

24. Traditionally, the signal characteristic of a "special power" was that the class of permissible appointees should be expressly limited by the terms of the instrument granting the power. *See, e.g.*, GERAINT THOMAS, THOMAS ON POWERS ¶ 1.17 (2d ed. 2012); RONALD H. MAUDSLEY, THE MODERN LAW OF PERPETUITIES 60 (1979). In the United States, the acceptation of the term came to include the idea that the power is *not* a general power. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.3 cmt. b (AM. L. INST. 2011). More recently, some statutory definitions have made a power's being nongeneral the *only* signification of the tag 'special.' *See* MICH. COMP. LAWS § 556.112(i) (2012)); UNIF. POWERS OF APPOINTMENT ACT § 102(6), (10) (UNIF. L. COMM'N 2013) (defining terms "general power of appointment" and "nongeneral power of appointment," respectively). We can harmlessly adopt the latter use: the important distinction for federal transfer tax purposes is just between general and nongeneral powers, *see supra* note 23; and the important distinction for perpetuities purposes is just between presently exercisable general powers all other powers, *see infra* notes 53–55 and accompanying text. But the distinction between "broad" powers and "limited" ones that is drawn in the Pennsylvania statute is useless for our purposes because, by definition, either of those kinds of powers can be general powers. *See* 20 PA. CONS. STAT. § 7601 (2017).

25. *See* S. REP. No. 82-382, at 1 (1951), *reprinted in* 1951 U.S.C.C.A.N. 1530, 1535. For the treatment at common law of a trustee's discretionary distribution power as a special power of appointment, see, e.g., RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 11.1 cmt. d (AM. L. INST. 1986); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER

discretionary power in the role of a "first power" within the meaning of the Trap—so as to grant a trust beneficiary a power of appointment over trust assets—is also not intended to spring the Trap: such an exercise is not intended to cause inclusion of assets subject to the fiduciary power in the transfer tax base of the trust's settlor, let alone that of the trustee; for powers that are to be exercised only in a fiduciary capacity are not treated as powers of appointment under the federal transfer taxes.[26] Therefore, concern for unintended transfer tax consequences that may occur because of the Trap focuses on cases in which a nonfiduciary special power of appointment is exercised so as to grant another nonfiduciary power.

We should also note that to the extent an exercise of a given power of appointment, p_2, newly subjects assets to a preexisting power of appointment, p_1, p_1 has probably been newly granted for purposes of the Trap. The term 'power of appointment' is defined for purposes of Code section 2041, for example, to include "all powers which are in substance and effect powers of appointment regardless of the nomenclature used in creating the power and regardless of local property law connotations."[27] Thus, for example, if a power holder *H* exercises her power to appoint asset *a* by adding *a* to a preexisting trust over which a beneficiary *B* has a power of appointment, then, for purposes of the Trap, *B*'s resulting power over *a* should probably be viewed as having been granted by the exercise of *H*'s power.[28] In that case, an informed concern for unintended transfer tax consequences that may occur because of the Trap contemplates cases in which a nonfiduciary special power of appointment is exercised so as to grant, *or newly subject property to*, another nonfiduciary power.

B. Postponement of Vesting and Suspension of Alienation

Happily, the confluence of an established interpretation of the Trap itself and the particular contours of Pennsylvania's perpetuities law allow us to ignore the Trap's abstract concern with the remotest date on which interests granted by exercise of the second power (p_2 in our examples

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DONATIVE TRANSFERS § 17.1 cmt. g (AM. L. INST. 2011); JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 591 (7th ed. 2005).

26. *See, e.g.*, Treas. Reg. § 20.2041-1(b)(1) (1961) (dispositive powers exercisable only in fiduciary capacity not treated as powers of appointment under I.R.C. § 2041).

27. *Id.*

28. *See, e.g.*, MICH. COMP. LAWS § 554.92(b) (2012) (defining term 'first power' for purposes of Michigan's post-perpetuities-reform anti-Trap provision to include power "exercised so as *to subject [] property to*, or to create, another power of appointment" (emphasis added)). *See also id.* § 554.92(e) (defining term 'second power' for same purpose to include power "created *or to which property is subjected* by the exercise of" certain other powers (emphasis added)).

above) must become transferable within the meaning of a rule against suspension of absolute ownership or the power of alienation.[29] Postponement of vesting is the conceptual province of all forms of RAP, whereas suspension of absolute ownership or the power of alienation is the province of a conceptually distinct group of rules.[30] Vesting is irrelevant to rules against suspension of absolute ownership or the power of alienation, under which a suspension occurs when there is no person or group of persons living who can convey absolute ownership of the property in question, as when trust principal is directed to someone yet unknown or unborn.[31] These rules are violated when such a suspension may last longer than a specified period that often mimics the common law RAP's testing period of a life in being plus twenty-one years (plus gestation).[32]

Although the Trap refers to postponement of vesting and suspension of absolute ownership or the power of alienation in the disjunctive, that disjunction has been interpreted as referring to the particular vesting or alienation requirements actually imposed by local law.[33] So, in a jurisdiction that is without a RAP, a rule against suspension of absolute ownership or the power of alienation may nevertheless prevent the Trap from being sprung (assuming the instrument granting the second power, by exercising the first, does not itself avert the Trap by effectively placing relevant limitations on exercise of the second power) if the permissible suspension period is measured from the date of creation of the first power.[34] Contrariwise, in a jurisdiction that is without a rule against suspension of absolute ownership or the power of alienation, an applicable RAP may nevertheless disarm the Trap (if necessary) if the permissible postponement period is measured from the date of creation of the first power.

There was no rule against suspension of absolute ownership or the power of alienation at common law[35] (though, of course, in saying this, we must be careful to distinguish such a rule from prohibitions against direct restraints on alienation that the law makes ineffective *per se*, i.e., without

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29. *See supra* note 19 and accompanying text.

30. *See, e.g.*, GRAY, *supra* note 9, § 119; Greer, *supra* note 3, at 70–71.

31. *See* Ira Mark Bloom, *Transfer Tax Avoidance: The Impact of Perpetuities Restrictions Before and After Generation-Skipping Taxation*, 45 ALB. L. REV. 261, 267–69 (1981).

32. *See, e.g.*, *id.* at 268. *See also* GRAY, *supra* note 9, §§ 201, at 191 (famously formulating the RAP), 220–21 (regarding periods of gestation).

33. *See* Estate of Murphy v. Comm'r, 71 T.C. 671 (1979), *acq*. 1979-2 C.B. 2. *See also* Greer, *supra* note 3, at 71–72.

34. *See, e.g.*, N.C. GEN. STAT. § 41-32 (1995).

35. *See* GRAY, *supra* note 9, §§ 3, 278.1–.4, 736–773, 743–744, 747–752.1.

regard to their duration).[36] Where they exist, rules against suspension of absolute ownership or the power of alienation are, therefore, creatures of statute.[37] Pennsylvania has historically been without such a statute,[38] and, to the extent of its application, the 2006 Reform (of which section 6107.1(b)(3) is part) displaced an exclusive perpetuities regime[39] (which we may follow the Reform itself in tagging "the traditional rule")[40] that concerns only remoteness of vesting.[41] Thus, under both the traditional rule and the Reform, remoteness of vesting is the relevant concern for application of the Trap.

That means that the Trap's abstract concern with possible application of a rule against suspension of absolute ownership or the power of alienation is irrelevant to an examination of Pennsylvania law: for our purposes, the Trap might simply provide that assets subject to a nonfiduciary special power of appointment[42] (first power) are included in the power holder's (*H*'s) transfer tax base to the extent *H* exercises the power by granting or newly subjecting property to[43] another nonfiduciary power[44] over the assets in question that, under applicable local law, can be validly exercised so as to postpone the vesting of future interests in the assets for a period ascertainable without regard to the date of creation of the first power.[45] In what follows, therefore, we shall speak of the Trap as if it concerned only remoteness of vesting. By "the Trap," we shall hereafter mean *so much of the Delaware tax trap as applies when "the applicable local law" is that of Pennsylvania*.

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36. *See* Greer, *supra* note 3, at 70.

37. *See* GRAY, *supra* note 9, §§ 747–752.1. The common law RAP was partly superseded in Michigan, for example, from 1847 to 1949 by statutory provisions limiting suspension of the power of alienation. *See* Lantis v. Cook, 69 N.W.2d 849 (Mich. 1955). *See also* GRAY, *supra* note 9, § 751.1. Those provisions applied only to real estate. Rodney v. Stotz, 273 N.W. 404 (Mich. 1937). Later amendments repealed the provisions and restored the applicability of the common law RAP to real property, "thereby making uniform the rule as to perpetuities applicable to real and personal property." 1948 Mich. Pub. Act No. 38 (effective Sept. 23, 1949) (codified at MICH. COMP. LAWS § 554.51) (2008)).

38. *See* GRAY, *supra* note 9, § 741.

39. "No interest shall be void as a perpetuity except as herein provided." 20 PA. CONS. STAT. § 6104(a) (2018).

40. *See id.* § 6107.1(a).

41. *See id.* § 6104(b)–(c).

42. *See supra* text accompanying notes 22–26.

43. *See supra* text accompanying notes 26–28.

44. *See supra* text accompanying notes 25–26.

45. *Cf.* I.R.C. §§ 2041(a)(3), 2514(d) (2018).

III. PENNSYLVANIA'S "TRADITIONAL RULE" AND ITS RELATION-BACK PRINCIPLE

Pennsylvania's traditional rule is not entirely traditional; for it converts the common law perpetuities testing period, which is a life in being plus twenty-one years (plus gestation),[46] to a so-called "wait-and-see period."[47] But the traditional rule does incorporate an inveterate feature of the common law by providing that "[t]he period allowed by the common law rule against perpetuities under [the traditional rule] shall be measured *from the expiration of any time during which one person while living has the unrestricted power to transfer to himself the entire legal and beneficial interest in the property*."[48] This is a particular implication of a more general account of special and testamentary general powers of appointment that is sometimes called the "relation back theory,"[49] but it is a particular implication that is often singled out for mention when the general theory is described, as when we read: "Where an appointment is made under a special power, the appointment is read back into the instrument creating the power (as if the donee were filling in blanks in the donor's instrument) *and the period of perpetuities is computed from the date the power was created*."[50]

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46. *See, e.g.*, GRAY, *supra* note 9, § 201, at 191 (famously formulating the RAP). *See also id.* §§ 220–21 (regarding periods of gestation).

