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Our Wealth Transfer Tax System -- A View From the 100th Year

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All taxes upon the transference of property of every kind, so far as they diminish the capital value of that property, tend to diminish the funds destined for the maintenance of productive labour. They are all more or less unthrifty taxes that increase the revenue of the sovereign, which seldom maintains any but unproductive labourers at the expense of the capital of the people, which maintains none but productive.[1]

Thank you Cathy and thanks to all of you, not only for being here this morning but for being part of this organization that means so much to so many of us. My 34-year membership in ACTEC has played a very important role in the development of my professional career. It provides the forum of choice for many of us to share ideas to develop new ones and to form lasting friendships.

This morning I want to share with you some of my thoughts about our federal wealth transfer tax system – past, present and possible future. The system, now in its 100th year, is a shadow of what it was back in the 1970s when many of us began to practice.

In 1956 Louis Eisenstein told Congress that "the estate tax. . . is in a period of decline. Unlike its predicament in the Mellon era, [when Treasury Secretary Andrew Mellon came close to achieving its repeal][2] the present problem is not so much sudden death as chronic illness."[3] If Mr.

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* This speech has been published in the ACTEC Law Journal. Subsequent publication of portions of this speech will appear in the book, *Structuring the Tax Consequences of Marriage and Divorce*.

1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 814 (Edwin Cannan ed., University of Chicago Press 1976) (1776).

2 *See infra* note 61 and accompanying text.

3 Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223, 255-256 (1956) (originally prepared at the request of the Subcommittee on Tax Policy of the Joint Committee on the Economic Report and first appearing in FED. TAX POL'Y FOR ECON. GROWTH & STABILITY, J. COMM. ON THE ECON. REP., 84TH CONG., (J. Comm. Print 1955)). This article is indebted to Mr. Eisenstein's work. Many of the historical citations originated with his paper. *See* Terrance O'Reilly, *Tax Legal Scholarship To 1970,* 34 VA. TAX REV. 269, 306 (2014) (Mr. Eisenstein "produced some of the most erudite tax law scholarship from the mid 1940s to the mid 1960s."); *see*, *e.g.*, LOUIS EISENSTEIN, THE IDEOLOGIES OF TAXATION (1961). *See also* Abe Fortas, *In Memory of Louis Eisenstein*, 22 TAX L. REV. 1, 3 (1966-1967).

Eisenstein were writing in 2015, he would likely tell us that after a short recovery in the 70s, it lapsed back into a chronic illness that led to a near-death experience and it did not have a strong recovery. Is a struggle to rehabilitate it worthwhile? Should we rage against its decline or should we let it go gentle into that good night?[4]

John Wallace's 2001 Trachtman lecture focused on this subject 14 years ago,[5] three months before President Bush signed the Economic Growth and Tax Relief Reconciliation Act (EGTRRA), the bill that would eventually lead to the one year quasi-repeal of our wealth transfer tax system.[6] But much has happened since then, and I hope that this is a subject that you continue to find interesting.

I'll talk first about the past.

THE PAST

Our current wealth transfer tax system was, for all intents and purposes, battle-born on September 8, 1916, a few months before the United States joined World War I on April 6, 1917.[7] The 1916 Estate tax was not Congress's first attempt to tax gratuitous transmissions of property. It had experimented with these kinds of taxes several times before in response to truly dire revenue needs. In 1797 the very young federal government faced a fiscal crisis due to an undeclared war with France. To raise the needed revenue, Congress passed the Stamp Act of 1797,[8] imposing duties on paper used for certain legal instruments, including licenses to practice law and receipts for legacies and intestate shares. The tax on the latter was equal to two-tenths of one percent on amounts in excess of $500 and did not apply to the value of assets passing to wives, children and grandchildren.[9] The tax lasted less than five

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4 *See* DYLAN THOMAS, *Do Not Go Gentle into that Good Night*, *in* IN COUNTRY SLEEP AND OTHER POEMS 18 (1952).

5 John A. Wallace, *A View Through a Glass Darkly: The Impact of Transfer Tax Repeal on Trusts and Estates Lawyers*, 27 ACTEC L.J. 6, 6 (2001) (this is the text of the Annual Joseph Trachtman Memorial Lecture delivered by ACTEC Past President John A. Wallace at the Annual Meeting in Boca Raton, Florida, in March 2001).

6 EGTRRA was signed by President George W. Bush on June 7, 2001. Economic Growth & Tax Relief Reconciliation Act of 2001, Pub. L. No. 107–16, 115 Stat. 38 (2001).

7 *See* RANDOLPH E. PAUL, FEDERAL ESTATE & GIFT TAXATION § 1.02, at 6 (1942).

8 Act of July 6, 1797 (Stamp Act of 1797), 1 Stat. 527, 5 Cong. Ch. 11 (1797).

9 The Act stated,

> [T]here shall be levied, collected and paid throughout the United States, the several stamp duties following, to wit: For every skin or piece of vellum, or parchment, or sheet or piece of paper upon which shall be written or printed any or either of . . . any receipt or discharge for or on account of any legacy left by any will or other testamentary instrument, or for any share or part of a personal estate divided by force of any statute of distributions, the amount whereof

years. It was repealed in 1802 shortly after the United States signed a treaty with France.[10]

The next crisis that forced Congress to impose death taxes[11] was the Civil War. An inheritance tax was enacted as part of the Internal Reve-

> shall be above the value of fifty dollars, and shall not exceed the value of one hundred dollars, twenty-five cents; where the amount thereof shall exceed the value of one hundred dollars and shall not exceed five hundred dollars, fifty cents; and for every further sum of five hundred dollars, the additional sum of one dollar; . . . *Provided*, that nothing in this act contained, shall extend to charge with a duty, any legacy left by any will or other testamentary instrument or any share or part of a personal estate to be divided by force of any statute of distributions which shall be left to, or divided amongst the wife, children or grandchildren of the person deceased intestate, or making such will or testamentary instrument.

Id. at 527-28.

10 Appropriation for the Expense of Carrying into Effect the Convention with France, Act of April 6, 1802, 2 Stat. 148, 7 Cong. Ch. 19; Convention Between the French Republic and the United States, 8 Stat. 178 (1800).

11 The phrase "death tax" occasions great umbrage from certain authors. *See, e.g.*, DAVID CAY JOHNSTON, PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH—AND CHEAT EVERYBODY ELSE 81 (2003) ("The term *death tax* is a superb example of marketing triumphing over reasoned debate. So thoroughly has the phrase been infused into Washington that many journalists . . . employ this term of advocacy instead of the neutral, and correct, term *estate tax*. . ."); Peter Baker, *Republicans in the House Pass Repeal of Estate Tax*, N.Y. TIMES, April 16, 2015 at A20 ("The vote was the first in a decade to eliminate what Republicans call the death tax. . ."); Daniel W. Matthews, *A Fight To The Death: Slaying the Estate Tax Repeal Hydra*, 28 WHITTIER L. REV. 663, 671 ("The phrase 'death tax' is emblematic of how the fight over estate tax repeal became one of political marketing, rather than tax policy." (citing MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 8, 76 (2005); and WILLIAM H. GATES SR. & CHUCK COLLINS, WEALTH AND OUR COMMONWEALTH: WHY AMERICANS SHOULD TAX ACCUMULATED FORTUNES 57 (2002), who imply that the use of this phrase is a modern conservative conspiracy)). Despite the suggestion that the phrase "death tax" was coined as a marketing device to assist repeal efforts, the phrase has been used for many years as an accurate way to describe taxes, whether "estate," "accessions," "legacy," "successions," "inheritance," "stamp" taxes on legal documents required to transfer property (*see supra* note 9), or what have you, that are imposed as a result of a taxpayer's death (as it is used in the sentence in the text accompanying this note). This phrase has an impeccable pedigree that comfortably predates 21st century repeal efforts: *see, e.g.* Senator Thomas C. Plaat (R-NY) 26 CONG. REC. 6821 (1894) ("death duties are very odious."); Ruckgaber v. Moore, 104 F. 947, 951 (C.C.E.D.N.Y. 1900) ("the theory of a death tax is that it is a limitation upon the power of disposition."); Eisenstein, *supra* note 3, at 223 ("Death taxes are ancient taxes."); Eisenstein, *supra* note 3, at 235 n.72 ("Herbert Hoover had also praised death taxation as a leveler of hereditary wealth."); Eisenstein, *supra* note 3, at 237 n.87 ("I have failed to mention, for example, the repeated efforts to abolish the estate tax on the ground that death taxes fall within the fiscal province of the states."); REPORTS TO THE JOINT COMMITTEE ON INTERNAL REVENUE TAXATION, FEDERAL AND STATE DEATH TAXES, 73rd Cong. (1933); PAUL, *supra* note 7, at 3 n.1 ("for an excellent history of death taxation . . . "); PAUL, *supra* note 7, at 4 n.8 ("For a more extended account of

nue Act of 1862 to finance the war. The tax was imposed on the legacies of a decedent whose personal property, including lifetime gifts intended to take possession at death, was worth more than $1,000.[12] The rates were much higher than the Stamp Act's rates, but very low by today's standards. Once the $1,000 threshold was reached, the tax rates ranged from a low of .75% for property passing to issue, ancestors and siblings to a high of 5% for property passing to others. No tax was imposed on property passing from one spouse to the other.[13] The 1862 Act also imposed a small stamp tax on the probate of wills and letters of administration.

In 1864, Congress increased the inheritance tax rates to a new minimum of 1% and a new high of 6% and imposed an additional tax on succession to real estate.[14] For this purpose, the term "succession" included lifetime gifts, the passage of property at the termination of a life estate and at the death of a joint tenant. Curiously, the tax provided an exemption for property passing to a widow but not property passing to a widower. The failure to exempt a widower's share led to the first constitutional challenge of a federal inheritance tax. The text of the 1864 statute is interesting because some of its language remains in our current law. When a grantor transferred real estate but retained an interest

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the development of death taxes in Europe . . . "); *see also* Jeffery A. Cooper, *Interstate Competition and State Death Taxes: A Modern Crisis in Historical Perspective*, 33 PEPP. L. REV. 835, 836 n.1 (2006) (citing BLACK'S LAW DICTIONARY (8th ed. 2004) ("The term 'death tax' is a generic term that refers to two specific types of taxes imposed upon the death of an individual, namely 'estate taxes' and 'inheritance taxes,' the latter also often being referred to as 'succession taxes.'").

