Nor was the Senate correct in concluding that an amendment was necessary to rectify this situation. Even assuming the prior rulings were in point in the present instance, the Senate's position requiring amendment is unsound as a means of remedying the defective rule. The proper method would be to allow the Chair to exercise its prerogative to overruling the decisions of clearly erroneous interpretations.[29] This would be in accord with a well recognized exception to the doctrine of Stare Decisis—interpretations as precedent which defeat the very purpose of the rules and are plainly wrong should be freely overruled.[30]

In finding prior rulings binding on the Chair the Senate erred, and in requiring amendment to erase previous erroneous interpretations the Senate sacrificed the principles of parliamentary law in favor of political expediency.

TAXATION

TRANSFERS INTENDED TO TAKE EFFECT AT OR AFTER DEATH

In the recent case of *Spiegel's Estate v. Comm'r,* 335 U. S. 701 (1949), the United States Supreme Court held that application of the "intended to take effect at . . . death" provision of § 811 (c)[1] of the Internal Revenue Code to an

29. Senator Vandenberg expresses the opposition to such a proposal: "If the Senate wishes to cure this impotence it has the authority, the power, and the means to do so. The President pro tempore of the Senate does not have the authority, the power or the means to do so except as he arbitrarily takes the law into his own hands." 94 CONG. REC. 9753 (Aug. 2, 1948).

For reference to the powers and duties of the Chair see: WILLOUGHBY, *op. cit. supra* note 8 at 532; LUCE, LEGISLATIVE PROCEDURE, chs. XIX and XX (1922); CUSHING, *op. cit. supra* note 8, at pp. 110-115, 567-572; HATCH & SHOUP, A HISTORY OF THE VICE-PRESIDENCY OF THE UNITED STATES ch. VI (1934); GILFRY, PRECEDENTS IN THE UNITED STATES SENATE, p. 448 (1909).

Examples of other *"constructive rulings,"* where the Chair followed principles of policy rather than precedent, see 55 CONG. REC. 2436 (1919), and WILLOUGHBY, *op. cit. supra* note 8 at 482; VIII CANNON, *op. cit. supra* note 11, at § 2424.

See also VI CANNON, *op. cit. supra* note 11, at § 48, where the Chair followed precedent although he could find no intrinsic reason for sustaining the point of order.

30. WELL, RES ADJUDICATA AND STARE DECISIS, ch. XLV and p. 545 (1878); BLACK, LAW OF JUDICIAL PRECEDENT, p. 199 (1912).

1. "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property . . . to the

irrevocable trust resulted in the imposition of an estate tax where there was no provision for an ultimate gift over should the beneficiaries predecease the grantor. That this possibility of reverter retained by the grantor was extremely remote was dismissed as insignificant.[2]

An ever prevalent problem posed by § 811 (c) and one with which the Court has struggled for many years is whether an interest which takes effect in possession or enjoyment at or after the transferror's death, without more, is sufficient to subject the entire transferred property to a tax imposed upon the transferror's estate?

Early decisions established the proposition that something must pass to the beneficiaries from the transferror at his death, thus compelling the Commissioner of Internal Revenue to attack inter vivos trusts on the theory that the grantor had retained an interest in the transferred property.[3] *Helvering v. Hallock*[4] introduced a broader view of retained interests when the Court held that a possibility of reverter expressly reserved to the grantor by the terms of the conveying instrument was a sufficient retained interest to bring the property within the gross estate. The Court overruled prior cases drawing distinctions as to the character of the

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extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, *under which he has retained* for his life or for any period not ascertainable without reference to his death: (1) the possession, enjoyment of, or the right to the income from or (2) the right, either alone or in conjunction, to designate the persons who shall possess or enjoy the property or income therefrom."

2. The income from the trust was to be paid, during Spiegel's lifetime, equally to his three children, and if any of them should predecease him, to their issue or, if no issue, to the surviving children and their descendants. Upon Spiegel's death the trust was to terminate and the corpus was to be distributed in the same manner as was the income. Spiegel was survived by his three children and by three grandchildren.

3. Reinecke v. Northern Trust, 278 U. S. 339 (1929). The Court declared: ". . . we think it at least doubtful whether the trusts . . . intended to be reached by the phrase . . . include any others than those passing from the possession, enjoyment, or control of the donor at or after his death. . . ." And the Court cited Shukert v. Allen, 273 U. S. 545 (1927). In that case the trustee, under a trust executed in 1921, was to accumulate the income until 1951, then distribute the principal to the grantor's children. There the Court said: "Of course, it was not argued that every vested interest that manifestly would take effect in actual enjoyment after the grantor's death was within the statue. There certainly is no transfer taking effect after his death to be taxed under (the statute)."