47. "Upon the expiration of the period allowed by the common law rule against perpetuities *as measured by actual rather than possible events*, any interest not then vested . . . shall be void." 20 PA. CONS. STAT. § 6104(b) (2018) (emphasis added). Thus, there is no interest that this version of the RAP can invalidate any time sooner than the expiration of the common law testing period. This makes a stark contrast with the common law rule, according to which an interest that was not *certain* (i.e., in light of merely *possible* events) *as of the time the interest was created* to vest within the testing period was void *ab initio*. *See, e.g.*, MAUDSLEY, *supra* note 24, at 80–81; Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities,* 21 REAL PROP. PROB. & TR. J. 569, 571–73 (1986).

48. 20 PA. CONS. STAT. § 6104(c) (2018) (emphasis added).

49. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.4 cmt. f (AM. L. INST. 2011). *See also* BORRON, supra note 9, § 911.

50. MAUDSLEY, *supra* note 24, at 62 (emphasis added) (quoting W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 653 (1938)). Less often remarked implications of the general relation-back theory concern, for example, conflict of laws questions that can arise when the terms of a trust, whose validity is determined by the law of one state, grant a special power of appointment to a donee domiciled in another state. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 274 cmt. b (AM. L. INST. 1971).

A. The Relation-Back Principle

As a general account of the meaning and effect of special and testamentary general powers, the relation-back theory has its limitations.[51] But the particular implication of the theory that is picked out by the traditional rule[52] was thoroughly entrenched in the common law as the principle that in the case of any power of appointment other than a presently exercisable general power, the remotest date on which interests granted by exercise of the power must vest (if at all, to be valid) is reckoned from the time the power was *created*; in the case of a presently exercisable general power, the remotest such date is reckoned from the time the power is exercised.[53] What Pennsylvania's particular formulation of the principle[54] makes especially clear is that the relation in question, *viz.*, the *relation back* for perpetuities purposes of the exercise of a special or testamentary general power of appointment to the time of the power's creation, is *transitive over special and testamentary general powers*.

Suppose, for example, that someone who owns certain assets outright (or holds a presently exercisable general power of appointment over the assets)[55] settles an irrevocable trust for disparate income and contingent remainder beneficiaries, under the terms of which a beneficiary is granted a special or testamentary general power, p_1, to appoint the trust assets. The donee[56] of p_1 exercises p_1 to grant another special or testamentary general power over the trust assets, p_2,[57] the donee of p_2 exercises p_2 to grant

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51. *See, e.g.*, GRAY, *supra* note 9, §§ 523.1–523.2; BORRON, *supra* note 9, §§ 913, 1274 at 274–75.

52. *See supra* note 48 and accompanying text.

53. *See, e.g.*, GRAY, *supra* note 9, §§ 474.2, at 467, 514–15; BORRON, *supra* note 9, § 1274. For an example of a comparatively straightforward codification of the common law principle (i.e., *straightforward compared* to 20 PA. CONS. STAT. § 6104(c) (2018)), see MICH. COMP. LAWS § 556.124(1) (2012).

54. Quoted *supra* text accompanying note 48, *infra* text accompanying note 58.

55. "A general power of appointment presently exercisable is, for perpetuities purposes, treated as absolute ownership in the donee." Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1669 (1985).

56. *See supra* note 22.

57. Unless the instrument granting a power of appointment, *p*, manifests a contrary intent, *p* can ordinarily be exercised to grant further powers of appointment in permissible appointees or in others provided, in the latter case, that the permissible appointees of any power thus created include only those for whose benefit the donee of *p* could appoint property by exercising *p*. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS §§ 19.13(a), 19.14 (AM. L. INST. 2011). *See also id.* § 17.1 (defining 'power of appointment' circularly to include power to "designate recipients of . . . powers of appointment over the appointive property"); UNIF. POWERS OF APPOINTMENT ACT § 102(13) (UNIF. L. COMM'N 2013) (defining 'power of appointment' circularly to include power to "designate a recipient of . . . another power of appointment").

another such power, p_3, the donee of p_3 exercises . . . , and the donee of p_{n-1} exercises p_{n-1} to grant another such power, p_n. If these are the only events affecting the vesting of interests in the trust assets, then no matter how large the number n is, we know that under Pennsylvania's traditional rule, any interest granted by exercise of p_n is deemed, for perpetuities purposes, to have been created on the date that p_1 was granted. This is because, according the traditional rule, the perpetuities period runs "from the expiration of any time during which one person *while living* has the unrestricted power to transfer to himself the entire legal and beneficial interest in the property."[58] On our story, no one, while living, has had such an "unrestricted power" over the trust assets since the donor of p_1 settled the trust.

Thus, under the traditional rule, an interest granted by exercise of p_n (in our hypothetical case) must vest (if at all, to be valid) within twenty-one years (plus gestation) from the death of a life that was in being on the date p_1 was granted.[59] To express that result equivalently in terms of the conventional formulation of the relation-back principle (according to which, again, the remotest date on which interests granted by exercise of a special or testamentary general power must vest (if at all, to be valid) is reckoned from the time the power was created),[60] we simply say that p_n was "created," for perpetuities purposes, when p_{n-1} was granted, and p_{n-1} was created when p_{n-2} was granted, and p_{n-2} . . . when $p_{n-x} = p_1$ was granted.[61] The occurrence of a presently exercisable general power anywhere in the series $p_1, p_2, p_3, \ldots p_n$ would reset the date of "creation," for perpetuities purposes, of any power granted by the exercise of that presently exercisable general power; for the donee of a presently exercisable general power of appointment has an "unrestricted power," within the meaning of the traditional rule, to appoint the property subject

58. 20 PA. CONS. STAT. § 6104(c) (2018) (emphasis added).

59. *See supra* notes 46–48 and accompanying text.

60. *See supra* note 53 and accompanying text.

61. This transitivity (of the relation back for perpetuities purposes of the exercise of a special or testamentary general power of appointment to the time of the power's creation) was recognized at common law:

> If [a] trust or other donative disposition was created by the exercise of a nongeneral or testamentary power that was created by the exercise of a nongeneral or a testamentary power, the relation-back doctrine is applied twice and the donor of the first power is the transferor of the trust or other donative disposition created by the second donee's exercise of his or her power.

RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 27.1 cmt. j(3) (AM. L. INST. 2011). For a codification of this principle of transitivity in terms of the conventional formulation of the relation-back principle, see, e.g., MICH. COMP. LAWS § 556.124(2) (2012).

to the power to herself.[62] But among special or testamentary general powers in an unbroken series of such powers formed by successive generation, the date of each power's creation is transitive under the traditional rule's interpretation of the relation-back principle.

That interpretation of the relation-back principle, indeed, entails a particular interpretation of the Trap, one on which the meaning of the expression 'date of creation of the first power' is partly conventional; for the transitivity of the relation back (for perpetuities purposes, of the exercise of a special or testamentary general power of appointment to the time of the power's creation) means that a "first power" within the meaning of the Trap that was itself granted by the exercise of a special or testamentary general power of appointment will be treated, under the traditional rule, as having been created, for perpetuities purposes, *before* it was actually granted.

To see this, we may suppose, again, that someone who owns certain assets outright (or holds a presently exercisable general power of appointment over the assets) settles an irrevocable trust for disparate income and contingent remainder beneficiaries, under the terms of which a beneficiary is granted a special power, p_1, to appoint the trust assets; the donee of p_1 exercises p_1 to grant another special power over the trust assets, p_2, and the donee of p_2 exercises p_2 to grant another such power, p_3. If these are the only events affecting the vesting of interests in the trust assets, then under the traditional rule, the remotest date on which interests granted by exercise of p_3 must vest (if at all, to be valid) is a function of the date on which p_2 is *deemed* to have been created according to the relation-back principle, *viz.*, the date on which p_1 was granted. That means that if we look at the granting of p_3 by the exercise of p_2 through the lens of the Trap, it may fairly be said that the period during which exercise of p_3 can postpone the vesting of future interests is "ascertainable without regard to the date of creation of [p_2]," [63] at least in the sense of the date on which p_2 *came into existence*, because under the traditional rule, the remotest date on which interests granted by exercise of p_3 must vest (if at all, to be valid) is actually determined by the date on which p_1 came into existence.[64]

Of course, the date on which p_1 came into existence (in our example) *is* the date of "creation" of p_2 *within the meaning of the relation-back principle*, and in that sense, we may say that the period in question is *not* ascertainable without regard to the date of creation of p_2. The traditional

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62. *See supra* note 48 and accompanying text. As to the unrestricted power in question, see, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 17.3(a) (AM. L. INST. 2011); THOMAS, *supra* note 24, ¶ 1.16; MAUDSLEY, *supra* note 24, at 63.

63. I.R.C. §§ 2041(a)(3), 2514(d) (2018).

64. *See supra* notes 53–62 and accompanying text.

rule's incorporation of the relation-back principle makes the date on which p_1 came into existence determinative of the remotest date on which interests granted by exercise of p_3 must vest (if at all, to be valid), and the relation-back principle *identifies* the date on which p_1 came into existence with the date of "creation" of all the powers in our story, including p_2. And that is the sense in which the meaning of 'date of creation of the first power' has become partly conventional: the relation-back principle obviously has to be transitive over powers if it is to prevent the exercise of a special or testamentary general power of appointment from postponing the vesting of future interests for longer than the donor of the power could have arranged without having interposed the power;[65] and it is widely supposed that the relation-back principle (1) does not itself spring the Trap and (2) regularly *prevents* the Trap from springing.[66] On that supposition, the Trap is better reformulated[67] as providing that assets subject to a nonfiduciary special power of appointment (first power) are included in the power holder's (*H*'s) transfer tax base to the extent *H* exercises the power by granting, or newly subjecting property to, another nonfiduciary power over the assets in question that, under applicable local law, can be validly exercised so as to postpone the vesting of future interests in the assets for a period ascertainable without regard to either (1) the date on which the first power came into existence or (2) an *earlier* date on which the first power is *deemed* (under the applicable local law) to have come into existence.[68]

That interpretation of the Trap—as incorporating the relation-back principle and the transitivity of the relation back over affected powers—comports with the Trap's legislative history. The Trap was a response to the peculiarity of Delaware law that allows the exercise of a special power of appointment to restart any applicable perpetuities testing or wait-and-see period.[69] Delaware is peculiar in providing that the period determining the remotest date on which interests granted by exercise of a special power of appointment must vest (if at all, to be valid) is measured from the time

65. *See supra* note 50 and accompanying text.