12 Revenue Act of July 1, 1862, ch. 119 § 111-12, 12 Stat. 432, 485 (1862).

13 *Id.* at 486. A simple citation fails to capture the breathtaking sweep of this act and the dire fiscal straits that the Government must have been in to enact it. Along with the death tax duties, this act created the office of the Commissioner of Internal Revenue within the Treasury Department and imposed fees on licenses for auctioneers, lawyers, doctors, liquor dealers, pawn shops, bowling alleys and billiard rooms, peddlers, photographers, medicines, jugglers, circuses, playing cards, *etcetera*. In the face of this barrage Alexis de Tocqueville can perhaps be forgiven his hyperbolic prediction that the enactment of an inheritance tax would signal an inevitable socio-economic leveling:

> When the legislator has once regulated the law of inheritance, he may rest from his labor. The machine once put in motion will go on for ages, and advance, as if self-guided, towards a point indicated beforehand. . . . it divides, distributes, and disperses both property and power. Alarmed by the rapidity of its progress, those who despair of arresting its motion endeavor at least to obstruct it by difficulties and impediments. They vainly seek to counteract its effect by contrary efforts; but it shatters and reduces to powder every obstacle, until we can no longer see anything but a moving and impalpable cloud of dust, which signals the coming of the Democracy.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 48 (Henry Reeve trans., Alfred A. Knopf 1945) (1835).

14 Revenue Act of June 30, 1864, ch. 173 §§ 124-150, 13 Stat. 223, 287 (1864).

measured by the term of her life or for a period ascertainable only by reference to her death, a tax was payable at the death of the grantor.[15]

In 1870, after the end of the Civil War, Congress repealed these taxes.[16] Before repeal, the constitutionality of the land succession tax was challenged by a Mr. Scholey.[17] His late wife had left him an interest in real estate worth $45,000. Remember – there was no exemption for land passing to widowers. Mr. Scholey claimed[18] that the tax was a direct tax that had not been properly apportioned among the states based on relative population as required by the Constitution.[19] The tax survived the attack with the Supreme Court deciding that an inheritance tax is an excise tax rather than a direct tax.[20]

Between repeal and Congress's next experiment with wealth transfer taxes, the political and economic landscape changed. Global trade and the Industrial Revolution, which had been essential in providing the strategic assets that the Union used to defeat the Confederacy, had also facilitated the growth of unprecedented individual wealth.[21]

French Revolution refugee E.I. DuPont,[22] whose family business made and sold gunpowder to the North, amassed a substantial fortune.

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15 *Id*. at 288. Further changes were made to the tax in 1865 and 1866. In 1865 a retroactive exemption for real estate passing to a widow (but not to a widower) was passed and in 1866 a minor child's share was exempted so long as it did not exceed a value of $1,000. Act of March 3, 1865, ch. 78 § 1, 13 Stat. 469 (1865); Act of July 13, 1866, ch. 184 § 9, 14 Stat. 98, 140 (1984); *see* STEVEN R. WEISMAN, THE GREAT TAX WARS, 29-50, 75-90 (2002).

16 Act of July 14, 1870, ch. 255 § 3, 16 Stat. 256, 257 (1870) (repealing the legacy and stamp taxes); Act of June 6, 1872, ch. 315 § 3617, 17 Stat. 256, 256 (1872) (repealing the stamp duty).

17 *See generally* Scholey v. Rew*,* 90 U.S. 331, 338 (1874).

18 *Id.*

19 U.S. CONST. art. I, § 2, cl. 3.

20 *Scholey,* 90 U.S. at 346. This fact has greater significance in the larger picture because it meant that death taxes were a Constitutional way for later Congresses to raise revenue. In contrast, income taxes were held unconstitutional in *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429, 589 (1895), and would eventually require a Constitutional Amendment (the 16th) to be validly enacted. *See infra* note 36.

21 *See* David Frederick, *Historical Lessons from the Life and Death of the Federal Estate Tax*, 49 AM. J. LEGAL HIST. 197, 201 (2007); *see also* WEISMAN, *supra* note 15, at 77.

22 *See* DU PONT, *History*, http://www.dupont.com/corporate-functions/our-company/dupont-history.html (last visited Nov. 16, 2015). Éleuthère Irénée du Pont de Nemours, a Parisian chemist, was born in 1771. In 1794, his chemistry mentor, Antoine-Laurent de Lavoisier, was beheaded during the Reign of Terror. In 1797, his father's newspaper was ransacked, and he and his father were imprisoned. He immigrated to the U.S. on January 1, 1800, and founded his chemical company on April 21, 1801 with $36,000 and his belief that he could make better gunpowder than what was available locally. He had eight children. Two of his sons and a son-in-law were involved in managing the family business and helping it become the major supplier of this superior gunpowder to the Union, in-

Other entrepreneurs followed.[23] The Populist movement's objections to the increasing growth and concentration of personal wealth in the United States gave politicians a reason to consider the imposition of some form of death tax.[24]

Andrew Carnegie, wielding one of the great fortunes of the Gilded Age, joined the debate. In his 1889 book, *The Gospel of Wealth*, he worried that a man who left his fortune to his children would be disparaged by the populace of the future, who would piously condemn him ("the public verdict will then be") by saying, "'[t]he man who dies thus rich dies disgraced.'"[25] He argued that those with superior abilities and fortunes should use their time and wealth to establish and administer philanthropic institutions during their lifetimes.[26] He further wrote that those who died rich should be subject to an inheritance tax of at least

strumental in winning the Civil War. Today, E. I. du Pont de Nemours and Company, has 58,000 employees and a market capitalization of $68.3 Billion. It is a bellwether publicly traded company, a component of the Dow Jones Industrial Average that paid $547 million in income taxes with an additional $768 million in deferred income taxes for 2014.

23 "The years immediately following the repeal of the inheritance tax were witness to an unprecedented number of mergers in the manufacturing sector of the economy, fueled by the development of a new form of corporate ownership, the holding company. This resulted in the concentration of wealth in a relatively small number of powerful companies and in the hands of the businessmen who headed them. Along with such wealth came great political power, fueling fears over the rise of an American plutocracy and sparking the growth of the progressive movement. Progressives, including President Theodore Roosevelt, advocated both an inheritance tax and a graduated income tax as tools to address inequalities in wealth." *See* Darien B. Jacobson, Brian G. Raub & Barry W. Johnson, *The Estate Tax: Ninety Years and Counting*, 27 STAT. OF INCOME BULL. 118, 120 (2007) (describing the rise of substantial wealth in a small number of powerful companies and business men).

24 *Id.*

25 *See* ANDREW CARNEGIE, THE GOSPEL OF WEALTH (1889) (published originally in the North American Review in June 1889, reproduced at https://www.swarthmore.edu/SocSci/rbannis1/AIH19th/Carnegie.html (last visited Nov. 16, 2015)). In the same essay he wrote: "the man who dies leaving behind many millions of available wealth, which was his to administer during life, will pass away 'unwept, unhonored, and unsung,' no matter to what uses he leaves the dross which he cannot take with him." *Id*.

26 *See id.* Carnegie wrote of death taxes: "The growing disposition to tax more and more heavily large estates left at death is a cheering indication of the growth of a salutary change in public opinion . . . of all forms of taxation, this seems the wisest. Men who continue hoarding great sums all their lives, the proper use of which for - public ends would work good to the community, should be made to feel that the community, in the form of the state, cannot thus be deprived of its proper share. By taxing estates heavily at death the state marks its condemnation of the selfish millionaire's unworthy life." *Id*. Carnegie believed that the wealthy should establish and administer philanthropic institutions during their lifetimes because their entrepreneurial success made it likely that their philanthropic endeavors would be similarly successful. *See id.*

50%.[27] Carnegie practiced what he very publicly preached and donated the bulk of his fortune to charities named after himself, including Carnegie Hall, Carnegie Hero Fund Commission, and the Carnegie Mellon Institute.[28] He left his widow and daughter so little that they had insufficient funds to pay for the upkeep of the family home in Manhattan and were eventually forced to sell it.[29]

On April 25, 1898, Congress declared war with Spain. The war was a short one, but the need for revenue to support the war effort resulted in our third wealth transmission tax, enacted on June 13, 1898.[30] The tax was imposed on the personal property of estates worth more than $10,000. The rates applicable to taxable estates ranged between .74% and 15%, varying according to the kinship degree of the legatees and the size of the estate. No taxes were imposed on the portion of an estate passing to a surviving spouse. The war ended on December 10, 1898 and the tax was repealed on April 12, 1902.[31]

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27 *See generally id.* ("[I]t is difficult to set bounds to the share of a rich man's estate which should go at his death to the public through the agency of the state, and by all means such taxes should be graduated, beginning at nothing upon moderate sums to dependents, and increasing rapidly as the amounts swell, until of the millionaire's hoard, as of Shylock's, at least 'The other half comes to the privy coffer of the state.'")

28 *See* Columbia Univ. Libraries, *Rare Book & Manuscript Library*: *Philanthropy of Andrew Carnegie*, http://library.columbia.edu/locations/rbml/units/carnegie/andrew.html (last visited Nov. 16, 2015). Other equally eponymous charities receiving shares of Carnegie's wealth included: The Andrew Carnegie Birthplace Museum, maintained by the Carnegie Dunfermline Trust, the Carnegie Trust for the Universities of Scotland, the Carnegie Corporation of New York, the Carnegie Endowment for International Peace, the Carnegie Foundation, the Carnegie Institute of Technology, the Carnegie Hero Fund Trust, the Carnegie Institute of Washington, the Carnegie United Kingdom Trust, the Carnegie Institute (now the Carnegie Library of Pittsburgh and the Carnegie Museums of Pittsburgh), which originally comprised the Carnegie Library, the Carnegie Museum of Art, the Carnegie Museum of Natural History and the Carnegie Music Hall. He also donated money to build many imposing library buildings that prominently bore his name. It seems Mr. Carnegie was familiar with William Shakespeare's, *The Merchant of Venice* (*see supra* note 27), and Sir Walter Scott's *The Lay of the Last Minstrel* (*see supra* note 25), but perhaps not Percy Bysshe Shelley's *Ozymandias*.

29 *See* Chloe Sorvino, *The Gilded Age Family That Gave It All Away: The Carnegies*, FORBES (July 8, 2014, 9:45 AM), http://www.forbes.com/sites/chloesorvino/2014/07/08/whats-become-of-them-the-carnegie-family/ (last visited Nov. 16, 2015). Ms. Sorvino reports that Thomas Carnegie, Andrew's younger brother, who also made a fortune during the Industrial Revolution, did not subscribe to Andrew's draconian theories of wealth redistribution. He left his wife and nine children trusts of $10 million each: "that wealth has now also dried up." Now, according to a member of the fifth generation of descendants "The money isn't there." *Id.*

30 *See* War Revenue Act of 1898, ch. 448 §§ 29-30, 30 Stat. 448, 464-466 (amended 1901).