4. 309 U. S. 106 (1940).

proprietary interest retained and declared that taxation should no longer be contingent upon the "casuistries of property law."[5] In this latest case, Spiegel's interest was said to be retained under Illinois law rather than by the conveying instrument. The primary issues raised were: Does the Hallock doctrine extend to trusts under which there is no express retention of interest by the grantor? If so, did Spiegel retain an interest under Illinois law? The Tax Court, in a none too explicit memorandum decision, apparently relied upon the remoteness of Spiegel's interest in ordering a refund.[6] The Seventh Circuit Court of Appeals reversed, holding that Spiegel retained an interest in the transferred property under Illinois law.[7] In affirming this holding, the Supreme Court ruled that the Hallock doctrine extended to this type of retained interest which resulted from a reasonable construction of the Illinois law. Spiegel was also held to have intended the consequences effected by the conveying terminology, regardless of his actual intention. Indications of a far more expansive construction of § 811 (c) in the future were found in the broad declaration of the majority that the grantor must have ". . . no possible reversionary interest in that title . . . . Any requirement less than that which we have outlined, . . . would partially impair the effectiveness of the 'possession and enjoyment' provision as an instrument to frustrate estate tax evasions."[8]

5. Earlier, in May v. Heiner, 281 U. S. 238 (1930), the Court had held that a reservation of a life income was not a sufficient retained interest to subject the transferred property to an estate tax. A Congressional Resolution of 1931 declared that such a retention would be sufficient, and the case was overruled in Estate of Church v. Comm'r, 335 U. S. 632 (1949), a companion case to *Spiegel*. After the legislative rebuke, the Court found a taxable interest retained in Klein v. United States, 283 U. S. 231 (1931), where the grantor conveyed a remainder contingent upon the beneficiary surviving him. But in Helvering v. St. Louis Union Trust Co., 296 U. S. 39 (1935), where the grantor conveyed a vested remainder subject to divesture, the Court distinguished the Klein trust, and held there was no taxable interest retained by the grantor. This case was overruled in *Hallock*.

6. 4 T. C. M. 256 (1945).

7. 159 F.2d 257 (7th Cir. 1946). The Court declared the remainders to Spiegel's children to be contingent, relying on several Illinois cases. But the estate cited strong authority supporting its contention that the remainders were vested under Illinois law. *See*, Lachenmyer v. Gehlback, 266 Ill. 11 (1914); Murphy v. Westhoff, 386 Ill. 136 (1944); Wyeth v. Crane, 342 Ill. 545 (1931). Also, see Justice Burton's dissent, 69 Sup. Ct. 301, 310 (1949).

8. This language indicates that the mere retention of interest by the grantor will be sufficient to allow the imposition of the tax, and that it may not be required that the beneficiaries must necessarily

In the period between *Hallock* and *Spiegel* the litigation and regulation under § 811(c) unfolded in a pattern of confusion and seeming inconsistency.. The problem centered upon how far *Hallock* was to be extended. The Commissioner promulgated Treasury Regulation 105, § 81.17, which provided that a transfer would be intended to take effect at death if the two following requisites were present: (1) possession of the transferred interest could be obtained only by beneficiaries who must survive the decedent, *and* (2) the decedent or his estate possessed any right or interest in the property (whether arising by the terms of the instrument or otherwise). This second qualification was construed by the Commissioner to include reversions by operation of law,[9] but the courts did not achieve uniform construction. The Tax Court and some of the lower federal courts began to draw a line between proximate and remote retained interests,[10] but this possible limitation to *Hallock* was rejected when the Supreme Court, in *Field v. United States*,[11] held remoteness to be of no import. Despite this decision, some of the lower courts continued to distinguish between propinquity and remoteness of retained interests[12] while others predicated *Hallock* limitations upon views either that, in the case of implied reversions, there is no intent within the statute,[13] or that there has been no interest retained by the grantor.[14]

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survive the grantor to take their estate. Justice Burton dissented on the ground that Spiegel retained no interest under Illinois law, and that he had no intention that the transfer take effect at his death. Justice Frankfurter declared that the thread tying the grantor to the transferred property was too thin to render the property taxable.