66. *See, e.g.*, Jonathan G. Blattmachr & Jeffrey N. Pennell, *Using "Delaware Tax Trap" to Avoid Generation-Skipping Taxes*, 68 J. TAX'N 242, 244 (1988); James P. Spica, *A Practical Look at Springing the Delaware Tax Trap to Avert Generation Skipping Transfer Tax*, 41 REAL PROP. PROB. & TR. J. 165, 167 (2006).

67. The reformulation of the Trap in the text incorporates the refinements described *supra* Part II.A–B.

68. *Cf.* I.R.C. §§ 2041(a)(3), 2514(d). *Cf. also supra* text accompanying note 19.

69. As to the difference between these two different types of perpetuities periods, see *supra* note 47.

the power is exercised[70] rather than from the time of the power's creation or deemed creation according to the common-law relation-back principle.[71] Before the enactment of the federal GST tax, that peculiarity of Delaware law posed a serious threat to the integrity of the federal transfer tax base as a measure of wealth, a threat that the Trap was designed to neutralize:

> In at least one State a succession of powers of appointment, general *or limited*, may be created and exercised *over an indefinite period* without violating the rule against perpetuities. In the absence of some special provision in the [Code], property could be handed down from generation to generation without ever being subject to estate tax.[72]

Thus, the threat that the Trap was designed to meet was decidedly *not* the relation-back principle, according to which the exercise of a special or testamentary general power of appointment is referred, for perpetuities purposes, to an *earlier* dispositive event. Rather, it was the elective *restarting* of the applicable perpetuities testing or wait-and-see period so as to push the remotest date on which interests granted by exercise of the second power must vest (if at all, to be valid) *out into the future*. So, the Trap assumes that if applicable local law limits the period during which the vesting of future interests can be postponed, then, under that law, when one power of appointment, p_1, is exercised so as to grant another power of appointment, p_2, the date of the "creation" of p_1, *whether it is the date on which p_1 came into existence or an earlier date on which p_1 is deemed to have come into existence according to the relation-back principle*, may or may not be determinative of the remotest date on which interests granted by exercise of p_2 must vest (if at all, to be valid).[73] If the date of p_1's "creation"—the date on which p_1 came into existence or an *earlier* date on which it is *deemed* to have come into existence—is determinative, the Trap is not sprung because the relevant perpetuities period has not been restarted by the granting of p_2. But if the date of p_1's "creation" (in the conventional sense informed by the relation-back principle) is *irrelevant* to the determination of the remotest date on which interests granted by exercise of p_2 must vest (if at all, to be valid), then the Trap is sprung, and

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70. *See* 25 DEL. CODE ANN. tit. 25, § 501 (2019). As to the uniqueness of Delaware's rule on this point among common law jurisdictions having a RAP, see, e.g., GRAY, *supra* note 9, § 514 n.1.

71. *Cf. supra* note 53 and accompanying text.

72. S. REP. No. 82-382, at 1 (1951), *reprinted in* 1951 U.S.C.C.A.N. 1530, 1535 (emphasis added).

73. *Cf. supra* text accompanying note 20.

the assets subject to p_2 are included in the transfer tax base of the holder of p_1 upon the granting of p_2.[74]

B. Trap Springing Under the Traditional Rule

On that reading of the Trap, the donee of a special power of appointment can spring the Trap under the traditional rule only by granting a presently exercisable general power of appointment; for if she exercises her special power, p_1, to grant either a testamentary general power or another special power of appointment, p_2, interests granted by exercise of p_2 are forced to vest, under the traditional rule, within (or upon the expiration of) the common law perpetuities testing period[75] *measured from the date on which p_1 was "created" within the (conventional) meaning of the relation-back principle*.[76] In that case, p_2 cannot "be validly exercised so as to postpone the vesting of [future interests in the assets subject to the power] . . . for a period ascertainable without regard to the date of creation of [p_1]";[77] for, unless it vests earlier, a nonvested interest granted by exercise of p_2 will be forced to vest on a date certain that can only be specified by determining measuring lives.[78] Measuring lives can only be determined by ascertaining whether certain people were living when the interest was created,[79] and the time of the "creation" of the interest must be referred to the time of the "creation" of p_1.[80] Thus, the traditional rule's deployment of the relation-back principle makes the date of p_1's creation (in the conventional sense) determinative of the remotest date on which interests granted by exercise of p_2 must vest (if at all, to be valid). For that reason, if the traditional rule governs, the Trap is *not* sprung when p_1 is exercised to grant p_2.

Now, there are situations in which it can be advantageous to spring the Trap, as when, for example, a nonfiduciary special power holder's death would otherwise be a "taxable termination" within the meaning of the federal GST tax, and the attributable GST tax would be more than the

74. *See supra* notes 19, 45 and accompanying text.

75. *See* 20 PA. CONS. STAT. §§ 6104(b) (prescribing circumstances in which an interest is void as perpetuity under traditional rule), 6105(b)–(c) (forcing vesting of interests void as perpetuities).

76. *See id.* § 6104(c) (articulating traditional rule's relation-back principle) (quoted *supra* text accompanying notes 48, 58).

77. I.R.C. §§ 2041(a)(3), 2514(d) (2018).

78. *See* 20 PA. CONS. STAT. § 6104(b) (2018) (designating "the period allowed by the common law [RAP]" as wait-and-see period under traditional rule). *See also, e.g.*, GRAY, *supra* note 9, § 201 (describing common law RAP testing period as "twenty-one years after some life in being at the creation of the interest").

79. *See, e.g.*, GRAY, *supra* note 9, § 201; MAUDSLEY, *supra* note 24, at 5.

80. *See supra* note 48 and accompanying text.

attributable estate tax under the Trap.[81] Trap springing can also be advantageous when the effective exclusion amount available to the holder (*H*) of a testamentary special power of appointment is ample enough to cover appreciated assets subject to the power. In that case, thanks to the effective exclusion of the unified credit, an exercise of the power to grant another power so as to spring the Trap will be without transfer tax effect, but the appointed assets will have been acquired by *H*'s appointees "from a decedent" within the meaning of Code section 1014 and, hence, qualify for the so-called "step up" in basis.[82] In situations like these, the power holder can spring the Trap under the traditional rule, but only by exercising her power so as to grant a presently exercisable general power of appointment; for, again, under the traditional rule, in the case of a presently exercisable general power, the period for which exercise of the power can postpone the vesting of a future interest (that is, under the traditional rule, the common law perpetuities testing period)[83] is measured from the time the power is *exercised*. In the case of any power *other than* a presently exercisable general power, the period is measured from the time the power was *created*.[84]

Thus, if a nonfiduciary special power of appointment, p_1, is exercised to grant a second power, p_2, that is a presently exercisable general power, the date of creation of p_1 is irrelevant in determining the remotest date on which interests granted by exercise of p_2 must vest under the traditional rule because, in that case, the perpetuities testing period is measured from the time p_2 is *exercised* to grant those interests, and the Trap is, therefore, sprung when p_1 is exercised to grant p_2.[85] But if we alter the facts only so far as to make p_2 a special or testamentary general power (rather than a presently exercisable general power), the date of p_1's creation (in the conventional sense informed by the relation-back principle) becomes crucial in determining the period during which interests granted by exercise of p_2 must vest under the traditional rule because the terminus of that period is a function of the date on which p_1 was *created* (in the conventional sense).[86] Thus, the Trap is *not* sprung when p_1 is exercised to grant p_2.[87]

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81. *See generally* Blattmachr & Pennell, *supra* note 66, *passim*; Spica, *supra* note 66, *passim*.

82. *See* I.R.C. § 1014(a)(1), (b)(9); Treas. Reg. § 1.1014-2(b) (2017).

83. *See supra* note 78.

84. *See supra* note 53 and accompanying text.

85. *See supra* notes 19–21 and accompanying text.

86. *See supra* notes 75–80 and accompanying text.

87. *See* I.R.C. §§ 2041(a)(3), 2514(d).

IV. PENNSYLVANIA'S "MODERN RULE" AND ITS ANTI-TRAP PROVISION

The traditional rule specifies a finite period—*viz.*, the common law testing period of a life in being plus twenty-one years (plus gestation)[88]—during which the vesting of future interests can be postponed. In that context, it is easy to see how the traditional rule's relation-back principle meets the policy concern that motivated the Trap.[89] The terminus of a finite period measured from the date that the "first power" contemplated by the Trap came into existence (or from an *earlier* date on which that power is *deemed* to have come into existence under the relation-back principle) is bound to fall earlier on the timeline than the terminus of the same period measured from a date *later than* the date on which the first power came into existence, as happens when, for example, the period is measured—as it is, under the traditional rule, in the case of a presently exercisable general power[90]—from the date on which the second power (progeny of the "first") is *exercised* (provided both of the relevant powers are not both granted and exercised on the selfsame date). Moving a finite period along the timeline is like laying down a ruler—the point at which one end is placed rigidly determines the point at which the other end falls.