31 Act of April 12, 1902, ch. 500 §§ 7, 11, 32 Stat. 96 (1902).

Again, the constitutionality of the tax was challenged. There were three grounds of attack: first, that it was an unapportioned, direct tax; second that it unconstitutionally interfered with rights created solely by state law; and finally that the taxes were not uniform throughout the United States, as required by the Constitution,[32] because of the variation in tax rates. The Supreme Court rejected the first argument based on its earlier *Scholey* decision.[33] It rejected the second argument because, in its view, the tax was not imposed on the right of the states to regulate inheritances but on the transmission or receipt of property at death.[34] Finally, it concluded that the Constitution's uniformity requirement was met because the tax operated uniformly on a geographical basis.[35] With this decision the constitutionality of our future legislation taxing inheritances and estates seemed solidly based although — as we will see — there was one more challenge to come.[36]

Although the first three wealth transfer taxes seemed to have been solely motivated by a need to raise revenue, the inclusion of an estate tax in the War Revenue Act of 1898 was facilitated at least in part by the growing resentment over dynastic family wealth emerging from industrial capitalism and global trade. The level of concern grew in the years leading up to World War I, with President Theodore ("Teddy") Roosevelt, although himself a member of the privileged class, joining the pro-death tax movement with a 1906 speech advocating "the adoption of . . . a progressive tax on all fortunes, . . . so framed as to put it out of the power of the owner of one of these enormous fortunes to hand on more than a certain amount to any one individual."[37]

Teddy's focus was on the wealth received by each individual, not on the total amount left by a decedent. His proposed tax was an "inheritance" tax, not an "estate" tax.[38] As the father of six children, he was

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[32] U.S. CONST. art. 1, § 8, cl. 1.

[33] Knowlton v. Moore, 178 U.S. 41, 81-82, 89 (1900) (citing Scholey v. Rew, 90 U.S. 331 (1874)).

[34] *Id.* at 59-60.

[35] *Id.* at 105-06.

[36] *See id*. at 109-10. Following *Pollack v. Farmers' Loan & Trust Co.,* 157 U.S. 429 (1895), the Supreme Court struck down a federal income tax that treated inheritances and gifts as income, *see* Eisenstein, *supra* note 3, at 227 n.22. ("this definition was buried in the general debris."), not because it believed that Congress lacked the authority to tax inheritances and gifts as income, but because it concluded that the tax on income generated by real or personal property, that was an integral part of the tax, was a direct, unapportioned tax.

[37] Theodore Roosevelt, *Address of President Roosevelt at the Laying of the Corner Stone of the Office Building of the House of Representatives: The Man With The Muck Rake* (Apr. 15, 1906), http://www.pbs.org/wgbh/americanexperience/features/primary-resources/tr-muckrake/ (last visited Nov. 16, 2015).

[38] Both of which would be "death taxes." *See supra* note 11.

likely personally aware that it takes a much larger after-tax estate to provide for each of six children, than it does to provide for a single child. Six years later the Progressive Party included an inheritance tax in its platform, not so much as a means of breaking up inherited wealth but as a "means of equalizing the obligations of holders of property to government."[39] Teddy and the Progressive Party were unsuccessful. The enactment of the next wealth transmission tax, the one we have had now for almost 100 years, awaited the next critical need for revenues. It took a horrific war in Europe and a recognition that the United States needed to prepare for involvement.[40] Once the need for additional revenue was accepted, a wealth transmission tax again became a political possibility. This time Congress chose an estate tax rather than an inheritance tax.

Jens Beckert, a German economic sociologist, studied the Congressional debates that preceded the adoption of the estate tax as part of the Revenue Act of 1916, as well as a number of other debates involving the estate tax. These studies are published in chart form in his 2004 book *Inherited Wealth*.[41] They provide interesting insight into the reasons why the relevant Senators and Representatives voted for and against the estate tax.

The 1916 Congressional debates show that 59% of the supporters of the tax did so because of the need for revenue combined with a belief that using an estate tax to raise needed revenue was a fair way to do it.[42] Only 22.6% of them based their support on goals relating to the rejection of privileges attributable to inherited wealth and the promotion of greater wealth equality.[43] The principal objections of the opponents included the still-familiar argument against double taxation and one we don't hear much anymore – that wealth transmission taxes be left to the states. Seventy-five percent of the opponents based their opposition on the states' rights principle.[44] At the time of the debate 42 states had already adopted their own version of a wealth transmission tax.[45]

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[39] *Declaration of the Progressive Party Platform* (Aug. 7, 1912), http://www.pbs.org/wgbh/americanexperience/features/primary-resources/tr-progressive/ (last visited Nov. 16, 2015).

[40] H.R REP NO. 922, at 1 (1916) ("The necessity for this legislation grows out of the extraordinary appropriations for the Army and Navy and the fortification of our country.").

[41] JENS BECKERT, INHERITED WEALTH (Thomas Dunlap trans., Princeton Univ. Press 2008) (2004).

[42] *Id.* at 183.

[43] *Id.* at 184.

[44] *Id.* at 183.

[45] Joseph J. Thorndike, *A Century of Soaking the Rich: The Origins of the Federal Estate Tax*, TAX ANALYST, July 10, 2006, at 295, http://www.taxhistory.org/thp/read-

The 1916 Revenue Act exempted the first $50,000 from tax (about $1 million in today's dollars)[46] and imposed rates between 2% and 10% on estates worth more than $5,000,000 (about $100 million in today's dollars). There was no exemption for property passing to spouses but many of the other features of the tax were the same as they are today. The tax base included not only property owned by the decedent at death but also property transferred in contemplation of death or intended to take effect in possession or enjoyment after death, and jointly held property, to the extent the decedent furnished the consideration.[47]

As our entry into World War I grew closer, the need for additional revenue became more imperative. Congress increased the estate tax's contribution to the war effort by increasing its rate two times with the top rate eventually increased to 25%.[48] With a top rate of only 25%, the wealth leveling potential of the estate tax was not particularly strong, confirming Beckert's conclusion that the real objective of those who enacted the estate tax in 1916 was to collect revenue to meet a critical need in a fair and equitable way rather than confiscating and redistributing wealth.[49] In 1917, estate tax returns were required to be filed by less than 1% of the decedents.[50] As the value of the exemption eroded with inflation, that percentage increased to as much as 1.3% in 1922.[51] As has almost always been the case, the tax was also not particularly effec-

ings.nsf/ArtWeb/880F5B5E62FE817F852571B0006851CA?OpenDocument (last visited Nov. 16, 2015).

46 The appropriate method to calculate this inflation adjustment is controversial. *Id.* ("Estimates range from roughly $900,000 to more than $11 million, depending on the method and political agenda at work. Calculations based on the commodity price index – popular among estate tax supporters – yield the lower number; calculations based on gross domestic product – popular among opponents – yield the higher estimate"). *Id.*

47 Revenue Act of 1916, Pub. L. No. 271, § 202, 38 Stat. 756, 777-778 (1916).

48 *See* Revenue Act of March 3, 1917, Pub. L. No. 377, § 300, 36 Stat. 1000, 1002 (1917); War Revenue Act of October 3, 1917, Pub. L. No. 50, § 900, 39 Stat. 300, 324 (1917); Revenue Act of 1918, Pub. L. No. 254, § 400, 39 Stat. 1057, 1096 (1918); Revenue Act of 1921, Pub. L. No. 98, § 400, 40 Stat. 227, 277 (1921).

49 *Contra* James R. Repetti, *Democracy Taxes, and Wealth*, 76 N.Y.U. L. Rev. 825, 825 (2001) ("Congress adopted an estate tax in 1916 in response to concerns about the harmful social effects of wealth concentration."); *Id.* at 831 ("For its first 150 years, however, the United States federal government only used an inheritance tax to raise revenue during times of war. It was not until President Theodore Roosevelt proposed adopting a heavily progressive income tax in 1906 that national focus shifted to using the tax to prevent concentrations of wealth as well as to raise revenues. He proposed a tax to prevent 'the owner of . . . enormous fortunes to hand more than [a] certain amount. . .' The estate tax was not actually adopted until 1916. At that time, the economist Irving Fisher urged an estate tax to address the 'danger of an hereditary plutocracy' to 'democratic ideals'." (citations omitted)).

50 Kathy Medve, *Estate Tax Returns Revisited, 1916-1931*, 60 fig.A, http://www.irs.gov/pub/irs-soi/16-31estxrtre.pdf.

51 *Id.*

tive in collecting revenue. In 1917, estate tax collections amounted to only .55% of total revenues.[52] This rose as high as 3.49% in 1922.[53]

In 1918 the Senate tried to replace the estate tax with an inheritance tax. The compromise act in 1919 retained the estate tax with lower rates, an expansion of the base to include the value of a surviving spouse's rights of dower and curtesy, life insurance proceeds in excess of $40,000 received by an executor and certain property passing by exercise of a general power of appointment, and a new deduction for charitable contributions.[54]

How could there have been another constitutional attack after the Supreme Court's 1900 decision in *Knowlton?* Jacob Harsen Purdy died a resident of New York City in December of 1916, shortly after the enactment of the 1916 estate tax. His executor, the New York Trust Company, now JP Morgan Chase, paid state inheritance taxes of $37,799 and federal estate taxes of $23,911 and sued for a refund.[55] It could no longer challenge the constitutionality of an inheritance tax after *Knowlton*. But the bank claimed that the new federal estate tax was different from an inheritance tax, saying: "[T]he United States has [the] power to tax legacies, . . . but this tax is cast upon a transfer while it is being effectuated by the state itself, and therefore is an intrusion upon its processes, whereas a legacy tax is not imposed until the process is complete."[56] Again, a states' right argument was presented.

Chief Justice Oliver Wendell Holmes dispensed with this argument concluding that "if a tax on the property distributed by the laws of a state determined by the fact that distribution has been accomplished, is valid, a tax determined by the fact that distribution is about to begin is no greater interference and is equally good."[57]

The bank also claimed that an inheritance tax was not a direct tax because the tax is on the privilege of receiving, which may be avoided, while an estate tax is inevitable and therefore direct.[58] Here's the source of one of Holmes's familiar quotations. Holmes said that the Court's decision in *Knowlton* did not attempt to make a scientific distinction between a tax on the privilege of receiving wealth and on the privilege of transmitting it but instead based its decision on "an interpre-

52 David Joulfaian, *The Federal Estate and Gift Tax: Description, Profile of Taxpayers, and Economic Consequences*, 62 tbl.16 (U.S. Dep't. of Treas., Working Paper No. 80, 1998), http://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/ota80.pdf.

53 *Id.*

54 Revenue Act of 1918, Pub. L. No. 254, § 400, 40 Stat. 1057, 1097-98, 1121 (1919).

55 N.Y. Tr. Co. v. Eisner, 256 U.S. 345, 346 (1921).

56 *Id.* at 348.