9. T. R. 105, § 81.17, as amended by T. D. 5512, May 1, 1946: Example 7.

10. Estate of Joseph K. Cass, 3 T. C. 562 (1944); Francis Biddle Trust, 3 T. C. 832 (1944); Estate of Henry S. Downe, 2 T. C. 967 (1943); Estate of Goodyear, 2 T. C. 885 (1943); Comm'r v. Kellogg, 119 F.2d 54 (3d Cir. 1944); Lloyd's Estate v. Comm'r, 141 F.2d 758 (3d Cir. 1944). The difficulty introduced by these decisions is detailed in PAUL, FEDERAL ESTATE AND GIFT TAXATION, § 7.23 (1946 Supp.). And see Creamer, *Reversions, Resulting Trusts and the Estate Tax*, 19 ROCKY MT. L. REV. 305 (1947).

11. 324 U. S. 113 (1945). Both in this case and in Fidelity-Philadelphia Trust Co. v. Rothensies, 324 U. S. 108 (1945) the Court also ruled that the estate tax was based upon the value of the property to which the possibility of reverter relates and not upon the value of the reversion.

12. Fifth Ave. Bank of N.Y. v. Comm'r, 59 F. Supp. 753 (1945).

13. Friedman v. Comm'r, 8 T. C. 68 (1947).

14. Estate of Edward P. Hughes, 7 T. C. 1348 (1948); Friedman v. Comm'r, 8 T. C. 68 (1947).

However, the *Spiegel* ruling has been heralded by other decisions which reasoned that the statute, as clarified by the regulation, included implied as well as express reversions,[15] that there is no distinction between express and implied reversions,[16] that estates are taxed where the inter vivos disposition is too much akin to a testamentary distribution,[17] and that the practical impossibility of reverter is only one, and not a controlling, consideration.[18]

Despite the emphasis placed by the lower courts upon the potency of the "string" retained by the grantor, it may be that many of these decisions can be reconciled under the first qualification of the treasury regulation.[19] The appar-

15. Bank of California v. Comm'r, 155 F.2d 1 (9th Cir. 1946).

16. Comm'r v. Bayne, 155 F.2d 475 (2d Cir. 1946); Leaman v. Comm'r, 5 T. C. 699 (1945).

17. Central Hanover Bank v. United States, 57 F. Supp. 497 (1944).

18. *Id.*

19. It appears that many of the lower federal court decisions may be reconciled under the first qualification. Those transfers found taxable have involved instances where the beneficiaries *necessarily* had to survive the grantor to take under the trust. Central Hanover Bank v. United States, 57 F. Supp. 497 (1944) (life income to.grantor; corpus, at his death, to children and issue); Comm'r v. Bayne, 155 F.2d 475 (2d Cir. 1946) (same); Leaman v. Comm'r, 5 T. C. 699 (1945) (same); Bank of California v. Comm'r, 155 F.2d 1 (9th Cir. 1946) (same); Beach v. Busey, 156 F.2d 496 (6th Cir. 1946) (income to grantor's wife for life, to be split between daughter and wife at his death; corpus according to descent statutes at death of survivor. Here the remaindermen must survive the survivor of the daughter and wife, who in turn must survive the grantor). In those cases denying tax liability, it was only possible, and not necessary, that the beneficiaries would have to survive the grantor to take their estates. Lasker's Estate v. Comm'r, 141 F.2d 889 (7th Cir. 1944) (property to children for life, remainder at their death to certain beneficiaries); Fifth Ave. Bank of N.Y. v. Comm'r, 59 F. Supp. 753 (1945) (income to daughter and grandson for life, trust to terminate at death of survivor); Estate of Houghton v. Comm'r, 2 T. C. 871 (1943) (income to life beneficiaries, remainder to descendants surviving the life beneficiaries); Goodyear v. Comm'r, 2 T. C. 885 (1943) (income to son for life, remainder to brothers, children, or issue); Lloyd's Estate v. Comm'r, 141 F.2d 758 (3d Cir. 1944) (income to son with power of appointment; corpus to beneficiaries, one-half at the age of thirty, balance at thirty-five); Comm'r v. Kellogg, 119 F.2d 54 (3d Cir. 1944) (life income to grantor, then to his wife; corpus, upon death of survivor, to beneficiaries); Estate of Harris Fahnestock, 4 T. C. 1096 (1945) (life income to child; corpus, at child's death, to issue). Marion v. Glenn, 79 F. Supp. 96 (1948) appears to be the only case where the court has imposed the estate tax where it was not necessary that the beneficiary survive the grantor to take his estate. It is important to note that none of the decisions are predicated upon the survivorship test, but the holdings rely upon retention of interest by the grantor, in which area they are inconsistent. Under this view, the courts have necessarily had more difficulty in finding a taxable interest where the grantor has reserved a life estate, because of the May v. Heiner ruling. It is only in this phase that there have resulted rulings which are inconsistent under the survivorship

ent inconsistency arises only when one thinks solely in terms of the second qualification. But there are indications that the government position is that the only survivorship requisite is that inherent in this second qualification.[20] If this is to be the future government contention, it has received strong support from the expansive language used by the majority in the *Spiegel* case.