But what if the ruler is infinitely long? In that case, the point at which we place the nearer end does *not* determine where the farther end falls—because there is no farther end! The new perpetuities regime instituted by the Reform (which we may follow the Reform itself in tagging "the modern rule")[91] creates an infinitely long ruler: under the modern rule, *apart from what was no doubt intended to be the effect of the rule's anti-Trap provision*, "no interest shall be void as a perpetuity,"[92] which means that, under the modern rule, apart from the intended effect of the rule's anti-Trap provision, the vesting of future interests can be postponed indefinitely. So, if the modern rule does not make an effective anti-Trap exception, given that Pennsylvania does not have rule against suspension of absolute ownership or the power of alienation,[93] *any* power of appointment, including a nonfiduciary special or testamentary general power, granted by the exercise of a "first power," within the meaning of the Trap, can postpone vesting for a period *without end*.

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88. *See supra* notes 46–47 and accompanying text.

89. I.e., the policy concern expressed in the legislative history quoted *supra* text accompanying note 72.

90. *See supra* note 53. *See also supra* Part III.B.

91. *See* 20 PA. CONS. STAT. § 6107.1(b) (2018).

92. *Id.* § 6107.1(b)(1). *See also id.* § 6107.1(b)(3) (being the modern rule's anti-Trap provision).

93. *See supra* notes 35–41 and accompanying text.

Now, if there is any sense in which the farther end (to continue the ruler metaphor) of an endless period is "ascertainable," what is ascertained must be merely that *there is no farther end*, and that is a realization to which the position of the period's nearer end (if it has one) is evidently irrelevant—the terminus of a period that has a beginning but no end cannot be drawn nearer by moving the period's origin to an earlier place on the timeline. Thus, under the modern rule, apart from the intended effect of the rule's anti-Trap provision, the remotest date by which interests granted by exercise of any second power (progeny of the "first power") contemplated by the Trap must vest (if at all, to be valid) would be "ascertainable," for any practical purpose concerning perpetuities that is to be served after the exercise of the "first power," "without regard to the date of creation of the first power" (or any other event), and the Trap would, therefore, include the assets subject to the second power in the transfer tax base of the holder of the first power upon exercise of the first power to grant the second.[94]

A. The Anti-Trap Provision Itself

Pennsylvania had two choices in fashioning a statutory anti-Trap provision pursuant to perpetuities reform: it could *invent* a Pennsylvania rule against suspension of absolute ownership or the power of alienation for the narrow purpose of avoiding the Trap[95] or it could retain, for that purpose, a narrow application of some form of RAP.[96] It chose the latter tack by providing in section 6107.1(b)(3) that "if a power of appointment is exercised to create a new power of appointment, any interest created by the exercise of the new power of appointment is invalid if it does not vest within 360 years of the creation of the original power of appointment."[97] So far, so good: that much of the provision contains both of the systemic elements necessary to prevent Trap springing, *viz.*, a finite perpetuities period and a relation-back principle.[98]

94. *See* I.R.C. §§ 2041(a)(3), 2514(d) (2018). *See also supra* note 20.

95. *See supra* notes 34–41 and accompanying text. For a discussion of the relative inelegance of this form of anti-Trap provision for a jurisdiction that antecedently lacks a rule against suspension of absolute ownership or the power of alienation, see Spica, *supra* note 1, at 682–83.

96. *See supra* Part II.B.

97. 20 PA. CONS. STAT. § 6107.1(b)(3) (2018).

98. *See supra* notes 88–94 and accompanying text.

B. Making Anti-Trap Protection Elective

But by its terms, that much of the provision applies when a power of appointment is exercised to grant *any kind* of power of appointment, even a presently exercisable general power. So, if the provision comprised only the language just quoted, there would simply be *no way* for the holder of a special power of appointment to spring the Trap under the modern rule. That would not quite do, though, for as we have noted, there are situations in which it may be advantageous to spring the Trap.[99] That is why section 6107.1(b)(3) goes on to say, ". . . *unless* the exercise of the new power of appointment expressly states that this provision [section 6107.1(b)(3)] shall not apply to the interests created by the exercise."[100]

The legislative intention behind the language just quoted is no doubt to make Trap springing elective so that it can be availed of in situations in which it may be beneficial. In fact, though, that language vitiates the effectiveness of section 6107.1(b)(3) *altogether* because it makes the section's application depend on the choice of the wrong power holder. Suppose a nonfiduciary special power of appointment, p_1, is exercised to grant a second power, p_2. In that case, p_1 is the "original power" within the meaning of section 6107.1(b)(3), and p_2 is the "new power."[101] If the clause of section 6107.1(b)(3) beginning with the exceptive conjunctive 'unless' were omitted, the section would prevent the Trap's being sprung on these facts because "any interest created by the exercise of the new power [p_2] is invalid if it does not vest *within 360 years of the creation of the original power [p_1]*."[102] This would mean that under the modern rule, p_2 could not "be validly exercised so as to postpone the vesting of [future interests in the assets subject to p_2] . . . for a period ascertainable without regard to the date of creation of [p_1]."[103]

But the exceptive clause, '*unless* the exercise of the new power . . . ,' is there in the statute.[104] It entails that, unless the instrument that grants the new power, p_2, (by exercising p_1) provides otherwise,[105] it is entirely up to

99. *See supra* notes 81–82 and accompanying text.

100. 20 PA. CONS. STAT. § 6107.1(b)(3) (2018) (emphasis added). The full text of section 6107.1(b)(3) is quoted *supra* in the text accompanying note 4.

101. *See* 20 PA. CONS. STAT. § 6107.1(b)(3) (2018).

102. *Id.* (emphasis added). *See also id.* §§ 6107.1(b)(4) (prescribing treatment of void interests under modern rule), 6105(b)–(c) (forcing vesting of interests void as perpetuities).

103. I.R.C. §§ 2041(a)(3), 2514(d) (2018).

104. For the idea that a judge's power to ignore statutory words is extremely limited, see, e.g., RUPERT CROSS, STATUTORY INTERPRETATION 99 (John Bell & George Engle eds., 3d ed. 2005).

105. The exercise of a power of appointment must generally comply with any requirements in the instrument granting the power as to the manner, time, and conditions

the donee of p_2 whether the main clause of section 6107.1(b)(3)—requiring interests granted by exercise of p_2 to vest within a finite period measured from the date of creation of the original power, p_1—applies or not. The question posed by the Trap is whether the new power, p_2, "*can be* validly exercised so as to postpone the vesting of [future interests in the assets subject to p_2] . . . for a period ascertainable without regard to the date of creation of the [original power, p_1]."[106] As far as the statute is concerned,[107] the answer to that question, under the modern rule, must invariably be, "Yes": if she chooses, the donee of the "new power" *can* exercise that power by an instrument that "expressly states that [section 6107.1(b)(3)] shall not apply to the interests created by the exercise,"[108] in which case, the vesting of interests granted by that exercise can be postponed for a period *without end* under the modern rule,[109] and a period without end is "ascertainable," for any practical purpose concerning perpetuities that is to be served after the exercise of the original power, p_1, "without regard to the date of creation of [p_1]."[110] The Trap is sprung![111]

The point to be emphasized is that, as far as the statute is concerned,[112] the Trap is sprung under the modern rule *regardless* of what the donee of the "new power" does. It is what the donee of that power *may do*, under the statute, that requires us to say that in every case to which the modern rule applies, if a power p_1 is exercised so as to grant another power p_2, then unless the instrument that exercises p_1 to grant p_2 itself averts the Trap, the Trap is sprung, and the assets subject to p_2 are included in the transfer tax base of the holder of p_1 upon the granting of p_2. That is because as far as the statute is concerned, it is *always* the case under the modern rule that a "new power" within the meaning of section 6107.1(b)(3) *can be* validly exercised so as to postpone the vesting of future interests granted by exercise of the new power *forever*, which is exactly what the Trap was designed to prevent.[113] Thus, thanks to the exceptive clause of section 6107.1(b)(3), the modern rule is utterly bereft of an anti-Trap provision.

We should note that depriving the "new power's" donee of the option to forgo anti-Trap protection is a necessary, but not sufficient, condition

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of exercise. *See, e.g.*, RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 12.1 (AM. L. INST. 1986); BORRON, *supra* note 9, § 892, at 430.

106. I.R.C. §§ 2041(a)(3), 2514(d) (emphasis added).

107. I.e., unless the instrument that grants the new power p_2 provides otherwise. *See supra* note 105.

108. 20 PA. CONS. STAT. § 6107.1(b)(3) (2018).

109. *Id.* § 6107.1(b)(1). *See also supra* notes 91–93 and accompanying text.

110. I.R.C. §§ 2041(a)(3), 2514(d).

111. *See supra* text accompanying note 94.

112. *See supra* note 107.

113. *See supra* notes 70–72 and accompanying text.

for making section 6107.1(b)(3) effective in disarming the Trap. If the exceptive clause were amended to read, *unless the exercise of the original power of appointment expressly states that this provision shall not apply to the interests created by exercise of the new power*,[114] section 6107.1(b)(3) would still be incompetent to disarm the Trap unless it also somehow ruled out the possibility that when the donee of a nonfiduciary special power of appointment, p_1, exercised p_1 to grant a like power, p_2, and did *not* opt out of anti-Trap treatment for interests granted by exercise of p_2, the donee of p_2 could still exercise p_2 to grant a like power, p_3, and *opt out* of anti-Trap treatment for interests granted by exercise of p_3. That possibility is a problem because, as far as the statute is concerned, what is a "new power" (within the meaning of section 6107.1(b)(3)) in respect of one power of appointment may be an "original power" in respect of another. Thus, since p_2 could be validly exercised to grant an additional "new power" that would be eligible for the section 6107.1(b)(3) election, p_2 could be validly exercised so as to postpone the vesting of future interests in the assets subject to p_2 for a period *without end*, a period thus "ascertainable," for any practical purpose concerning perpetuities that is to be served after the exercise of p_1, without regard to the date of creation of p_1. So, the Trap would be sprung when p_1 is exercised to grant p_2.