57 *Id.*

58 *Id.* at 349.

tation of language by its traditional use — on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; 'has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.'"[59] And he concluded by saying, "Upon this point a page of history is worth a volume of logic."[60]

Andrew Mellon, the Secretary of the Treasury, organized a spirited attack against the estate tax in the 1920s.[61] Despite his efforts, Congress increased the maximum rate in 1924, from 25% to 40%, introduced the gift tax, and provided a credit for state death taxes paid, in amounts up to 25% of the federal estate tax.[62] Mellon attempted to use some of the same campaign techniques that have recently been used against the wealth transfer tax system. He engaged a lobbyist to try to raise grass-roots support and used arguments that are similar to the ones modern transfer tax opponents are using. His testimony before the Senate Finance Committee described his belief that the estate tax undermined the nation's economy. He claimed that "forced sales of securities for payment of estate and inheritance taxes permanently depleted capital not only because the government claimed a portion, but also because the value of the capital in the purchaser's hands was determined by his purchase price at depressed rates."[63] He predicted that eventually the capital of the country would be worthless and disappear altogether.[64] Unlike today's opponents, he failed to generate any significant pro-repeal press.

Mellon achieved a reduction in the top estate tax rate to 20%, a repeal of the gift tax and a return of most of the estate tax revenue to the states by raising the credit for state estate taxes to 80% of the federal tax (a maximum of 16% when the top rate is 20%).[65] But his goal of repeal failed. The estate tax remained alive, ready to be rejuvenated when the nation's fiscal policies put it in the position of needing additional revenue.

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59 *Id*. (quoting Knowlton v. Moore, 178 U.S. 41, 81-83 (1900)).

60 *Id*.

61 M. Susan Murnane, *Andrew Mellon's Unsuccessful Attempt to Repeal Estate Taxes*, TAX ANALYST, Aug. 22, 2005, http://www.taxhistory.org/thp/readings.nsf/cf7c9c870b600b9585256df80075b9dd/672746f8e859ea77852570900006ac21?OpenDocument (last visited Nov. 16, 2015).

62 Revenue Act of 1924, Pub. L. No. 68-176, § 300, 43 Stat. 254, 303-04, 313 (1925) (Estate Tax § 301(a), p. 303; credit for State taxes § 301(b), p. 304; Gift Tax § 319, p. 313); Eisenstein, *supra* note 3, at 232 n.51 (The rate increase and gift tax were retroactively repealed, Revenue Act of 1926, Pub. L. No. 69-20, § 322, 44 Stat. 9 (1926)).

63 Murnane, *supra* note 61.

64 *Id.* at n.34.

65 *Id.*

Yet Beckert's charts show that Congress, on balance, was still not supportive of the estate tax as a means of redressing wealth inequality. Only 14.4% of the supporters based their support on goals relating to the rejection of privileges attributable to inherited wealth and the promotion of greater wealth equality, down from 22.6% in 1916.[66] The principal basis for support continued to be the view that the tax provided an equitable means of raising revenue.

In 1932, as the Depression deepened, Congress raised rates at most levels of taxable estates, raised the top rates from 20% to 45%, cut the exemption in half to $50,000, and resurrected the gift tax with rates set at 3/4 of the estate tax rates calculated on a tax exclusive basis.[67] The stated purpose of the gift tax was to prevent the avoidance of the estate tax through lifetime gifts.[68] But it is likely that an important additional motive was the raising of immediate revenue. The purpose of preventing estate tax avoidance could have been equally well served by a gift tax that raised the same revenue per dollar of gift as would be raised by the estate tax. Instead, the net effect of the lower rate and tax-exclusive nature of the gift tax produced an effective rate of 25.23%. Supporters of the lower level of gift tax pointed out in the debates that the reduced tax would encourage lifetime giving and "increase the income to the Treasury when it is most needed."[69]

Before we see what happened next, let's look at Mr. Bromley's constitutional attack on the gift tax. Joseph Bromley made a gift, paid a gift tax and filed a claim for refund attacking the gift tax as a direct tax, unconstitutionally unapportioned among the states, and unconstitutionally lacking in uniformity, two of the arguments that were earlier used

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66 BECKERT, *supra* note 41, at 191.

67 The gift tax law contained a lifetime exemption of $50,000 and a yearly exemption of $5,000. Eisenstein, *supra* note 3, at 234; Murnane, *supra* note 61, at 81 ("Mellon made no further attempt to secure estate tax repeal before the Great Depression mooted the issue."); Murnane, *supra* note 61, at 82 ("Mellon might have succeeded in repealing the estate tax if only tax receipts had been higher in 1928 or the stock market had not crashed in 1929").

68 REPORT ON REVENUE ACT OF 1932, H.R. Rep. No. 72-708, at 8 (1932) (gift tax will "assist in the collection of the income and estate taxes, and prevent their avoidance through the splitting up of estates during the lifetime of a taxpayer . . . ."); S. COMM. ON FINANCE, REPORT ON REVENUE BILL OF 1932, S. REP. NO. 72-665, at 11 (1932) ("As a protection to both estate and income taxes, a gift tax is imposed."); *see* Jeffrey A. Cooper, *Ghosts of 1932; The Lost History of Estate and Gift Taxation*, 9 FLA. TAX REV. 875, 911 n.153, 910-911 (2010).

69 75 CONG. REC. 6, 5903 (1932) (statement of Rep. Canfield). Eisenstein's interpretation of the motivation for the estate tax confirms Beckert's conclusion. *See* Eisenstein, *supra* note 3, at 234. ("When the estate tax was finally revived at the end of this dismal period [the Mellon era], the controlling motivation was a desire to obtain revenue and not a desire to break down estates. Among those who made tax policy the levy was still a fiscal measure.")

against the estate tax.[70] The uniformity argument was rejected in the same manner as it was rejected in the estate tax case. The uniformity requirement requires geographical not intrinsic uniformity.[71] The direct tax analysis is more interesting. The Supreme Court told us in the 1929 *Bromley* decision that a tax on a gift is not a direct tax because it is a tax imposed on the exercise of one of the rights incident to the ownership of property, not on the property itself.[72] Those of you who are interested in the generation-skipping transfer tax might ask yourself who is exercising what right when a taxable termination occurs. The answer could be that the generation-skipping transfer tax on a taxable transfer is simply an additional tax imposed on a transferor's transfer to a trust that has generation-skipping transfer potential deferred until the taxable transfer takes place.

The next big debates over the wealth transfer tax occurred in the mid-30s. Franklin Delano Roosevelt ("FDR") became President of the United States in 1933. He faced a continuing economic crisis as well as a growing populist movement spearheaded by Louisiana Democrat Huey Long, who called for a radical redistribution of wealth. The goal of his Share Our Wealth Society was to confiscate fortunes over $8 million, limit annual income to $1 million, limit inheritances to $5 million and use the funds to provide every American family with an annual income of $2,000 and every American with a free university education.[73] By 1935 the Share Our Wealth societies had more than 7.5 million members in 27,000 clubs.[74] One of FDR's ways of dealing with both crises was to suggest a new succession and inheritance tax to go hand in hand with the current estate tax. It would be imposed on any individual who received large amounts of gifts or inheritances. His thinking was that a more radical redistribution of wealth through the estate tax would put more purchasing power in the hands of poorer people whose additional anticipated spending, it was hoped, would bolster the economy. In addition, it would undercut Huey Long's support.

FDR failed in his attempt to enact an additional succession tax, but he did persuade Congress to raise the top estate tax bracket to 70% and to decrease the exemption to $40,000, about $800,000 in today's dol-

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70 Bromley v. McCaughn, 280 U.S. 124, 134-35 (1929).

71 *Id.* at 138.

72 *Id*.

73 *Share Our Wealth (a.k.a. Share the Wealth),* HUEY LONG, http://www.hueylong.com/programs/share-our-wealth.php (last visited Nov, 16, 2015).

74 *Id.*

lars.[75] The 1935 Act also introduced the alternate valuation date.[76] In the year after the 1935 Act, the new law resulted in an increase in the share of total revenues contributed by the transfer tax system from 5.89% to 9.71% although it still affected less than 1% of decedents. This time Beckert's charts show some increased support for the use of the wealth transfer tax system to redistribute wealth and eliminate the privileges of inherited wealth.[77] Of those who supported an increase in estate taxes, 33.9% of them argued for increases on this basis, up from only 14.4% in 1926.[78]

In 1940 Congress imposed a temporary 10% tax increase to raise funds for defense.[79] This increased the top estate tax rate to 77%, an increase that became permanent in 1941.[80] The top rate then remained at 77% for 25 years until 1976.[81] The Revenue Act of 1942 also increased the estate tax exemption to $60,000, pegged the gift tax exemption at $30,000, and created the $3,000 per donee annual gift tax exclusion.

One more important revision to the system was made before the 1976 revisions, the first big set of changes that many of us were around to watch happen. That change was the passage of the 50% estate tax and gift tax marital deductions.[82] For many married individuals in non-community property states, this change had the effect of reducing the progressivity of the tax. By dividing the estate between two spouses, each would get two rides up the progressive brackets.

In spite of our victory in World War II and the global economic supremacy victory gave us, not much happened to the provisions of the estate and gift tax between 1948 and 1976. They were years of relative stability.

During those post-war Baby Boom years, the debate continued between proponents of a wealth transfer tax that would redistribute tax-

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75 Revenue Act of 1935, Pub. L. No. 74-49, § 201, 49 Stat. 1014, 1021 (1935).

76 Revenue Act of 1935, Pub. L. No. 74-62, § 202(a), 49 Stat. 1014, 1021 -1022 (1935) (The alternate valuation date was one year after death); *see also* Jacobson, Raub & Johnson, *supra* note 23, at 122.

77 BECKERT, *supra* note 41, at 191.

78 *See* Eisenstein, *supra* note 3, at 235 ("The levelling of hereditary fortunes was formally approved as one of its objectives.. . . In 1935 the accent on levelling became bolder."); *see* Eisenstein, *supra* note 3, at 237 ("At best, then, the social objective of the estate tax was prominent only in 1934 and 1935. Yet even in those years the deliberate destruction of 'great accumulations of wealth' was more verbal than actual.").