Under either approach, however, it is now clear that in some instances the court will look to state law in determining the taxability of decedent's estates under § 811(c). This introduces undesirable complexity since, at the election of the estate,[21] the federal tax scheme may be snarled by forty-eight interpretations of one retained interest.[22]

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qualification. Gamble v. United States, 65 F. Supp. 114 (1946); Estate of Nina M. Campanari, 5 T. C. 488 (1945); Estate of Harold I. Pratt, 5 T. C. 881 (1945); Estate of Sallie Houston Henry, 4 T. C. 423 (1944); United States v. Brown, 134 F.2d 372 (9th Cir. 1943). But even the courts finding a taxable interest under § 811 (c) in similar fact situations find the interest, not in the life estate, but in the possible reversion. The overruling of May v. Heiner should alleviate this difficulty.

To the effect that survivorship should be the sole test of taxability see Nelson, *Reverters in Estate Taxation*, 23 TAXES 98 (1945).

20. See PAUL, FEDERAL ESTATE AND GIFT TAXATION, p. 194 (1946 Supp.) where the Government brief in the *Fidelity-Philadelphia* case is reviewed, and it is concluded that, under this argument, virtually any trust would be taxable. And see Eisenstein, *The Hallock Problem: A Case Study in Administration*, 48 HARV. L. REV. 1148 (1945).

21. Should the estate fear an adverse determination in the federal courts, Justice Frankfurter, in his dissent, suggests that the estate may petition the state court for a declaratory judgment, or some similar decree. But the effectiveness of this alternative is severely limited as there is no assurance of its availability or the binding effect of such a decree. The Uniform Declaratory Judgments Act provides that such relief is discretionary and that the court may refuse to render a decree where such would not terminate the controversy giving rise to the proceeding. And the federal courts have refused to be bound by state court declarations amounting to consent decrees. United States v. Mitchell, 74 F.2d 571 (7th Cir. 1944); First-Mechanics National Bank of Trenton v. Comm'r, 117 F.2d 127 (3d Cir. 1940). There has been no standard laid down for the determination of what constitutes a consent decree, but it has been suggested that the taxpayer should establish four propositions: (1) substantial opposition, (2) oral arguments or briefs, (3) serious attention to the pertinent issue, (4) necessity for the determination of the particular issue. Cahn, *Local Law In Federal Taxation*, 52 YALE L. J. 799 (1943). Thus, a heavy burden is placed upon the estate and access to the state courts may not be readily available.

22. As to the desirability of uniformity generally, see Cahn, *Local Law in Federal Taxation*, 52 YALE L. J. 799 (1943). In Helvering v. Hallock, 309 U. S. 106, 117 (1940), Justice Frankfurter declared: "There are great diversities among the several states as to the conveying significance of like grants; . . . the importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable system."

Also inherent in the inclusion of implied reversions within the statute is the continued dependence of tax liability upon property law; a dependency that frequently has been criticized.[23] So long as retention-of-interest is argued, taxability will be subjected to the "unwitty diversities of property law." For this disturbing situation, however, the Court must accept full responsibility, because it forced the Government to this contention. But the elimination of this judicial doctrine would require overruling of earlier decisions, a course which was apparently considered and rejected by the Court on reargument of the *Spiegel* case.[24]

While the applicable theory of taxation under § 811(c) still appears elusive, *Spiegel* has raised problems of estate planning which are of more immediate concern. From this aspect the case is merely another in a long line of cases imposing an ever higher premium on draftsmanship. The same plan of distribution may be adopted by the grantor, but he must be more careful to rid himself of any possible interest, as by providing for an eventual remainder to charity or the state.[25] The alteration of existing trusts to meet the requirements imposed by *Spiegel* is of even more pressing importance. Suggested solutions are necessarily speculative, but several merit consideration. The grantor may revoke the trust and resettle it,[26] or he may release his reversionary interest.[27] Such attempts to avoid tax may be regarded as

23. Klein v. United States, 283 U. S. 231, 234 (1931): "Nothing is to be gained by multiplying words in respect of various niceties of the art of conveyancing or the law of contingent and vested remainders." And in Helvering v. Hallock, 309 U. S. 106, 112 (1940): "It . . . [Klein decision] . . . refused to subordinate the plain purposes of a modern fiscal measure to the wholly unrelated origins of the recondite learning of ancient property law." See Ray, *The Estate Tax on Transfers Intended to Take Effect in Possession or Enjoyment at or After Death: Helvering v. Hallock*, 29 GEORGETOWN L. J. 943 (1941), where the overruling of Shukert v. Allen is advocated along with the deletion or presumption of "intent" as used in § 811(c). Shukert v. Allen presents a problem not within the scope of this discussion. See note 2, *supra*.