But even if the election to opt out of anti-Trap protection under section 6107.1(b)(3) were not overbroad in the sense just described, giving the election to the donee of the "new power," as section 6107.1(b)(3) does, must thoroughly vitiate the section's effectiveness as anti-Trap protection. If the donee of the new power can decide not to require interests granted by exercise of the new power to vest within a finite period measured from the date of creation of the original power, then by granting the new power, the donee of the original power has certainly created a power that "under the applicable local law *can be* validly exercised so as to postpone the vesting of [future interests in the assets subject to the new power] . . . for a period ascertainable without regard to the date of creation of the [original] power" because, in that case, interests granted by exercise of the new power need never vest.[115]

V. THE SCOPE OF THE MODERN RULE'S ANTI-TRAP PROBLEM

Section 6107.1(b)(3)'s failure to disarm the Trap makes us interested in the extent of affected cases. That, of course, depends on the extent of the modern rule's application, and *that*, in turn, depends on the interpretation of the Reform's effective date provision, according to which

114. *Cf.* 20 PA. CONS. STAT. § 6107.1(b)(3) (2018).
115. *See supra* notes 88–111 and accompanying text.

the traditional rule "shall apply to every interest created before January 1, 2007 but [] shall not apply to any interest created after December 31, 2006,"[116] and the modern rule applies "to every interest created after December 31, 2006."[117] So, we want to ask, (1) What is an "interest" for these purposes? and (2) When is an interest "created"?

Neither the Reform nor the title of the Pennsylvania Consolidated Statutes that the Reform affects[118] offers an interpretation provision defining the term 'interest.'[119] The "interests" affected by the common law RAP[120] were *property*;[121] for as we have noted, the RAP concerns postponement of vesting,[122] and to be vested is an attribute of a certain kind of property, *viz.,* future interests.[123] But powers of appointment are no kind of property: "The power of a person to appoint an estate to himself is . . . no more his 'property' than the power to write a book or to sing a song."[124] So, although the common law RAP affected (as it certainly did) the validity of powers of appointment as well as that of future interests,[125] the creation of a power of appointment, in itself, would seem to be indifferent, on a technical reading at least, under the Reform's effective

116. 20 PA. CONS. STAT. § 6107.1(a) (2018).

117. *Id.* § 6107.1(b).

118. I.e., title 20. *See* Act of July 7, 2006, No. 98, sec. 3.1, 2006 Pa. Laws 625 (codified at 20 PA. CONS. STAT. § 6107.1 (2018)).

119. *See id. See also, e.g.*, *id.* secs. 3, § 6101 (defining 'charity,' 'charitable purpose,' 'conveyance'), 9, § 7703 (providing interpretation provisions for Pennsylvania's trust code).

120. For the canon of statutory interpretation according to which legislation is presumed to effect the minimum change in matters covered by common law, see *infra* notes 141–43 and accompanying text.

121. I.e., in the technical sense in which 'property' denotes enforceable interests in determinate things, not determinate things in which persons have enforceable interests. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 9, intro. note (AM. L. INST. 1971); WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 28–29 (Walter W. Cook ed., 1964). *Cf., e.g.*, 20 PA. CONS. STAT. § 7703 (2018) (defining 'property' for purposes of Pennsylvania's trust code as "[a]nything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein").

122. *See supra* note 30 and accompanying text.

123. *See, e.g.*, MAUDSLEY, *supra* note 25, at 7–10; GRAY, *supra* note 9, §§ 101 (vesting of legal interests), 116 (vesting of equitable interests identical to that of legal interests).

124. *Ex Parte* Gilchrist (In re Armstrong), 17 Q.B.D. 521, 531–532 (1886) (Fry L.J.) (appeal taken from Q.B.D.) (Eng.). *Cf.* GRAY, *supra* note 9, § 474.2 (muddling matters by suggesting that for the RAP's purposes, at least, there need be no objection to treating powers of appointment as property).

125. *See, e.g.*, MAUDSLEY, *supra* note 25, at 35.

date provision; for the provision refers only to the creation of "interests."[126]

A. A Relation-Back Interpretation

But we have seen that at common law, the *exercise* of a special or testamentary general power of appointment could radically affect the answer to the question of when a granted interest was "created" for perpetuities purposes because of the relation-back principle.[127] According to that principle, if an interest was granted by the exercise of a special or testamentary general power p_n, the interest was treated, for perpetuities purposes, as having been created at the time of the creation of p_n;[128] and if p_n had been granted by the exercise of a special or testamentary general power p_{n-1}, which had been granted by the exercise of a like power p_{n-2}, which had been granted by the exercise of a like power p_{n-3} . . . by the exercise of a like power p_{n-x}, then any interest granted by exercise of p_n was treated, for perpetuities purposes, as having been created at the time of the creation of p_{n-x}.[129]

Now, if the relation-back principle governs the application of the Reform's effective date provision, section 6107.1(b)(3)'s failure to disarm the Trap affects marginally fewer cases; for on that construction, the modern rule does not apply to any interest granted by the exercise of a special or testamentary general power of appointment, *regardless of when the exercise occurs*, if the power "relates back," within the meaning of the relation-back principle, to a date on or before December 31, 2006.[130] Such interests are governed by the traditional rule,[131] which, as we have seen, is safe as houses in respect of the Trap.[132] To see this, we may suppose that at time T_1, someone who owns certain assets outright (or holds a presently exercisable general power of appointment over the assets) settles an irrevocable trust for disparate income and contingent remainder beneficiaries, under the terms of which a beneficiary is granted a special power, p_1, to appoint the trust assets; at time T_2, the donee of p_1 exercises p_1 to grant another special power over the trust assets, p_2; at time T_3, the donee of p_2 exercises p_2 to grant another like power, p_3; at time T_4, the donee of p_3 exercises p_3 to grant a nonvested interest in the trust; these are

126. *See* 20 PA. CONS. STAT. § 6107.1(a)–(b) (2018) (quoted *supra* in the text accompanying notes 116–17).

127. *See supra* Part III.A.

128. *See supra* notes 50, 53 and accompanying text.

129. *See supra* notes 55–62 and accompanying text.

130. *See* 20 PA. CONS. STAT. § 6107.1(b) (2018).

131. *See id.* § 6107.1(a).

132. *See supra* Part III.B.

the only events affecting the vesting of interests in the trust assets between times T_1 and T_4; T_1 is on or before December 31, 2006; T_2, T_3, and T_4 all fall in 2007 or later.

In that case, assuming the relation-back principle governs the application of the Reform's effective date provision, the traditional rule, not the modern rule, governs all of the events in our story for perpetuities purposes because, like the powers p_2 and p_3, the nonvested interest granted by exercise of p_3 is treated, according to the relation-back principle, for purposes of the Reform's effective date provision, as having been created at time T_1, which, by hypothesis, was on or before December 31, 2006. As a result, even if the instruments exercising p_1 (to grant p_2) and p_2 (to grant p_3) say nothing themselves to avert the Trap,[133] neither exercise is a Trap springer because (given that both p_2 and p_3 are special powers rather than presently exercisable general ones) the traditional rule itself is effective anti-Trap protection.[134] On the same construction,[135] the modern rule would govern the events in our story only if T_1 occurred *after* December 31, 2006, in which case, as far as the statute is concerned, *both* the exercise of p_1 to grant p_2 *and* that of p_2 to grant p_3 would spring the Trap because the modern rule's anti-Trap provision, section 6107.1(b)(3), is useless.[136]

B. A Simpler Interpretation

What if the relation-back principle does *not* govern the application of the Reform's effective date provision? In that case, the most plausible interpretation is no doubt that an interest is created whenever it actually comes into existence—whenever the last thing but for which the interest would not exist occurs. On that construction, both the exercise of p_1 to grant p_2 and that of p_2 to grant p_3 in our illustration above spring the Trap because, if we are to ignore the relation-back principle, as of T_2, any interest that may be granted by exercise of p_2 is bound to be "created," within the meaning of the effective date provision, after December 31, 2006, and the same is true as of T_3, of any interest that may be granted by exercise of p_3. That means that any interest granted by exercise of p_2 or p_3 will be subject to the modern rule, which entails that, as far as the statute is concerned,[137] any such interest need never vest because, in each case,

133. E.g., by expressly requiring interests granted by exercise to vest within a finite period measured from the date of creation of p_1.

134. *See supra* Part III.B.

135. I.e., assuming the relation-back principle governs the application of the Reform's effective date provision.

136. *See supra* Part IV.B.

137. I.e., unless the instrument that grants p_2 (by exercising p_1) or the instrument that grants p_3 (by exercising p_2) provides otherwise. *See supra* note 105.

again, the modern rule's anti-Trap provision, being elective with the donee of the "new power,"[138] is useless.

C. The Relative Merits of the Competing Interpretations in General

The latter interpretation of the Reform's effective date provision certainly has simplicity to recommend it, but it ignores a feature of the common law, *viz.*, the relation-back principle, which, though it is conspicuous in the traditional rule that the modern rule supplants, is not expressly repudiated by the modern rule. Indeed, the modern rule *mimics* the relation-back principle, albeit pointlessly, in section 6107.1(b)(3); for section 6107.1(b)(3)'s requirement that "any interest created by the exercise of the new power . . . vest within 360 years *of the creation of the original power*"[139] is a statutory variation on the theme of the relation-back principle. Unlike the rule against suspension of absolute ownership or the power of alienation, for example,[140] the RAP was not originally a creature of statute, but developed at common law; and the practical necessity that judges must understand legislation that modifies an aspect of the common law *in light of* what is being modified makes interpretation of such legislation conservative in the sense that "[t]he presumption is for a minimum change to be effected by legislation in a common law area."[141] "Statutes in derogation of the common law must be construed strictly and only such modification of the law will be recognized as the statute clearly and definitely prescribes."[142]

> Any such rule of law, being in derogation of the common law, must be strictly construed, for no statute is to be construed as altering the common law farther than its words import. It is not to

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138. *See supra* Part IV.B.

139. 20 PA. CONS. STAT. § 6107.1(b)(3) (2018) (emphasis added).

140. *See supra* note 37 and accompanying text.