79 Revenue Act of 1940, Pub. L. No. 76-54, § 201, 54 Stat. 516, 520 (1940).

80 Revenue Act of 1941, Pub. L. No. 77-55, § 401, 55 Stat. 692, 705 (1941); *See* Eisenstein, *supra* note 3, at n.83.

81 Jacobson, Raub & Johnson, *supra* note 23, at 122.

82 Revenue Act of 1948, Pub. L. No. 80-471, §§ 361, 62 Stat. 110, 116 (1948) (Estate Tax); Revenue Act of 1948, Pub. L. No. 80-471, § 372, 62 Stat. 110, 125 (1948) (Gift Tax).

payer assets and the opponents who sought to protect private wealth from government interference. The proponents talked about equal opportunities and the opponents about the adverse economic consequences of a strengthened wealth transfer tax system. The proponents gradually lost ground against positions based on supply-oriented economics.[83] The economy was in pretty good shape. There was no longer much reason to blame wealthy individuals or their families for the economic problems of the nation. In fact, because economic prosperity was accompanied by an increase of individually controlled wealth, some were convinced that redistributing that wealth might interfere with continued prosperity.[84]

One of the last political efforts to turn the estate tax into a significant wealth redistribution tool was launched in 1972 by the Democrat presidential candidate, George McGovern. Emulating Huey Long's earlier efforts, McGovern campaigned for an inheritance tax that would collect 100% of the wealth of each decedent after the first $500,000 (about $2.8 million in 2015 dollars).[85] Collections would be used to provide each family with a minimum income of $4,000. McGovern's plan was poorly thought out and was widely rejected. McGovern's spokesperson (Richard Dougherty) explained the rejection of this inheritance proposal by what he called the "dream factor."[86] "Every . . . [ordinary person] in the street thinks that if he hits the lottery big, he may be able to leave half a million to his family."[87] Given that 50-60% of adults living in states where there is a legal lottery play and of those, two-thirds play regularly,[88] the dream factor or as John Oliver wryly dubbed it in

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[83] *See* BECKERT, *supra* note 41, at 196.

[84] *See id.* at 197; Eisenstein, *supra* note 3, at 238 ("Neither the 1934 Act nor the 1935 Act disturbs my conclusion that the estate tax has been primarily imposed for revenue. I am not unaware that the tax has also helped to redistribute wealth. But any progressive levy on income or wealth will have this effect. Nor do I forget the desire to control accumulations significantly contributed to the development of the tax. Undoubtedly that objective infiltrated into its rate structure. Still the fact remains that the growth of the tax responded more to the stimulus of revenue that to eloquent exhortations for the dismantling of estates.").

[85] BECKERT, *supra* note 41, at 196.

[86] *See* Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 119 (1990).

[87] *McGovern: "Jobs are the Cornerstone of My Policy"*, WASH. POST, Aug. 30, 1972, at A12.

[88] Roger Dunstan, *Gambling in California*, CAL. RESEARCH BUREAU, https://www.library.ca.gov/CRB/97/03/Chapt3.html (last visited Nov. 16, 2015). ("A large proportion, about 50 to 60 percent of adult Americans play legal lotteries in lottery states. Two-thirds of these play regularly, which means that about one-third of the adults are regular players.").

his recent segment on the death tax, "the optimism of the American public,"[89] may actually be the right explanation.[90]

In any event, during this period of legislative inactivity, changes in the economy were working to expand the reach of the transfer tax system. Increasing numbers of donors and decedents were drawn into its grasp by inflationary forces. In 1948 estate and gift tax revenues made up 2.14% of total revenues and about 2% of all decedents were required to file returns.[91] By 1976, the revenue share contributed by the transfer tax was about the same as it had been in 1948, but the filing requirements now reached 13% of all decedents.[92] Not only were more fami-

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[89] *Last Week Tonight with John Oliver: Wealth Gap* (HBO television broadcast July 13, 2014), https://www.youtube.com/watch?v¼gSEwjAeno (last visited Nov. 16, 2015). *See also* Ascher, *supra* note 86, at 119 ("Americans seem attached not only to buying tickets in state lotteries and watching television game shows, but also to dreaming about 'rich uncles' whose imminent death will make them instant millionaires."); Lee Anne Fennell, *Death, Taxes, and Cognition*, 81 N.C. L. REV. 567, 603 (2003) ("Optimism might well interact with some of the strictly rational reasons for opposing the estate tax to expand the number of estate tax opponents significantly."); Michael J. Graetz, *To Praise the Estate Tax, Not To Bury It*, 93 YALE L.J. 259, 285 (1983) ("The only convincing explanation that has occurred to me for this phenomenon lies in the optimism of the American people."); Edward J. McCaffery, *Cognitive Theory and Tax*, 41 UCLA L. REV. 1861, 1944-45 (1994) ("Why do people oppose a very limited, nominally progressive tax, one that has the further advantage of speaking directly to liberal egalitarian notions of equal opportunity and level playing fields? One answer . . . is a 'lottery mentality' . . . or . . . might there be a moral dimension to the factually erroneous identification of most people with estate tax targets?"); *see generally* Edward J. McCaffery, *Why People Play Lotteries and Why It Matters*, 1994 WIS. L. REV. 71, 82 (1994) (exploring high rates of lottery participation despite standard economic theories that would suppose that normal risk aversion would make people unlikely to participate in typical lottery play).

[90] Fennell, *supra* note 89, at 593-615 (exploring some reasons which include uncertainty about social mobility, "rational ignorance," framing distortions, and mental accounting errors); ROBERT NOZICK, EXAMINED LIFE 30 (1989) (describing sociological explanations for the widespread opposition to inheritance taxes by indicating that bequests to family members are important in our society as an expression of caring about them, as a means of intensifying family bonds and as creating an extended identity between the giver and the receiver); GEORG F. W. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT, § 214 (A. W. Wood ed., 1821) (explaining that assets owned at the death of an individual are the common resources of the family). *See generally* BECKERT, *supra* note 41, at 196 (discussing broadly the debates over rights of inheritance and rights to curtail inheritance through taxation).

[91] Joulfaian, *supra* note 52, at 62 tbl. 16 (illustrating the percent of total Estate and Gift Tax receipts in 1948 as 2.14%); Jacobson, Raub & Johnson, *supra* note 23, at 125 (illustrating in figure F that taxable estate tax returns were 2% in 1948 and in figure G the estate and gift receipts as a percentage of total revenue in 1976 was about the same as it had been in 1948).

[92] Jacobson, Raub & Johnson, *supra* note 23, at 125; Edward J. McCaffery, *Grave Robbers: The Moral Case against the Death Tax*, 353 CATO INST. POL'Y ANALYSIS at 4 (1999); OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES, *Composition of "Other Receipts": 1940–2020*, Table 2.5 (1999) (select desired table at https://www.whitehouse.gov/

lies caught by the tax but some taxpayers, like farmers, realized that their land was located in areas ripe for residential and commercial development and that the value of their land for estate tax purposes would be the development value rather than the farm value. This meant that their farms would be subject to the tax, and, unless they generated and put aside sufficient cash before they died, the farm or maybe some other treasured appreciated family heirloom or assets would have to be sold.

Think of a potato farmer on Long Island. He and his family have earned a modest living farming potatoes for several generations. For agricultural purposes, his land has a value of $30,000. However, a commercial developer is willing to buy the farm for $100,000. If the farmer dies when the estate tax exemption is only $60,000, as it was before the Tax Reform Act of 1976, the farm would have to be sold to pay the estate tax because his estate will be valued at $100,000. And this problem was likely to get worse each successive generation. Some of you may remember these arguments from 1976.

The farmers brought their concern to Congress.[93] The result was the conversion of the exemption to a credit, which had the effect of excluding the first $120,000 of date-of-death value from the tax, an exclusion that was to be raised over a number of years until it reached $175,625 in 1981. The farmers were also able to win a decrease in the top rate from 77% to 70%, an increased marital deduction and section 2032A's[94] set of special valuation rules applicable to farms and small businesses. As part of the package, the estate and gift tax systems were substantially integrated and a new generation-skipping transfer tax and the short-lived carry-over basis regime were created.[95]

Beckert's charts show just how badly the support for wealth redistribution had eroded between 1935 and 1976.[96] Of course, total repeal was not on the table yet. But now only 17.7% of those who argued against the reduction in the estate tax's reach used redistributive arguments.[97] Most of their arguments were based on concerns over lost rev-

omb/budget/Historicals (last visited Nov. 16, 2015) (discussing the gift and estate tax as a percentage of "other receipts" comprising federal revenue by fiscal year).

93 *See* Stanley S. Surrey, *Reflections on the Tax Reform Act of 1976*, 25 CLEV. ST. L. REV. 303, 319-22 (discussing Congress's role in the matter); Daniel J. Balz, *Congress Looks at Death and Taxes But Outlook Is Far From Certain*, NAT'L J., Mar. 13, 1976 at 328.

94 Unless indicated to the contrary, references to "section" are to sections of the Internal Revenue Code of 1986, as amended (the "Code").

95 Tax Reform Act of 1976, Pub. L. No. 94-455, § 2001-06, 90 Stat. 1520, 1846-79 (1976); *See* Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, § 401, 94 Stat. 229, 299-301 (1980) (repealing the carryover basis created by the Tax Reform Act of 1976).

96 BECKERT, *supra* note 41, at 193.

97 *Id.* at 202, 204.

enue. In contrast, foreshadowing what was to come in 2001, 55% of the supporters of the reform were concerned with the effect of the estate tax on farms and small businesses.[98] Furthermore, 17.8% of the supporters were concerned with "bracket creep," a problem not limited to farmers and owners of small businesses, and 8.9% thought it was important to be able to preserve wealth for family members.[99]

At about this time Columbia University Law School professor George Cooper published an article in the Columbia Law Review explaining that the exemption levels and certain sophisticated estate planning techniques that utilized the exemptions made the estate tax a largely voluntary tax.[100] Professor Cooper's article was one of the opening salvos in an academic counter-offensive launched by some professors against the anti-estate tax lobbies of the farm and small business groups. Although he was supportive of the goals of the wealth transfer tax system he expressed the view that "[u]nless the system can be significantly reformed, consideration should be given to scrapping it or at least replacing it with a more effective means of accomplishing its perceived goals."[101]

Between the Tax Reform Act of 1976 and EGTRRA's temporary repeal, Congress whittled away at the impact of the estate tax. In 1981, the top rate was lowered from 70% to 50%, the 50% marital deduction became the 100% marital deduction and the annual gift tax exclusion became $10,000, up from $3,000.[102] In 1986, the 1976 generation-skipping transfer tax was retroactively repealed and replaced with a new tax, the goals of which were the same, but which also taxed direct gifts to grandchildren and other members of a transferor's grandchildren's generation and more remote generations.[103] In 1990, the Omnibus Budget Reconciliation Act gave us Chapter 14 and its special valuation rules.[104] The Tax Relief Act of 1997 raised the exemption equivalent to $1 million and indexed the annual gift tax exclusion, the GST exemption and section 2032A's special use valuation exemptions for inflation.[105]

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98 *Id.* at 202, 205-06.

99 *Id.* at 202.

