COMMENTS ON THE WORD "GRANDFATHERED" AND ITS VARIANTS BY RON AUCUTT (MAY 25, 2023)

After discussing the evolution of my views about the use of the word "grandfathered" and its variants with ACTEC's Diversity, Equity, and Inclusivity Committee, and with the Committee's affirmation and encouragement, I have recorded my thoughts in this paper.

Background

History, as we know, has recorded many offensive policies, actions, and ideas that undermine principles of diversity, equity, and inclusivity. Many **words** have been used in connection with this offensive history that themselves aggravate that offense. But that doesn't necessarily mean that such words themselves are offensive and cannot be respectfully and safely used in other contexts. For example, the ancestors of some of our White citizens **confined** to plantations the ancestors of some of our Black citizens. But when we say that distributions from a trust are **confined** to a certain class of beneficiaries or to a certain set of standards, we are not being racist. Other ancestors of some of our White citizens **ousted** Native Americans from their lands, but we are not being racist when we say that proposed regulations under section 2642(g)(1) would **oust** the 9100 regulations in the evaluation of requests for permission to make late allocations of GST exemption. We are simply using those words to convey their **traditional and generic meanings**.

Likewise with the word **grandfather**. There is nothing racist about that word as such. **I** am a **grandfather**. If I refer to myself as a **grandfather**, I am not being racist. Maybe if I make a point about "**grandfathers**" in general, I could be **sexist** by excluding **grandmothers**, but not racist, and, again, I'm not necessarily being sexist either merely by referring to myself and others like me as **grandfathers**.

The Problem

But **grandfather**, **grandfathered**, and **grandfathering**, in the sense I am addressing here, are different. That is because there is nothing about the date a trust was created, for example, that resembles the fact that I have grandchildren. There is nothing about the **traditional and generic meaning** of the word **grandfather** to describe men like me that suggests anything about the creation of a trust. And that leads to the point. Those words, used **in the way I am addressing here**, not only **resemble** other offensive uses – they are **derived** from such offensive uses.

For example, a dictionary (in book form) which I happen to own – Merriam-Webster's Collegiate Dictionary (Tenth Edition), with a copyright date of 1996 – includes the following definition:

> **grandfather clause** *n* (1900) : a clause creating an exemption based on circumstances previously existing; *esp* : a provision in several southern state constitutions designed to enfranchise poor whites and disfranchise Negroes by waving high voting requirements for descendants of men voting before 1867

That is at least a clue.

For more elaboration, that way-too-accessible and largely-anonymously-created resource, Wikipedia, provides an article on "Grandfather clause," which is accessible here (retrieved October 22, 2022) and is included as an Appendix at the end of this paper. The core of that article is this (emphasis added):

> The term ["grandfather clause"] **originated** in late nineteenth-century legislation and constitutional amendments passed by a number of Southern U.S. states, which created new requirements for literacy tests, payment of poll taxes and residency and property restrictions to register to vote. States in some cases exempted those **whose ancestors** (i.e., grandfathers) **had the right to vote** before the American Civil War or as of a particular date from such requirements. The **intent and effect** of such rules was **to prevent former African-American enslaved persons and their descendants from voting** but without denying poor and illiterate whites the right to vote.

Thus, those terms were **created** (not, for example, merely "appropriated") for **no purpose whatsoever** other than to preserve the dehumanizing political and social deprivations of slavery long after slavery had been made unconstitutional by the ratification of the Thirteenth Amendment in 1865. In effect, the original meaning of those terms was "**I am privileged and empowered, because my ancestors were not slaves**." That is reprehensible. (I have intentionally used the term "slaves" in this quotation to emphasize that reprehensibility. While today the word "slaves," in context, can refer simply to persons who have been enslaved against their will by others, it can also imply a shortcoming or inferiority in the persons themselves. That can be avoided, and the objective meaning of imposed enslavement clarified, by use of the term "enslaved persons," which I have consistently used in this paper, except in this quotation. I intend this quotation to reflect the intent of those who drafted and supported those Jim Crow laws at the time, which undoubtedly was based on demeaning assumptions of shortcoming or inferiority or worse. And that makes it all the more reprehensible.)

That type of voting restriction was declared unconstitutional in *Guinn v. United States*, 238 U.S. 347 (1915), although some states then found other ways to achieve the same result.

My Response

My first reaction to this insight was one of surprise. Certainly the intent that lawyers have when using those terms today has nothing to do with preserving any remnants of slavery. But now, knowing the **racist origin** of this use of those words in ways that would never otherwise occur to us to use them, I cannot use those words in that way again. Instead, I will look for descriptive terms that might have occurred to us for such uses if those historical atrocities had never occurred. In other words, terms like "pre-enactment," "pre-effective date," "pre-applicable date," "pre-funding," "pre-election," "pre-transaction," and the like.