141. CROSS, *supra* note 104, at 43–44. *See also* KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 119 (2013) (indicating that "[a]mong other substantive canons . . . statutes that alter the common law should be strictly construed"). *See generally* CARLETON KEMP ALLEN, LAW IN THE MAKING 378–80 (4th ed. 1946). As to the antiquity of this form of conservatism, see, e.g., S.E. Thorne, *The Equity of a Statute and Heydon's Case, in* ESSAYS IN ENGLISH LEGAL HISTORY 155, 161–62 (1985).

142. Heaney v. Borough of Mauch Chunk, 185 A. 732, 733 (1936); *see also* Buradus v. Gen. Cement Prods. Co., 52 A.2d 205, 208 (1947) (stating that "in the absence of express declaration, the law presumes that the [statute] did not intend to make any change in the common law"); Mindlin v. O'Boyle, 112 A. 294, 295 (1923) (stating that "a statute will not be construed as changing the common law beyond what is expressly stated or necessarily implied, and in doubtful cases the presumption is that no change was intended").

> be construed as making any innovation upon the common law which it does not fairly express.[143]

The relation-back interpretation of the Reform's effective date provision[144] displays the desiderated conservativism concerning the common law: where the effective date provision makes the "creation" of an interest decisive, the relation-back interpretation applies the common law conception of when an interest is "created" in the relevant context—that is, for perpetuities purposes, when the interest in question springs from the exercise of a power of appointment. According to that conception, if an interest springs from the exercise of either a special or a testamentary general power of appointment, then, for perpetuities purposes, the interest was created at the time the power was created, not at the time the power was exercised.[145]

D. The Merit of Limiting the Risk of Unintended Tax Consequences in Particular

We can hardly commend the relation-back interpretation of the Reform's effective date provision as the pursuit of legislative intent[146]

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143. Robert C. Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297, 304–05 (1959) (citations omitted). The Michigan Supreme Court has made some of the canon's implicit implications explicit:

> *[T]he legislature is deemed to act with an understanding of common law in existence before the legislation was enacted.* Moreover, statutes in derogation of the common law must be strictly construed and will not be extended by implication to abrogate established rules of common law. In other words, where there is doubt regarding the meaning of such a statute, it is to be given the effect which makes the least rather than the most change in the common law. *This Court will presume that the Legislature of this state is familiar with the principles of statutory construction.*

Nation v. W.D.E. Elec. Co., 454 Mich. 489, 494–95 (1997) (emphasis added) (citations omitted).

144. I.e., the interpretation described *supra* Part V.A.

145. *See supra* note 53 and accompanying text.

146. For present purposes, a fairly primitive conception of legislative intention, such as the following, will do: "But lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or *the cause which moved the legislator to enact it*." CROSS, *supra* note 104, at 23 (emphasis added) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 59 (photo. reprt. 1979) (1765)). *See also* ALLEN, *supra* note 139, at 403 (quoting John Austin on *ratio legis* as "the end or purpose which determines the lawgiver to make [a statute]"). For an indication of the complexities associated with more refined formulations of the notion of legislative intention, see, e.g., *id.* at 24–27; Gerald C. MacCallum, Jr., *Legislative Intent, in* ESSAYS IN LEGAL PHILOSOPHY 237 *passim* (Robert S. Summers ed., 1970).

based on its limiting the risk of inadvertent Trap springing to a proper subset of the cases that the simpler interpretation[147] exposes to that risk.[148] The Pennsylvania legislature evidently did not realize that section 6107.1(b)(3) was self-defeating, or the section would never have been enacted in its current form. And if the section had actually been effective to disarm the Trap, there would never have been a role for the effective date provision to play in providing marginal anti-Trap protection. But even a perfectly successful anti-Trap provision would not exhaust an informed legislative concern to control the risk of unintended tax consequences; for RAP reform, in a state that antecedently lacks a rule against suspension of absolute ownership or the power of alienation,[149] is liable to increase the risk not only of inadvertent Trap springing, but also, independently, of inadvertent loss of "grandfathered" status under the GST tax effective date regulations.[150]

1. The GST Tax Effective Date Regulations

Those regulations generally exempt from GST tax any transfer under a trust that was irrevocable on September 25, 1985, provided the trust is not tampered with in any of several prohibited ways.[151] One mode of tampering that the regulations proscribe involves extension of the time for vesting of future interests in assets of a grandfathered trust by means of post-GST-tax-effective-date exercises of fiduciary and nonfiduciary special powers of appointment.[152] And for purposes of distinguishing permissible extensions of that kind from impermissible ones, the regulations impose a RAP of their very own (Regulatory RAP), one ostensibly independent of state-law perpetuities rules.[153]

The Regulatory RAP testing period is twenty-one years from the death of some life that was in being at the time the grandfathered trust became irrevocable—or, for purposes of some of the regulations, the time the

147. I.e., the interpretation described *supra* Part V.B.

148. I.e., to the cases involving "first powers," within the meaning of the Trap, that do not "relate back," within the meaning of the relation-back principle, to a date on or before December 31, 2006. *See supra* Part V.A.

149. *See supra* Part II.B.

150. *See supra* note 2 and accompanying text.

151. *See* Treas. Reg. § 26.2601-1(b)(1) (2004). A fuller description of the effective date exemption would have to refer also to the regulations' transition rules for wills and revocable trusts executed before October 22, 1986 and for certain cases involving mental incompetency. *See id.* § 26.2601-1(b)(2)–(3).

152. *See id.* § 26.2601-1(b)(4)(i)(A)(2) (regarding fiduciary special power of appointment). *See also id.* § 26.2601-1(b)(1)(v)(B)(2) (regarding nonfiduciary power).

153. *See id.*

grandfathered trust was "created"—(plus gestation).[154] But in a nod to the Uniform Statutory Rule Against Perpetuities,[155] the regulations grant that

> the exercise of a power of appointment that validly postpones or suspends the vesting, absolute ownership or power of alienation of an interest in property for a term of years that will not exceed 90 years (measured from the date of creation of the trust [or for purposes of some of the regulations, the date the trust became irrevocable]) will not be considered an exercise that postpones or suspends vesting, absolute ownership or power of alienation beyond the [regulatory] perpetuities period.[156]

The regulations expressly acknowledge the transitivity of grandfathered status in certain cases in which a fiduciary or nonfiduciary special power of appointment is used to move assets from a grandfathered trust to another trust provided exercise of the power does not make it possible for the vesting, absolute ownership, or power of alienation of an interest in the trust assets to be postponed or suspended beyond the Regulatory RAP testing period.[157] On the other hand, an exercise that *does* make a relevant postponement or suspension possible will forfeit grandfathered status.[158] The precise effect of that forfeiture is not spelled out in the effective date regulations, and the Internal Revenue Service has taken inconsistent positions on the point in private letter rulings.[159] But whatever its precise effects may be, loss of grandfathered status must make possible a GST tax event that grandfathered status would have precluded.[160]

Like the Trap, the effective date regulations refer to postponement of vesting, on the one hand, and suspension of absolute ownership or the

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154. *See id.* As to the specification of the time for determining measuring lives as the time the grandfathered trust became irrevocable *or*, for purposes of some of the regulations, the time the grandfathered trust was "created," see James P. Spica, *Means to an End: Electively Forcing Vesting to Suit Tax Rules Against Perpetuities*, 40 ACTEC L.J. 347, 393–94 (2014).

155. UNIF. STATUTORY RULE AGAINST PERPETUITIES (UNIF. L. COMM'N 1990).

156. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2) (2004). *See also id.* § 26.2601-1(b)(4)(i)(A)(2). *See generally* Dukeminier, *supra* note 2, at 189–90.

157. *See* Treas. Reg. §§ 26.2601-1(b)(1)(v)(B), 26.2601-1(b)(4)(i)(A) (2004).

158. *See id*.

159. *See* William R. Culp, Jr. & Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 REAL PROP. TR. & EST. L.J. 1, 22 (2010).

160. *See* I.R.C. § 2611 (2018) (defining 'generation-skipping transfer' for GST tax purposes); *id.* § 2612 (defining 'taxable termination' and 'taxable distribution'). *See also* Treas. Reg. § 26.2601-1(b)(1)(i) (2004) (regarding effect of grandfathered status).

power of alienation, on the other, in the disjunctive, but, as we have seen, in the case of the Trap at least, the disjunction has been interpreted as a reference to the particular vesting or alienation requirements actually imposed by local law.[161] It is difficult to imagine why the effective date regulations should be interpreted differently than the Trap on this point, and, as we have noted, Pennsylvania does not have a rule against suspension of absolute ownership or the power of alienation.[162] So, remoteness of vesting is presumably the relevant concern in Pennsylvania for application of the effective date regulations, and the risk inherent in the Reform is that owing to the modern rule, the exercise of a fiduciary or nonfiduciary special power of appointment to move assets from a grandfathered trust to another trust will bring it about that the vesting of future interests in those assets may be postponed *forever*[163]—a period that extends beyond the Regulatory RAP testing period[164]—and will thereby forfeit grandfathered status.

2. Treating the Risk of Inadvertent Loss of Grandfathered Status

Apart from the possibility that the Reform's effective date provision should be interpreted as including the relation-back principle,[165] there is nothing in the Reform to prevent the holder of a special power of appointment over the assets of a GST tax grandfathered trust from forfeiting the assets' grandfathered status by obliviously exercising the power so as to grant a nonvested interest in the trust assets that is subject to the modern rule and, therefore, need never vest.[166] If the exercise of such a power grants another special power of appointment[167] over the trust assets, the anti-Trap provision of section 6107.1(b)(3) is as helpless to prevent the forfeiture of grandfathered status as it is to avert the Trap[168] because, given that the section is elective and overbroad in the senses described above in Part IV.B, the section *springs* the Trap, as far as the

161. *See supra* note 33 and accompanying text.

162. *See supra* notes 35–41 and accompanying text.

163. 20 PA. CONS. STAT. § 6107.1(b)(1) (2018). *See also supra* note 92 and accompanying text.

164. *See supra* notes 154–56 and accompanying text.

165. *See supra* Part V.A.

166. *See supra* Part IV. *Cf., e.g.*, MICH. COMP. LAWS § 554.94 (2011) (excepting from Michigan's most recent RAP reform property previously held in trusts grandfathered from GST tax that have not lost grandfathered status without regard to the reform).