100 *See* George Cooper, *A Voluntary Tax: New Perspectives on Sophisticated Tax Avoidance*, 77 COLUM. L. REV. 161, 169, 221 (1977); *see infra* notes 128-29 and accompanying text.

101 Cooper, *supra* note 100, at 223.

102 Economic Recovery and Tax Act of 1981, Pub. L. No. 97-34, § 441, 95 Stat. 314, 319 (1981).

103 Tax Reform Act of 1986, Pub. L. No. 99-514, §§ 1432-33, 2515, 100 Stat. 2085, 2729-2732 (1986).

104 Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 2701-04, 104 Stat. 1388-491, 1388-491-501 (1990).

105 Tax Payer Relief Act of 1997, Pub. L. No. 105-34, § 501, 111 Stat. 788, 845-846 (1997).

This brings us to 2001 and the brief repeal of the estate and generation-skipping transfer tax, but not the gift tax. By 2001, bracket creep had once again brought the wealth transfer tax system to the attention of a broader group of the public. Between 1989 and 2001, the percentage of decedents whose estates were forced to file estate tax returns climbed from 2.52% to more than 5%.[106] Starting in the 1990s, a movement to repeal the estate tax gathered momentum, and attracted enough support to pass The Death Tax Elimination Act in 2000, an act that was later vetoed by President Bill Clinton.[107] Support for repeal came from a wide number of lobbying groups, including, surprisingly to some,[108] groups most of whose members were not likely to ever be caught in the wealth transfer tax system, the National Association of Women Business Owners, the National Black Chamber of Commerce, and the National Indian Business Association[109] to name a few.

A counter movement eventually came together led by Warren Buffet and George Soros, but they were too late to make much of a difference. They and a number of other wealthy individuals took out ads in newspapers arguing against repeal on the grounds "that complete repeal of the estate tax would be bad for our democracy, our economy, and our society. . . . Repealing the estate tax would enrich the heirs of America's millionaires and billionaires while hurting families who struggle to make ends meet . . . and would have a devastating impact on public charities."[110]

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106 *See* Jacobson, Raub & Johnson, *supra* note 23, at 124-25. *See also*, Appendix Table 1 for a chart that shows the percentages of decedents required to file federal estate tax returns for 1916 through 2011.

107 Death Tax Elimination Act of 2000-Veto Message from the President of the United States, 146 CONG. REC. H7240, H7240-41 (daily ed. Sept. 6, 2000).

108 Cooper, *supra* note 11, at 836 n.5 ("Death taxation often provokes disproportionately emotional reactions."); Graetz, *supra* note 89, at 259 ("For several decades, total revenues raised by estate and gift taxes have roughly equalled those raised by excise taxes on alcohol and tobacco. Yet no law journal has ever asked me to write on alcohol or tobacco excise taxes . . . . We do not hear of the suffering of widows and orphans (or even of farmers and small businesses) because of alcohol and tobacco taxes. Philosophers and economists do not routinely debate the merits of such taxes. Perhaps most significantly, increases in such excise taxes do not arouse fears that we are about to eliminate the concept of private property in this country and embrace socialism, or even communism. The estate tax, however, evokes just such responses."); Fennell, *supra* note 89, at 568-69 ("Two puzzles surround the estate tax. First, why is it so unpopular, even among those who could not reasonably expect to be subjected to it? . . . I examine ways in which features of human cognition interact with rational decision-making processes to generate both excessive hostility towards the tax and surprisingly low levels of liability-reducing gift giving.").

109 GRAETZ & SHAPIRO, *supra* note 11, at 72.

110 Press Release, United For a Fair Economy, Bill Gates, Sr., George Soros, Steven Rockefeller, 100 Others Oppose Estate Tax Repeal (Feb. 14, 2001), http://www.faireco no

When President George W. Bush took office in 2001, he made repeal a priority and almost achieved his goal. In the end, however, a failure to obtain support from 60% of the Senators (necessitated by the Byrd Rule),[111] resulted in only a one-year repeal in 2010 of the estate tax and the generation-skipping transfer tax.[112] The repeal was accompanied by a carry-over basis regime that permitted basis adjustments of $1.3 million and an extra basis adjustment of $3 million for property passing to a surviving spouse.[113]

What happened to the gift tax? Although gift tax repeal had been part of the original proposal, several prominent trusts and estates lawyers alerted Congress to the potential income tax abuses they thought would occur if the gift tax no longer provided a barrier to making gifts.[114] The predicted abuses included gifts of appreciated assets by tax payers in high brackets to low tax paying family members. The idea was that the donees would sell the assets, pay tax at lower rates and then return the proceeds to the original owner.[115] As a result, the gift tax repeal portion of the proposed legislation was dropped.

In the years between 2001 and 2013, the exemption amount for the estate tax and the generation-skipping transfer tax was gradually increased from $675,000 to $3,500,000, the credit for state death taxes was converted to a deduction, and the top tax rate was decreased from 55% to 45%.[116] President Bush signed EGTRRA on June 7, 2001.[117]

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my.org/press_room/2001/gates_sr_soros_100_others_oppose_estate_tax_repeal. (last visited Nov. 16, 2015).

111 2 U.S.C. § 644 (2000). The Rule permits Senators to block legislation if it significantly increases the federal deficit beyond a ten-year term; *see also* STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, at 16, r. XXII(2) (2013).

112 *See* Economic Growth and Tax Relief Reconciliation Act, Pub. L. No. 107-16, § 501, 115 Stat. 38, 69 (2001).

113 Task Force on Fed. Wealth Transfer Taxes, *Report on Reform of Federal Wealth Transfer Taxes*, A.B.A. § 7, at 33 (2004), http://www.americanbar.org/content/dam/aba/migrated/tax/pubpolicy/2004/04fwtt.authcheckdam.pdf.

114 David Cay Johnston, *Questions Raised on New Bush Plan To End Estate Tax*, N.Y. TIMES, Jan. 29, 2001, at A1.

115 *See President's Tax Relief Proposals: Tax Proposals Affecting Individuals: Hearing Before the Comm. on Ways and Means,* 107th Cong. 87 (2001) [hereinafter *President's Tax Relief Proposals*] (statement of Lauren Y. Detzel, Attorney, Dean Mead Egerton Bloodworth Capuano & Bozarth, P.A.); *see also* Jonathan G. Blattmachr & Mitchell M. Gans, *Wealth Transfer Tax Repeal: Some Thoughts on Policy and Planning*, 90 TAX NOTES 393 (2001); Johnston, *supra* note 114, at A21.

116 DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2016 REVENUE PROPOSALS at 193-94 (Feb. 2015), http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2016.pdf.

117 Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107–16, 115 Stat. 38 (2001).

Beckert's final chart shows just how much Congress's attitude toward the wealth transfer tax system had changed since 1935 and even since 1976.[118] Only 2.8% of them cared any longer about wealth distribution and equality issues.[119] Their opposition to repeal was based purely on revenue concerns. Indeed, 78% of the supporters of repeal wanted to protect small businesses and farms.[120]

The Present

The temporary repeal is now behind us. The wealth transfer tax system has been restored in a much-weakened form. It is now responsible for less than 1% of federal revenues and affects less than ½% of decedents.[121]

The controversy about the tax continues. President Obama, according to his latest budget proposal,[122] wants to restore the tax to its 2009 parameters, which could bring its share of total revenues to about 1% and increase covered decedents to about 1%. But since the exemption level he is suggesting would not be subject to any adjustments for inflation, inflationary bracket creep would gradually cause many more decedents' estates to be caught. His proposal would also tax capital gains at death and any disposition of appreciated property by gift.[123]

What's left of our weakened wealth transfer tax system? We have an exemption of $5,430,000 per individual, or effectively $10,860,000 for a married couple.[124] At the somewhat lower exemption level for dece-

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118 Beckert, *supra* note 41, at 205-06.

119 *Id.* at 206.

120 *Id.*

121 Joint Comm. on Tax'n, History, Present Law and Analysis of the Federal Wealth Transfer Tax System, JCX-52-15, at 1 (Mar. 16, 2015), https://www.jct.gov/publications.html?func=startdown&id=4744 (last visited Nov. 16, 2015).

122 Dep't of the Treasury, s*upra* note 116, at 193.

123 *Id.* at 155-57. The proposal would increase the top tax rate on long term capital gains to 28% (with the 3.8% net investment income tax), and incongruously (and without any explanation) makes portable and expands the $250,000 exclusion on gain from the sale of a principle residence to all residences, but continues to postpone the taxation of unrealized gains on transfers to spouses "until the spouse disposes of the asset or dies." *Id*. at 156-57. The elimination of carry-over basis was referred to misleadingly as "closing the trust fund loophole," though it has nothing to do with trust funds and does not close a "loophole," so much as erases a fundamental provision of the Code. *See* Julie Hirshfeld Davis, *Obama Will Seek to Reduce Taxes on Middle Class*, N.Y. Times, Jan. 18, 2015 at A1, A22. (stating that "[t]he centerpiece of the plan, described by administration officials on the condition of anonymity ahead of the president's speech, would eliminate what Mr. Obama's advisers call the 'trust-fund loophole,' a provision governing inherited assets that shields hundreds of billions of dollars from taxation each year." There is no suggestion by the *Times* that there is anything disingenuous about the label.)

124 This amount is annually indexed for inflation. The $5,430,000 amount is in effect for 2015. Rev. Proc. 14-61, 2014-47 I.R.B. 860, 867 § 3.33. The recent wide-spread recog-

dents who died in 2012 and 2013, only 10,568 decedents were required to file federal estate tax returns in 2013.[125] There are now 7,629 members of the Real Property Probate and Trust Section[126] who have indicated they practice in our field, meaning there are fewer than two estate tax returns to be filed per member.

That may mean there will be less work for us in preparing and defending estate tax returns, but plenty more do in the planning and gift tax areas. Two professors of economics, Emmanuel Saez and Gabriel Zucman from Berkley and London recently published a study of wealth distribution in the United States and concluded that in 2012 there were 1,607,000 families with average net wealth of $13,840,000, the top 1%.[127] These families continue to need our planning skills. There are more than 200 of them for each of us. Not all members of the group have more than $10,860,000 now — the threshold level for inclusion in this category is $3,960,000 — but many of them have hopes that they will, and the best time for an individual to plan is before she acquires all of her wealth. And many of them may share a concern that President Obama will be successful in rolling back the exemption level to $3,500,000 and casting the estate tax net over their families.