In addition to avoiding offense, such terms can actually be more precise. For example, "pre-enactment" might be wrong if the statute has a different effective date, in which case "pre-effective date" would be more accurate. And in the case of the GST tax (which might be the context in which lawyers like us most often use those terms), the enactment date was October 22, 1986, and the effective date was generally also October 22, 1986, but there were (and are) special rules making the GST tax applicable to inter vivos transfers on or after September 25, 1985, and excepting generation-

skipping transfers under trusts that were irrevocable on September 25, 1985 (the date we most often intend to refer to), except to the extent corpus is added to the trust after that date.

I realize that in such cases the use of the word "grandfathered" might be a convenient way to avoid keeping track of those nuances, but for me that convenience does not justify the serious and incurable offense created by the use of a word in a context in which its meaning can be explained only with reference to its Jim Crow origin. And if a substitute term that might, like "grandfathered," cover all scenarios is desirable, then "pre-applicable date" (*i.e.*, September 25, 1985, in the GST tax example) might be the most technically accurate, but **"pre-effective date"** would probably also fill that role, because, in a sense, the GST tax was made "effective" for trusts created or added to on or after September 25, 1985.

Application

So I believe that ACTEC should consider avoiding the use of the word "grandfathered" and its variants in this context and encouraging ACTEC Fellows to avoid it too. But, because the original meaning of the word "grandfather" as a man who has a grandchild is not offensive and for a long time many have used its adaptations in the context of effective dates without realizing their potential to give offense, I think we should be respectful and understanding of Fellows who might continue to use those words. If appropriate, we might educate, but should try not to criticize or condemn. I recall the many years I used those terms without any idea that they might be offensive.

Another reason to be careful, humble, and moderate in our response is that the word "grandfathered" and its variants are actually used in the Internal Revenue Code, albeit in only three sections – section 36B(c)(2)(C)(iii) & (3)(B) (citing section 1251 of the Patient Protection and Affordable Care Act), section 401(o), and section 5000A(f)(1)(D) & (2). They have also been used over the years in congressional committee reports, in Treasury regulations (although not the regulations under Subchapter J or Subtitle B), and in letter rulings and other guidance from the IRS. Without more information about the background of those uses, I assume that, as in my own experience in the past, those uses have been entirely innocent – that is, without understanding the racist origin of the use of those words in this context.

I have, for example, gone back through my Capital Letters on the ACTEC website and changed those words where I found them. But I do not think we should expect or even request others to do that kind of thing; we should let that be a decision they come to on their own. We also do not want to create an undue burden for ACTEC staff and others in this regard. The emphasis should be on being more sensitive in the future.

Post-Script: A Possible Alternative Explanation

The cited Wikipedia article adds this:

> There is also a rather different, older type of *grandfather clause*, perhaps more properly a *grandfather principle* in which a government blots out transactions of the recent past, usually those of a predecessor government. The modern analogue may be repudiating public debt, but the original was Henry II's [who reigned from 1154 to 1189] principle, preserved in many of

> his judgments, "Let it be as it was on the day of my grandfather's [Henry I, who died in 1135] death", a principle by which he repudiated all the royal grants that had been made in the previous 19 years under King Stephen [who reigned from 1135 to 1154].

Again I am surprised. I understand the notion of one Administration's reversal of a previous Administration's actions; we have seen much of that in recent American history. But I cannot think of any persuasive relationship between King Henry II's attitude and actions and our need to distinguish actions affecting, for example, the GST tax. And even if such a relationship could be deduced, it still would have no effect in alleviating the identifications of those terms with late Nineteenth Century racist legislation. So I do not think that this "different" explanation of a type of **grandfather clause** should have any bearing on the consideration of this issue.

APPENDIX
(From Wikipedia, retrieved October 22, 2022)

Grandfather clause

A **grandfather clause**, also known as **grandfather policy**, **grandfathering**, or **grandfathered in**, is a provision in which an old rule continues to apply to some existing situations while a new rule will apply to all future cases. Those exempt from the new rule are said to have grandfather rights or acquired rights, or to have been grandfathered in. Frequently, the exemption is limited, as it may extend for a set time, or it may be lost under certain circumstances; for example, a grandfathered power plant might be exempt from new, more restrictive pollution laws, but the exception may be revoked and the new rules would apply if the plant were expanded. Often, such a provision is used as a compromise or out of practicality, to allow new rules to be enacted without upsetting a well-established logistical or political situation. This extends the idea of a rule not being retroactively applied.