167. We refer here only to the granting of a *special* power of appointment because the creation of a general power over the assets of a grandfathered trust will cause the loss of grandfathered status regardless of the modern rule. *See* Treas. Reg. § 26.2601-1(b)(1)(v)(A) (2004).

168. *See supra* Part IV.B.

statute is concerned, whenever it applies, and springing the Trap on grandfathered assets causes the assets to loose grandfathered status.[169] Furthermore, even if section 6107.1(b)(3) were not elective with the wrong powerholder and overbroad in the senses noted, the section's 360-year wait-and-see period[170] is obviously longer than that of either of the alternative limbs of the Regulatory RAP.

But if the relation-back principle governs the application of the Reform's effective date provision, any power of appointment whose exercise could inadvertently[171] cause the loss of GST tax grandfathered status under the modern rule will necessarily be subject, instead, to the traditional rule, which requires interests to vest within the same common law RAP testing period[172] that is specified as one of the two alternative testing periods comprised by the Regulatory RAP[173] and which is, therefore, quite safe. On the relation-back interpretation of the Reform's effective date provision, any power of appointment whose exercise *could*, in itself, cause inadvertent loss of GST tax grandfathered status under the modern rule will necessarily be subject, instead, to the traditional rule because any interest granted by any such power will necessarily "relate back," within the meaning of the relation-back principle, to a dispositive event occurring before December 31, 2006. To see this, we have to say a bit more about the GST tax effective date regulations.

3. Which Special Powers of Appointment Are Implicated?

The supposition that a given special power of appointment governs GST tax grandfathered assets entails that the assets have continuously been held in trust since September 25, 1985 because the exemption conferred by grandfathered status is for transfers under *trusts* of the specified vintage,[174] and though the assets of such a trust can be moved *to another trust* in certain circumstances without loss of grandfathered status,[175] no other *post*-September 25, 1985 contribution to a trust is grandfathered regardless of the vintage of the receptacle trust.[176] It follows

169. *See* Treas. Reg. § 26.2601-1(b)(1)(v)(A) (2004).

170. *See* 20 PA. CONS. STAT. § 6107.1(b)(3) (2018) (quoted *supra* in the text accompanying notes 4, 97).

171. I.e., without simply appointing the grandfathered assets outright or granting a general power of appointment over them, either of which would cause the loss of grandfathered status regardless of the modern rule. *See supra* note 167.

172. *See supra* note 78.

173. *See supra* notes 154–56 and accompanying text.

174. *See supra* note 151 and accompanying text.

175. *See supra* notes 157–58 and accompanying text.

176. *See* Treas. Reg. § 26.2601-1(b)(1)(i), (v) (2004).

that if as of a given time *T*, assets subject to a special power of appointment are GST tax grandfathered, those assets must have been held in trust on September 25, 1985, they must be held in trust at time *T*, and they can have been distributed in the interim only from one trust *to another* (in one of the narrow circumstances in which the effective date regulations acknowledge the transitivity of grandfathered status). So, we do not have to worry about special powers of appointment that arose after September 25, 1985 by means of a distribution from a grandfathered trust because assets subject to such a power have already lost grandfathered status without regard to exercise of the special power.

The supposition that a given special power of appointment governs GST tax grandfathered assets also entails that the assets have not been subject to a general power of appointment since sometime before September 25, 1985. This is because, regardless of the date on which a given trust became irrevocable, the release, exercise, or lapse of a general power of appointment over the trust's assets is treated as a transfer by the donee of the general power as of the date of the release, exercise, or lapse "and is not considered a transfer under a trust that was irrevocable on September 25, 1985."[177] As just noted, apart from the circumstances in which assets of a grandfathered trust can be moved to another trust without loss of grandfathered status, no *post*-September 25, 1985 contribution to a trust is grandfathered;[178] and the regulations' specifications for cases in which assets of a grandfathered trust can be moved to another trust without loss of grandfathered status expressly exclude assets subject to a general power.[179] It follows that trust assets that were subject to a general power on September 25, 1985 were never grandfathered,[180] and that grandfathered assets subjected to a general power sometime after September 25, 1985 will thereby have lost grandfathered status.[181]

Thus, in addition to our not having to worry about special powers of appointment that arose after September 25, 1985 by means of a distribution of grandfathered trust assets, we do not have to worry about such powers that arose by means of a general power: in either case, the grandfathered status of the assets in question has already been lost by the distribution or the granting of a general power itself. We also do not have to worry about special powers that arose after September 25, 1985 by means of the exercise of a statutory trust-decanting power,[182] a judicial

177. *Id.* § 26.2601-1(b)(1)(i). *See also id.* § 26.2601-1(b)(1)(v)(A).

178. *See supra* note 176 and accompanying text.

179. *See* Treas. Reg. § 26.2601-1(b)(1)(v)(A)–(B) (2004).

180. *See id.* § 26.2601-1(b)(1)(i) (quoted *supra* text accompanying note 177).

181. *See id.* § 26.2601-1(b)(1)(v)(A); *see also supra* note 167.

182. For our purposes, 'statutory trust-decanting power' is just a tag for a fiduciary power to make trust distributions in further trust that is *not* described in Treas. Reg.

modification, or a nonjudicial settlement agreement; for if the instrument or instruments effecting such a decanting, modification, or settlement do not expressly force interests in the grandfathered assets to vest by the remotest date on which interests in the original grandfathered trust were required to vest, the decanting, modification, or settlement itself will have caused the loss of grandfathered status.[183]

By process of elimination, then, the only powers of appointment whose exercise *could*, in itself, cause inadvertent[184] loss of GST tax grandfathered status under the modern rule, are powers that are (1) *special* powers (2) over assets that were held in a trust that was irrevocable on September 25, 1985, have continuously been held in trust since that date, and have not, at any time since sometime *before* that date, been subject to a general power of appointment,[185] and (3) that arose either on or before September 25, 1985 (by any means)[186] or by exercise of a special power of appointment after that date.[187]

4. The Protection of the Relation-Back Interpretation

That means that any interest granted by any power of appointment whose exercise *could*, in itself, cause inadvertent loss of GST tax grandfathered status under the modern rule must "relate back," within the meaning of the relation-back principle, to a dispositive event on or before September 25, 1985—because under the relation-back principle, if an interest is granted by the exercise of a special power p_n, the interest is

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§ 26.2601-1(b)(4)(i)(A) (2004) (cited *supra* note 152), i.e., a decanting power that was neither provided by the terms of the grandfathered trust nor recognized under applicable law *at the time the grandfathered trust became irrevocable*. *See id.* § 26.2601-1(b)(4)(i)(A)(1); Spica, *supra* note 154, at 359–60. The tag's reference to statute law ('*statutory* trust-decanting power') is suggested by the fact that the earliest decanting statute in the country, New York's original decanting statute, was enacted in 1992. *See* N.Y. EST. POWERS & TRUST LAW § 10-6.6 (McKinney 2002). Thus, the earliest statutory decanting power is at least seven years—1992 minus 1985—too late, and a decanting that is authorized solely by statute is, therefore, necessarily outside the description of Treas. Reg. § 26.2601-1(b)(4)(i)(A).

183. *See* Treas. Reg. § 26.2601-1(b)(4)(i)(D).

184. *See supra* note 171.

185. *See supra* notes 174–81 and accompanying text.

186. I.e., by the trust instrument that created the grandfathered trust, by the exercise of a special or general power of appointment, by a judicial modification or reformation, by a nonjudicial settlement agreement, or in any other way.

187. Because we know that the assets in question have not been subject to a general power of appointment since sometime before September 25, 1985, *see supra* notes 177–81 and accompanying text, we know that any power of appointment over those assets that arose on or after September 25, 1985 by the exercise of another power of appointment was granted by the exercise of a *special* power.

treated, for perpetuities purposes, as having been created at the time of the creation of p_n;[188] and if p_n was granted by the exercise of a special power p_{n-1}, which was granted by the exercise of a like power p_{n-2}, which was granted by the exercise of a like power p_{n-3} . . . by the exercise of a like power p_{n-x}, then the interest granted by exercise of p_n is treated, for perpetuities purposes, as having been created at the time of the creation of p_{n-x}.[189]

Of course, the instrument that granted such a power—that granted a power whose exercise *could*, in itself, cause inadvertent loss of GST tax grandfathered status under the modern rule—might itself require that any interest granted by exercise of the power must vest within one of the two periods permitted by the Regulatory RAP.[190] But if not, and the power is exercised after December 31, 2006, the continuation of grandfathered status for the assets subject to the power depends on the interpretation of the Reform's effective date provision. Suppose, for example, that at time T_1, someone who owns certain assets outright (or holds a presently exercisable general power of appointment over the assets) settles an irrevocable trust for disparate income and contingent remainder beneficiaries, under the terms of which a beneficiary is granted a special power, p_1, over the trust assets; at time T_2, the donee of p_1 exercises p_1 to grant another special power over the trust assets, p_2; at time T_3, the donee of p_2 exercises p_2 to grant another such power, p_3;[191] at time T_4, the donee of p_3 exercises p_3 to grant a nonvested interest in the trust; these are the only events affecting the vesting of interests in the trust assets between times T_1 and T_4; T_1 is before September 25, 1985; T_2, T_3, and T_4 all fall after December 31, 2006.

In that case, assuming the relation-back principle governs the application of the Reform's effective date provision, the traditional rule, *not* the modern rule, governs all of the events in our story for perpetuities purposes because, like the powers p_2 and p_3, the nonvested interest granted by exercise of p_3 is treated, according to the relation-back principle, for

188. *See supra* notes 50, 53 and accompanying text. *See also supra* text accompanying note 128.

189. *See supra* notes 54–62 and accompanying text. *See also supra* note 187.

190. *See supra* note 105.