24. Sup. Ct. Journal, June 21, 1948, pp. 296-8.

25. *See* Comm'r v. Lasker, 141 F.2d 889 (7th Cir. 1944); Comm'r v. Kellogg, 119 F.2d 54 (3d Cir. 1944); Estate of Hall, 3 T. C. M. 1264 (1944). In these cases the grantor provided for a final remainder to his next of kin, which was held sufficient to defeat any reversionary interest in the grantor.

26. The trust may be revoked with the consent of all beneficiaries and then resettled by the grantor. RESTATEMENT, TRUSTS §§ 337, 338. Helvering v. Helmholz, 296 U. S. 93 (1935).

27. See Griswold, *Powers of Appointment Under the Revenue Act of 1942*, 56 HARV. L. REV. 742 (1943). The complications arising in the area of transfer of powers of appointment indicate that the attempted release of reversions may be a dangerous course.

transfers in contemplation of death,[28] but there is precedent to the effect that a release will be regarded as a part of the original transaction and judged as of the date of the earlier transfer.[29] A sale of the reversion is an additional possible solution and an examination of the cases indicates that such a sale is more feasible than might be expected.[30] These alterations should be applied as well to trusts which are unlike the Spiegel instrument in that, under their provisions, the beneficiaries need not *necessarily* survive the grantor to take their estates. The fate of such trusts is left in doubt by the *Spiegel* decision because the applicability of the first qualification of the treasury regulation was not disputed.

Relief should not be expected from future regulations since the Commissioner has announced that the *Spiegel* decision has not rendered necessary any change in Treasury Regulation 105, § 81.17.[31] State legislatures, however, have already taken action to protect their citizens from the tax consequences of the decision.[32] In view of the very probable existence of other less complex solutions, it may be doubted that such action is either helpful or necessary.[33]

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28. Farmers Loan and Trust Co. v. Bowers, 98 F.2d 794 (2d Cir. 1938), *cert. denied,* 306 U. S. 648 (1939). In cases where urgent action must be taken to avert the *Spiegel* consequences, the factors weighing in favor of the grantor, such as age and health, will not be present to refute the presumption created by the presence of the tax evasion motive.

29. Allen v. Trust Co. of Georgia, 326 U. S. 630, 636 (1946). *Cf.* Comm'r v. Hofheimer Estate, 149 F.2d 733 (2d Cir. 1945).

30. The Spiegel trust, for example, was in excess of one million dollars; yet Spiegel's reversionary interest, computed by actuarial tables, was worth approximately $70 at his death. To the effect that possibilities of reverter are generally alienable, see 2 RESTATEMENT, PROPERTY § 159 (a). Such a sale, if bona fide, would avoid the contemplation of death problem.

31. Prentice-Hall Weekly Letter on Taxation and Government Regulation, April 25, 1949.

32. Minnesota has passed a statute providing that, if by the term of the trust the grantor shows an intention to irrevocably divest himself of all interest in the trust property, no reversionary interest shall arise in him or his estate, but the state shall stand in his place. L. 1949, c. 201.

33. State legislation raised the problem of statutory construction by state courts; so the state law problem becomes increasingly difficult. For example, under the Minnesota statute, there still remains the problem: Has the grantor shown an intention to divest himself of all interest?

A constitutional question is also posed by the Minnesota statute, which is applicable to trusts executed prior to enactment as well as those subsequently executed: Is the grantor being deprived of his property (reversionary interest) without due process of law where he executed his trust prior to the enactment of the statute?

The *Spiegel* decision is a further step in a trend requiring the grantor to specifically incorporate his intent into the terms of the conveying instrument if he is to avoid the consequences of the statute. Where the grantor desires to make an absolute inter vivos conveyance of his property he will find no legal obstruction. Where such an intention is not so clearly entertained by the grantor, the terms of the conveying instrument necessarily will be more vague. It is just this situation which § 811(c) portends to cover and extreme cases serve only as a warning for more cautious drafting.