What planning techniques work in today's environment? In the 38 years since Professor Cooper wrote about the voluntary tax, much has been written describing the available planning techniques, in some cases for the purposes of instructing us how to use them[128] and in other cases to invite Congress to shut them down.[129] In 2004, a task force composed

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nition of same-sex marriage, United States v. Windsor, 133 S.Ct. 2675, 2695-96 (2013), expands the potential revenue impact of the increased exemption. For a discussion of the potential impact of the recent same-sex marriage decisions, *see* Carlyn S. McCaffrey & John C. McCaffrey: Obergefell *and the Authority of the IRS to Challenge Valid Marriages and Divorces*, LISI EST. PLAN. NEWSL. No. 2345 (Sept. 21, 2015).

125 I.R.S., *Estate Tax Returns Filed in 2013 [1], by Tax Status and Size of Gross Estate,* STAT. OF INCOME DIV. (Oct. 2014), https://www.irs.gov/uac/SOI-Tax-Stats-Estate-Tax-Statistics-Filing-Year-Table-1.

126 E-mail from Robin K. Roy, Dir., Am. Bar Ass'n Section of Real Property, Trust & Estate Law to Carlyn S. McCaffrey (Feb. 24, 2015 9:45 AM EST) (on file with author).

127 Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data* 22 tbl. 1 (Nat'l Bureau of Econ. Research, Working Paper No. 20624, 2014), http://gabriel-zucman.eu/files/SaezZucman2014.pdf.

128 *See* Leo L. Schmolka, *FLPs and GRATs: What to Do?*, 86 TAX NOTES 1473 (2000); Mitchell M. Gans, Jonathan G. Blattmachr & Diana S.C. Zeydel, *Supercharged Credit Shelter Trust*SM, 21 PROB. & PROP., July/Aug. 2007, at 52 (2007), http://alaskatrust.com/wp-content/uploads/2014/04/Super-Charged-Credit-Shelter-Trust.pdf.

129 *See* Ascher, *supra* note 86, at 73; William S. Blatt, *Minority Discounts, Fair Market Value, and the Culture of Estate Taxation*, 52 TAX L. REV. 225, 225-26 (1997); Paul L. Caron & James R. Repetti, *Revitalizing the Estate Tax: 5 Easy Pieces*, 142 TAX NOTES 1231, 1231-32, 1237-41 (2014); Joseph M. Dodge, *A Deemed Realization Approach Is Su-*

of members of the American College of Trust and Estate Counsel along with members of the American Bar Association's Tax Section and Real Property, Probate and Trust Section, the American College of Tax Counsel, the American Bankers Association and the American Institute of Certified Public Accountants published a 169 page (plus an appendix) Report on Reform of Federal Wealth Transfer Taxes addressing most of the system's problem areas and describing alternatives to dealing with them.[130] Despite all the studies and thousands of pages dedicated to this topic, most of the same techniques that were available 38 years ago when Professor Cooper wrote about the voluntary tax are still with us.

There are only three strategies that are no longer available: certain preferred stock freezes, generation-skipping transfer tax-free direct gifts to grandchildren and annuities and other benefits under qualified plans. The original form of preferred stock recapitalization, which permitted close to zero value common equity subject to a noncumulative class of preferred stock to be gifted to children, was eliminated by the passage in 1990 of section 2701.[131] Direct gifts to grandchildren and other members of their generation and more remote generations have been subject to the generation–skipping transfer tax since 1986.[132] The estate tax exclusion for certain benefits under qualified plans was reduced to $100,000 in 1982[133] and eliminated in 1984.[134]

The remaining strategies described by Professor Cooper as well as several others are still available. They fall into two major categories. One category of techniques is used to shift future wealth; the other is used to remove existing wealth from the reach of the transfer tax. Let's

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perior to Carryover Basis (and Avoids Most of the Problems of the Estate and Gift Tax), 54 TAX L. REV. 421, 423-24 (2001); Joseph M. Dodge, *Colloquium on Wealth Transfer Taxation: Taxing Gratuitous Transfers Under a Consumption Tax*, 51 TAX L. REV. 529, 530, 542, 589 (1996); Joseph M. Dodge, *Redoing the Estate and Gift Taxes Along Easy-to-Value Lines*, 43 TAX L. REV. 241, 243-44 (1988); Graetz, *supra* note 86, at 259, 268; Harry L. Gutman, *Reforming Federal Wealth Transfer Taxes After ERTA*, 69 VA. L. REV. 1183, 1185, 1192 (1983); Edward J. McCaffery, *Tax Policy Under a Hybrid Income Consumption Tax*, 70 TEX. L. REV. 1145, 1147, 1160 (1992); Repetti, *supra* note 49, at 825-26, 851; James R. Repetti, *The Case For The Estate And Gift Tax*, 86 TAX NOTES 1493, 1493 (2000); Phyllis C. Smith, *Change We Can't Believe In . . . or Afford: Why the Timing is Wrong to Reduce the Estate Tax for the Wealthiest Americans*, 42 U. MEM. L. REV. 493, 513-14, 516-17 (2012).

130 *See* Task Force on Fed. Wealth Transfer Taxes, *supra* note 113.

131 Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 2701(a), 104 Stat. 1388-491, 1388-491-92 (1990). *See also* Caron & Repetti, *supra* note 129, at 1235.

132 Tax Reform Act of 1986, Pub. L. No. 99-514, §§ 2601, 2611-13, 100 Stat. 2085, 2718-20 (1986).

133 Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, § 245, 96 Stat. 324, 524-25 (1982).

134 Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 525, 98 Stat. 494, 873-74 (1984).

look at what's available in each category from Professor Cooper's original list and a few more recently created ones.

First – the shifting of future wealth – by this we mean wealth that is not yet part of a taxpayer's transfer tax base because she hasn't earned it yet. She hopes to earn it as an investment return on existing assets, by taking advantage of investment opportunities and by providing services. If a taxpayer has an investment that she expects will grow in value, and she wants to keep the wealth out of her transfer tax base, the following options are available:

1. Gifts

First, she can give the investment to a trust for her children and more remote descendants. I will assume throughout this discussion that the beneficiary of any technique I'm discussing will be a trust rather than children outright. We're all familiar with the non-tax advantages of trusts over outright gifts. In the context of tax planning, which is our focus here, the trust as a donee is preferable to an individual because of the opportunities the trust presents to keep the transferred assets out of the transfer tax system for several generations, to permit the taxpayer to make additional tax free gifts by causing the trust to be treated as a grantor trust wholly owned by the taxpayer so that she will pay income taxes on trust income and ultimately to save state and local income taxes.

If the taxpayer has not used her $5,430,000 lifetime exemption, the gift can be made free of gift tax. The use of the exemption does not itself save any future transfer taxes because, unless there's a concern that the exemption will be reduced in the future, 100% of the exemption the taxpayer does not use during her lifetime will be available at death to shield her assets from estate tax. What the exemption does is permit a shift of the future return expected from an asset to a trust without paying any tax for the privilege of making the shift.

The lifetime use of a taxpayer's $5,430,000, however, isn't always without risk. There are at least two reasons for concern. First, if the property declines in value, the gift will have been counterproductive. This is so because the donee trust will ultimately have less than $5,430,000 and the taxpayer's remaining exemption will not be adjusted upward to compensate for the loss. If this occurs, the taxpayer would have been better off if she had retained the asset. The second reason is a basis concern. Property removed from the transfer tax base will not have a fair market value basis adjustment at death. This will not matter if the gifted property is cash or an asset with a fair market value basis so long as the estate tax rate is higher than the income tax rate. This will usually be the case but in today's environment of lower estate tax rates and high federal and state income tax rates, this will not always be true.

Consider, for example, a California resident who wants to remove the future appreciation of a painting from her estate. The painting is now worth $1,000,000 and has a basis of $1,000,000 but she expects it to be worth at least $2,000,000 before her death. Her gift of the painting to her trust can be made tax free and will ultimately save estate taxes of 40% of $1,000,000 or $400,000. But this may not be a good idea. If the trust is a California trust and if the plan is to sell the painting when the taxpayer dies, the sale will attract federal and California income taxes of $452,900. Her trust would have been better off receiving the painting from her estate.

The income tax issue becomes more of a problem if the asset being gifted is already appreciated or is subject to debt in excess of basis, so-called negative basis property. To illustrate the issue, consider the possible gift of a zero basis asset worth $1,000,000 to a stateless trust (a trust that pays no residence-based income tax to any state). If the asset fails to appreciate after the gift, the gift will have generated no estate tax savings and will result in an income tax of $238,000. Assuming an income tax rate of 23.8% and an estate tax rate of 40%, the investment return on the asset would have to reach 147% for the tax results of the gift to break even with the retention alternative. Suppose that the asset was subject to a $500,000 debt. If that were the case, the required investment return would be 208% rather than 147%.

If the trust is a grantor trust and if there's a plan to sell the investment during the taxpayer's lifetime, the basis issue may not be a problem. Alternatively, if the taxpayer has additional unappreciated assets, she might sell them to the trust in exchange for the original asset. Although it is possible to purchase the appreciated asset back from the trust for a note, the tax treatment of the note in the hands of the trustee after the taxpayer's death is not clear.

Is there a way to mitigate the downside risk of a lifetime gift? It may be possible to build enough flexibility into the trust instrument to permit the gift to the trust to be included in the taxpayer's gross estate if it appears that inclusion would produce a better tax result than exclusion. If the property is brought back into the estate tax base, the portion of the taxpayer's lifetime exemption used to shield the gift will be restored and the fair market value basis adjustment will be available.

2. Sales and Installment Sales

If the transferee trust has assets, the taxpayer could sell the investment to the trust. So long as the trust is a grantor trust, there will be no income tax on the sale, although, depending on the nature of the asset, there may be sales tax or real property transfer tax.[135] The sale of an investment presents the same market risks and basis risks I discussed in connection with the use of a gift without the possible opportunity of reducing the damage by shifting the asset back to the taxpayer's transfer tax base.

The sale could be for cash or other property or for a trust obligation. The trust obligation could take the form of a note for a fixed term and fixed interest rate, a self-cancelling note, a life-time annuity or an annuity for a term of years that approximates the taxpayer's life expectancy. In today's low interest rate environment, the interest rate on a trust-issued note could be quite low. The applicable rate for this month (November 2015) for notes of three years or less is .49%, for nine years or less, it is 1.59%, and for longer than 9 years, it is 2.57%.[136] If a self-cancelling note is used there is some current uncertainty as to how it should be valued. If an annuity instrument is used, the trust will bear the risk of overpaying if the taxpayer outlives her life expectancy.

If the transfer is to be made in exchange for a trust obligation, there is an additional risk, particularly if the trust is thinly capitalized, that the IRS[137] will claim that the transfer of the asset has been made in exchange for an interest in the trust rather than for a note. IRS success with this argument would cause risk under section 2702 that the note would be treated as having a zero value and that the trust property would be included in the taxpayer's gross estate under section 2036. For the taxpayer who wants to give away future but not current value, the sale is preferable to the gift because she will retain her current value in the form of the trust obligation.