191. It does not matter to us whether either p_2 or p_3 is a fiduciary or a nonfiduciary power: the donee of either power may be a beneficiary, the trustee of the grandfathered trust, the trustee of another trust to which assets of the grandfathered trust are appointed, or a "trust protector" because the GST tax effective date regulations will allow any of these to exercise a special power of appointment over assets of the grandfathered trust without forfeiting grandfathered status provided exercise of the power does not make it possible for the vesting of an interest in the trust assets to be postponed beyond the Regulatory RAP testing period. *See supra* note 155 and accompanying text.

purposes of the Reform's effective date provision, as having been created at time T_1, which, by hypothesis, was before December 31, 2006.[192] We get the same result regarding the Trap under this assumption as in our prior time-line illustration[193]: even if the instruments of exercise do not themselves avert the Trap,[194] neither the exercise of p_1 to grant p_2 nor that of p_2 to grant p_3 springs the Trap because, given that both p_2 and p_3 are special powers, the traditional rule is Trap proof.[195] But in this case, if we assume that the events we have described as occurring at times T_1 through T_4 are the only events in that period that might affect the grandfathered status of the trust settled at T_1, the assumption that the relation-back principle governs the application of the Reform's effective date provision also yields that the grandfathered status of the trust's assets is preserved because time T_1 was before September 25, 1985.

The latter result follows from the assumption that the relation-back principle governs the application of the Reform's effective date provision because, on that assumption, (1) like the powers p_2 and p_3, the nonvested interest granted by exercise of p_3 is treated, according to the relation-back principle, as having been created at time T_1, which, by hypothesis, was before December 31, 2006, so that the traditional rule, rather than the modern rule applies under the Reform's effective date provision, and (2) the traditional rule forces nonvested interests to vest within (or upon the expiration of) the common law perpetuities testing period[196] measured from the date on which p_3 was "created" within the meaning of the relation-back principle.[197] Thus, under the traditional rule, exercise of p_3 cannot "extend the time for vesting of any beneficial interest in the trust in a manner that may postpone . . . the vesting . . . of an interest in property for a period measured from the date the [trust settled at T_1] became irrevocable, extending beyond any life in being at the date [that trust] became irrevocable plus 21 years, plus if necessary, a reasonable period of gestation,"[198] which means that grandfathered status is not forfeited

192. *See* 20 PA. CONS. STAT. § 6107.1(b) (2018). *See also supra* text accompanying notes 116–17.

193. *See supra* Part V.A.

194. *See supra* note 133.

195. *See supra* Part III.B.

196. *See* 20 PA. CONS. STAT. §§ 6104(b) (2018) (prescribing circumstances in which an interest is void as perpetuity under traditional rule), 6105(b)–(c) (forcing vesting of interests void as perpetuities).

197. *See id.* § 6104(c) (articulating traditional rule's relation-back principle). *See also supra* Part III.B.

198. Treas. Reg. § 26.2601-1(b)(4)(i)(A)(2) (regarding fiduciary special power of appointment); *see also id.* § 26.2601-1(b)(1)(v)(B)(2) (regarding nonfiduciary power). *See supra* Part V.D.1.

when p_1 is exercised to grant p_2, when p_2 is exercised to grant p_3, or when p_3 is exercised to grant the hypothesized nonvested interest.

But if the relation-back principle does *not* govern the application of the Reform's effective date provision, the result is very much otherwise. In *that* case, if the instrument exercising p_1 does not itself assure compliance with the GST tax effective date regulations,[199] grandfathered status is forfeited as of the exercise of p_1 to grant p_2 because, but for the relation-back principle,[200] any interest granted by the exercise of p_2 is bound to be "created," within the meaning of the Reform's effective date provision, after December 31, 2006. That means that the modern rule applies and, as far as the statute is concerned,[201] any such interest need *never* vest because application of the modern rule's anti-Trap provision, section 6107.1(b)(3), is elective with the donee of p_2.[202] And even if the section did not thus grant the election to the wrong power holder (for purposes of anti-Trap protection) and were not overbroad (for that purpose) in the sense also noted above,[203] its 360-year tolerance[204] is obviously longer than that of either of the alternative limbs the Regulatory RAP.

The particular effects on our facts of the assumption that the relation-back principle does *not* govern the application of the Reform's effective date provision differ a little depending on whether p_2 is or is not a fiduciary power. If p_2 is a *nonfiduciary* power, the GST tax grandfathered status of the assets subject to p_2 is lost because the Trap includes the assets in the transfer tax base of the donee of p_1, who thereby becomes the "transferor" of those assets for GST tax purposes.[205] If p_2 is a *fiduciary* power, the Trap is probably *not* sprung.[206] In that case, GST tax grandfathered status is lost simply because as far as the statute is concerned,[207] the shortest period within which vesting could be required under the modern rule is much longer than is permitted by either of the alternative limbs of the Regulatory RAP,[208] and we are left with some uncertainty as to just how the GST tax

199. I.e., by expressly requiring interests granted by exercise of p_2 to vest within the Regulatory RAP testing period measured from T_1. *See supra* Part V.D.1.

200. I.e., on the "simpler" interpretation described *supra* Part V.B, according to which the Reform's effective-date provision is *not* informed by the relation-back principle.

201. *See supra* note 199 and accompanying text; *see also supra* note 105.

202. *See supra* Part IV.B.

203. *See supra* text accompanying note 114.

204. *See* 20 PA. CONS. STAT. § 6107.1(b)(3) (2018) (quoted *supra* in the text accompanying notes 4, 97).

205. *See supra* note 169 and accompanying text.

206. *See supra* note 25 and accompanying text.

207. *See supra* note 201.

208. *See supra* note 204 and accompanying text.

will apply to the trust assets going forward.[209] In either case, though, the assumption that the relation-back principle does *not* govern the application of the Reform's effective date provision yields the loss of grandfathered status, which must make possible a GST tax event that grandfathered status would have precluded.[210]

VI. CONCLUSION

We find, then, that the relation-back interpretation of the Reform's effective date provision is recommended not only by the jurisprudentially favored form of conservativism we have noted,[211] but also by its tendency to advance a legislative intention to mitigate risks of unintended tax consequences. That intention is manifest in the patent, if patently flawed, attempt to avert unintended Trap springing by the enactment of section 6107.1(b)(3),[212] but even a perfectly successful anti-Trap provision would not exhaust an informed legislative concern to avert unintended tax consequences because perpetuities reform involves risks of unintended loss of GST tax "grandfathered" status as well as risks of inadvertent Trap springing.[213] And the relation-back interpretation yields complete protection against inadvertent loss of GST tax grandfathered status by the exercise of a power of appointment because any power of appointment whose exercise *could*, in itself, cause such loss under the Reform's modern rule will "relate back," within the meaning of the relation-back principle, to a dispositive event occurring on or before September 25, 1985, which is before the Reform's effective date of January 1, 2007.[214] That will leave the effect of the exercise to be determined under the traditional rule, which requires interests to vest within the same common law perpetuities period specified as one of the Regulatory RAP's alternative testing periods for exercises of powers of appointment over assets of grandfathered trusts.[215]

An incidental benefit of the relation-back interpretation of the Reform's effective date provision is that it limits the effects of section 6107.1(b)(3)'s failure to disarm the Trap to exercises of special powers of appointment that do not "relate back," within the meaning of the relation-back principle, to a dispositive event on or before December 31, 2006. On the relation-back interpretation, the modern rule does not apply to any interest granted by the exercise of a special or testamentary general power

209. *See supra* note 159 and accompanying text.
210. *See supra* note 160.
211. *See supra* Part V.C.
212. *See supra* Part IV.A.
213. *See supra* notes 149–50 and accompanying text.
214. *See supra* notes 116–17 and accompanying text.
215. *See supra* Part V.D.1.

of appointment, *regardless of when the exercise occurs*, if the power "relates back" to a date on or before December 31, 2006; such interests are governed by the traditional rule, under which the donee of a special power of appointment can only spring the Trap by granting a presently exercisable general power.[216]

But if the relation-back interpretation of the Reform's effective date provision is rejected, there is nothing in the Reform to prevent the holder of a special power of appointment over assets of a GST tax grandfathered trust from forfeiting the assets' grandfathered status by obliviously exercising the power under the modern rule. In that case, as far as the Reform is concerned,[217] whether such a power is exercised to grant a nonvested interest or another power of appointment, the result will be loss of grandfathered status because the shortest period within which vesting could be required under the modern rule—if section 6107.1(b)(3)'s application were not elective with the wrong power holder and the section were not overbroad in the sense also noted[218]—is much longer than is permitted by either of the alternative limbs of the Regulatory RAP.[219]

Rejection of the relation-back interpretation of the Reform's effective date provision also means that the risk of inadvertent Trap springing under Pennsylvania law must attend *every post*-December 31, 2006 exercise of a nonfiduciary special power of appointment to grant, or newly subject property to, another nonfiduciary power of appointment, for the modern rule is without an effective anti-Trap provision.[220] Section 6107.1(b)(3) was meant to be such a provision, but the attempt to make its anti-Trap machinery elective went awry.[221] Apart from the problem of over-breadth that we have noted, section 6107.1(b)(3) allows the donee of the *second power* (progeny of the "first power") contemplated by the Trap[222] to determine whether or not the section's anti-Trap machinery applies. Since that machinery is the only thing in Pennsylvania's "modern rule" that offers to prevent the donee of the second power from postponing the vesting of interests in assets subject to the power *forever*,[223] the donee's ability to opt out of section 6107.1(b)(3)'s anti-Trap treatment establishes precisely what triggers the Trap, *viz.*, that the second power *can be* validly exercised so as to postpone the vesting of future interests in assets subject to the power for a period that is "ascertainable," for any practical purpose

216. *See supra* Part V.A.
217. *See supra* note 201.
218. *See supra* text accompanying note 114.
219. *See supra* Part V.D.2, 4.
220. *See supra* Part IV.B.
221. *See supra* Part IV.B.
222. *See* I.R.C. §§ 2041(a)(3), 2514(d) (2018).
223. *See supra* notes 91–94 and accompanying text.

concerning perpetuities that is to be served after the exercise of the "first power," without regard to the date of creation of the first power.[224]

224. *See supra* Part IV.B.