

## Title

As late as 1939 it had not been universally self-evident that entrusted property subject to an unexercised general power of appointment ought to be subject to the federal estate tax.

## Text

December 7, 1941 is the day Pearl Harbor was bombed. And then there is October 21, 1942. Property subject to an unexercised general power of appointment created after that date became subject to the federal estate tax. Not everyone would have been sanguine about the prospect. Prof. A. James Casner explained in a law review article honoring the late Prof. W. Barton Leach. See 85 Harv. L. Rev. 717 (1972). Here is an excerpt: “It was during this period of intense work in the field of powers of appointment that the famous verbal exchange took place between Bart Leach and Erwin Griswold. Griswold published an article entitled Powers of Appointment and the Federal Estate Tax in 1939 [52 Harv. L. Rev. 929 (1939)]. The thrust of this article was that the donee of a power of appointment, whether general or, with some suggested modifications, special, should be taxed for federal estate and gift tax purposes as though he owned the appointive assets, whether the power was exercised or not. Bart filed a dissent [53 Harv. L. Rev. 961 (1939)], pointing out the great utility of powers of appointment in providing flexible family plans and abhorring the development of the tax laws in a way that would drive family plans into fixed and rigid molds. He observed that those who tinker with powers had better be lawyers rather than ribbon clerks. In a reply [52 Harv. L. Rev. 967 (1939)], Griswold responded that [t]he elimination of discrimination and loopholes from our tax laws does not necessarily come from...the viewpoint of a ribbon clerk.” [Note: Here are Leach’s exact words regarding ribbon clerks: “Powers, we are next told, constitute an intricate labyrinth so complex that it covers the whole gamut of ownership from zero to infinity — which sounds pretty terrifying but really adds up to saying no more than that those who tinker with powers had better be lawyers rather than ribbon clerks.”].

Non-tax-related concerns about the power-of-appointment sections of the Restatement (Third) of Property (Wills and other Donative Transfers) and about the Uniform Powers of Appointment Act, which “draws heavily on that Restatement,” are threaded throughout §8.1.1 of *Loring and Rounds: A Trustee’s Handbook* (2022). These concerns, and there are many, are collected in Rounds, *Old Doctrine Misunderstood, New Doctrine Misconceived: Deconstructing the Newly-Minted Restatement (Third) of Property’s Power of Appointment Sections*, 26 *Quinnipiac Prob. L. J.* 240 (2013). The article accompanies my JDSUPRA July 1, 2013 posting. See <https://www.jdsupra.com/legalnews/old-doctrine-misunderstood-new-doctrine-62165/>. See also the catalog of all my JDSUPRA postings immediately below. The Handbook is available for purchase at <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>.