Origin

Southern United States

The term originated in late nineteenth-century legislation and constitutional amendments passed by a number of Southern U.S. states, which created new requirements for literacy tests, payment of poll taxes and residency and property restrictions to register to vote. States in some cases exempted those whose ancestors (i.e., grandfathers) had the right to vote before the American Civil War or as of a particular date from such requirements. The intent and effect of such rules was to prevent former African-American enslaved persons and their descendants from voting but without denying poor and illiterate whites the right to vote.[1] Although these original grandfather clauses were eventually ruled unconstitutional, the terms *grandfather clause* and *grandfather* have been adapted to other uses.

The original grandfather clauses were contained in new state constitutions and Jim Crow laws passed between 1890 and 1908 by white-dominated state legislatures including Alabama, Georgia, Louisiana, North Carolina, Oklahoma, and Virginia.[2] They restricted voter registration, effectively preventing African Americans from voting.[3] Racial restrictions on voting in place before 1870 were nullified by the Fifteenth Amendment.

After Democrats took control of state legislatures again before and after the Compromise of 1877, they began to work to restrict the ability of blacks to vote. Paramilitary groups such as the White League, Red Shirts, and rifle clubs had intimidated blacks or barred them from the polls in numerous elections before what they called the Redemption (restoration of white supremacy). Nonetheless, a coalition of Populists and Republicans in fusion tickets in the 1880s and 1890s gained some seats and won some governor positions. To prevent such coalitions in the future, the Democrats wanted to exclude freedmen and other blacks from voting; in some states they also restricted poor whites to avoid biracial coalitions.

[1] Greenblatt, Alan (October 22, 2013). "The Racial History Of The 'Grandfather Clause'". *Code Switch*. NPR. Retrieved June 8, 2020.

[2] Valelly, Richard M. (2004). *The Two Reconstructions: The Struggle for Black Enfranchisement*. Chicago: University of Chicago Press. p. 141. ISBN 0-226-84528-1.

[3] "Grandfather clause". Concise Encyclopædia Britannica. Archived from the original on January 12, 2009. Retrieved September 6, 2009.

White Democrats developed statutes and passed new constitutions creating restrictive voter registration rules. Examples included imposition of poll taxes and residency and literacy tests. An exemption to such requirements was made for all persons allowed to vote before the American Civil War, and any of their descendants. The term *grandfather clause* arose from the fact that the laws tied the then-current generation's voting rights to those of their grandfathers. According to Black's *Law Dictionary*, some Southern states adopted constitutional provisions exempting from the literacy requirements descendants of those who fought in the army or navy of the United States or of the Confederate States during a time of war.

After the U.S. Supreme Court found such provisions unconstitutional in *Guinn v. United States* [238 U.S. 347] (1915), states were forced to stop using the grandfather clauses to provide exemption to literacy tests. Without the grandfather clauses, tens of thousands of poor Southern whites were disenfranchised in the early 20th century. As decades passed, Southern states tended to expand the franchise for poor whites, but most blacks could not vote until after passage of the 1965 Voting Rights Act.[4] Ratification in 1964 of the Twenty-fourth Amendment to the United States Constitution prohibited the use of poll taxes in federal elections, but some states continued to use them in state elections.

The 1965 Voting Rights Act had provisions to protect voter registration and access to elections, with federal enforcement and supervision where necessary. In 1966, the Supreme Court ruled in *Harper v. Virginia Board of Elections* [383 U.S. 663 (1966)] that poll taxes could not be used in any elections. This secured the franchise for most citizens, and voter registration and turnout climbed dramatically in Southern states.

Other contexts

There is also a rather different, older type of *grandfather clause*, perhaps more properly a *grandfather principle* in which a government blots out transactions of the recent past, usually those of a predecessor government. The modern analogue may be repudiating public debt, but the original was Henry II's principle, preserved in many of his judgments, "Let it be as it was on the day of my grandfather's death", a principle by which he repudiated all the royal grants that had been made in the previous 19 years under King Stephen.[5]

Further reading

- Riser, R. Volney (2006). "Disfranchisement, the U.S. Constitution, and the Federal Courts: Alabama's 1901 Constitutional Convention Debates the Grandfather Clause". *American Journal of Legal History*. **48** (3): 237–279. doi:10.2307/25434804. JSTOR 25434804.
- Grandfather Clause in *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*

[4] Feldman, Glenn (2004). *The Disfranchisement Myth: Poor Whites and Suffrage Restriction in Alabama*. Auburn: University of Georgia Press. p. 136. ISBN 0-8203-2615-1.

[5] Warren, Wilfred Lewis (1973). *Henry II*. Univ of Calif Press. p. 219.