3. Preferred Equity Freezes

Preferred freezes are harder to accomplish efficiently since the passage of section 2701 in 1990, but they are still possible. The major requirements are that the common equity must be worth at least 10% at the inception of the shift and the preferred return must be paid fairly currently, no later than 4 years after the year it first could have been paid.

In order to accomplish a preferred freeze, the taxpayer would transfer the investment expected to appreciate to an entity, usually a limited liability company. The entity would have two classes of interests, one a

135 President Obama's Revenue Proposal for Fiscal Year 2016, if adopted, would bring back into the taxpayer's gross estate the value at the date of death of all property sold to a grantor trust reduced by the value of the consideration provided by the trust. DEP'T OF THE TREASURY, *supra* note 116, at 198.

136 Rev. Rul. 2015-22, 2015-44 I.R.B. 610.

137 References to the "IRS" are to the Internal Revenue Service.

preferred interest entitling the holder to a fixed return; the other, a growth interest entitling the holder to 100% of the investment return above the preferred return. The taxpayer would then either gift or sell the common interest to her trust. All future growth and appreciation in the entity above the preferred return would inure to the benefit of the trust. The disadvantage of this approach over the straight gift or sale is that the return allocable to the preferred interest is retained by the taxpayer. This retention compares unfavorably with the retention of no part of the investment return in the case of a gift or sale for cash or other property. Because the return required on a preferred instrument is likely much higher than the rate required on a trust obligation, it also compares unfavorably with the sale for a trust obligation.

The preferred freeze has one important advantage over the gift and the sale for a taxpayer transferring an appreciated investment. Her basis in the preferred interest will be the same as her basis in the investment. The preferred interest will receive a basis adjustment if she holds it until death.

4. The Grantor Retained Annuity Trust "GRAT"

The GRAT is a device that became popular after 1977. Ironically, the popularity was enhanced by the enactment in 1990 of section 2702, a section that was designed to foreclose the use of grantor retained income trusts because of the uncertainty that the stream of income generated by transferred assets would match the return the IRS was required to assume in placing a value on the taxpayer's retained interest. The beauty of the GRAT provisions and their regulations from the standpoint of the estate planner and her clients was the creation of a statutorily sanctioned method of shifting future appreciation to a children's trust without any risk that investment loss or most basis issues would cause the transaction to be counterproductive and without any risk that an undervaluation of the transferred asset would expose the taxpayer to gift tax liability. A taxpayer can create a GRAT by transferring assets to a trust that requires the annual payment to her of a fixed annuity. If the regulatory requirements are met, the value of her transfer will be reduced, for gift tax purposes, by the value of her retained interest. The value of the retained interest is determined using an IRS prescribed interest rate that varies with the interest rate on mid-term federal obligations. The interest rate for the month of November, 2015 is 2.0%.[138] If the return on the investment exceeds the target interest rate, the excess will pass gift-tax free to the children's trust.

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[138] Rev. Rul. 2015-22, 2015-44 I.R.B. 610.

The preceding discussion of the gift and the sale does not mention the valuation risk that both of these techniques cause for any taxpayer who is giving hard-to-value assets, such as real estate, collectibles and interests in entities for which there is no regularly established market. But valuation risk is a real risk for this type of transaction. There are formula clauses to reduce the level of risk but, for good reason, the IRS does not like them. The efficient operation of the gift tax depends on taxpayers taking realistic positions about the value of their gifts. The IRS lacks the personnel to audit all returns to make sure that taxpayers are complying with this requirement.[139] In order to make compliance more likely, section 6662(g) imposes a penalty on substantial under-valuations of gifts, ranging from 20% to 40% of the underpayment of gift tax caused by a substantial gift tax valuation understatement. Good formula clauses interfere with the operation of the penalty provisions. If a formula clause works and the IRS successfully challenges the valuation, the clause will either reduce the amount of the transferred property or increase the consideration so that there is ultimately no gift tax liability. If there is no gift tax liability, there is no penalty. For this reason, the IRS has consistently attacked these clauses. Although its recent attacks have failed,[140] there is no assurance that it will not ultimately succeed.

139 A 2001 Non-Docketed Service Advice Review opinion as to whether a savings clause which gifted limited partnership interests to be valued at certain dollar amounts should be recognized for tax purposes warned against recognizing formula clauses. "To give substance to this clause effectively nullifies our regulations, defeats the gift tax, obstructs justice and hampers the administration of the tax laws. . . . Fair administration of the gift tax will become even more difficult if formula clauses are given effect, for scarce resources cannot reasonably be expended examining returns if the examination will have no tax effect." I.R.S. Non-Docketed Service Advice Review, 2001 IRS NSAR 0417, 2001 WL 34056189 at 3-4 (Feb. 27, 2001). I.R.S. Field Serv. Adv. Mem. 200122011 at 18 (Feb. 20, 2001) expresses a similar view. "The Taxpayer Relief Act of 1997, Pub. L. No. 105-34,111 Stat. 827 (1997), amended sections 2001, 6501(c)(9) and 7477 of the Code, so that gifts reported on a return may not be revalued for either gift or estate tax purposes after the expiration of the gift tax statute of limitations. Returns subject to the Act must now be examined currently, and no longer may be examined as part of the estate tax examination. Fair administration of the gift tax will become even more difficult if formula clauses are given effect, for scarce resources cannot reasonably be expended examining returns if the examination will have no tax effect." The focus of the opinion and the FSA is on the lack of tax effect in the short term. In the long term, a formula clause that results in retention by the transferor of a portion of the property she hoped to transfer or in her receipt of a larger purchase price is likely to result in larger collections of gift or estate tax in the future.

140 Estate of Christiansen v. Comm'r, 586 F.3d 1061, 1065-66 (8th Cir. 2009), *aff'g* 130 T.C. 1 (2008); McCord v. Comm'r, 461 F.3d 614, 632 (5th Cir. 2006), *rev'g* 120 T.C. 358 (2003); Wandry v. Comm'r, T.C. Memo. 2012-88, 16-22, 25; Hendrix v. Comm'r, T.C. Memo. 2011-133, 22; Estate of Petter v. Comm'r, T.C. Memo. 2009-280, 35, 37, 44.

It is for this reason that the GRAT technique is particularly useful. The GRAT regulations specifically permit the taxpayer to retain an annuity interest equal to the full value of the transferred property as finally determined for gift tax purposes.[141] As a result, if she undervalues the gift on her gift tax return and the IRS successfully challenges the value, the result will be an increase in her annuity payments with no gift tax liability. The formula by which the GRAT annuity is determined works the same way as a formula price adjustment clause in an ordinary sale contract of that type. The difference is that the regulations prevent the IRS from challenging its use.

The other major advantage of the GRAT is the protection it offers against investment loss. If the value of a transferred investment declines, the donee or purchasing trust bears the risk of loss. If an investment transferred to a GRAT declines in value, the investment is simply returned to the taxpayer and can be transferred by her to another GRAT. The loss protection aspect makes it desirable for taxpayers who have multiple assets to transfer each asset to a separate GRAT. By doing this, the loss assets will be returned to the taxpayer and will not depress the investment return of the appreciating assets.

There are two disadvantages to the GRAT compared to the gift and the sale. First there is mortality risk. If the taxpayer dies during the term of the GRAT, it is likely that the full value of the GRAT property, including post transfer appreciation, will be included in the taxpayer's gross estate. Second, GRAT profits can generally not be added to a trust protected from the generation-skipping transfer tax by the allocation of the taxpayer's GST exemption without diminishing the extent of the trust's protection.

If, however, the taxpayer, at the time she is creating a GRAT, has a trust in existence that is protected from the generation-skipping transfer tax, it may be possible to avoid both of these disadvantages by creating a GRAT with a remainder interest that has a small value and then selling the remainder interest to the protected trust. Arguably, the mortality risk will be removed by the fact that the taxpayer has made a transfer for full value. Similarly, the acquisition of the remainder by the protected trust should not affect the extent of its protection because it has paid full value for the interest.[142]

President Obama's advisors are aware of this technique. For the past several years, his annual revenue proposal has included a provision to reduce its utility. But this year's proposal, if enacted, would destroy

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141 Treas. Reg. § 25.2702-3(b)(1)(ii)(B).

142 It is possible that the IRS may reject these arguments, but there is no existing authority that would support rejection. In any event there is not likely to be any disadvantage to the taxpayer resulting from structuring her GRAT transactions in this way.

it. He has proposed that GRATs must last at least 10 years and may last no longer than the taxpayer's life expectancy and that the GRAT remainder have a minimum value of the greater of 25% of the value of the assets transferred to the GRAT or $500,000.[143] These changes would increase the mortality risk, make it less likely that a transfer to a GRAT could be made gift tax free, and remove the downside protection that the GRAT now provides.

For charitably inclined taxpayers, results similar to those achieved by a GRAT can be achieved through a charitable lead annuity trust (a "CLAT"). The principal difference between a GRAT and a CLAT is that the annuity, representing the current value of the asset, is paid to charity rather than to the taxpayer.

5. Intra-Family Performance of Services and Diversion of Opportunity

The current gift tax is imposed only on the transfer of property. It reaches neither the performance of services by a taxpayer nor the diversion of opportunity. A taxpayer, for example, could perform valuable services for a business or investment entity owned in part or entirely by her children's trust. Those services could result in substantial profits to the entity that it would not have earned without the taxpayer's help. Despite the fact that the taxpayer's services produced value for the trust, that value will not be subject to gift tax.

Similarly, if a taxpayer because of her position in the community or in her business or professional area is given the opportunity to make favorable investments, in many cases, she will be able to arrange for her children's trust to make the investment. Because an investment opportunity is not property, the shift will not be subject to the gift tax.

Professor Cooper's next major category covered techniques that can be used to remove existing wealth from the taxpayer's transfer tax base. There are several of them.

6. Excludable Gifts

Section 2503(b) permits a taxpayer to make gifts of up to $14,000 to unlimited numbers of individuals each year. The $14,000 amount is subject to periodic inflation adjustments and can be $28,000 for a taxpayer whose spouse splits gifts with him or her. If a taxpayer has a number of descendants, she can remove significant wealth from her transfer tax base each year. I have some clients with sufficient children, grandchildren and great grandchildren to permit them to make more than $1 million of excludable gifts each year. Gifts don't actually have to be given

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143 DEP'T OF THE TREASURY, *supra* note 116, at 198.

outright to individuals to qualify for the exemption. It is enough to make the gifts to a trust so long as each individual has a right to withdraw the gift from the trust for at least a limited period of time.[144]

7. Valuation Discounts

The estate and gift tax regulations adopted a rule that the value of property for transfer tax purposes is the price a hypothetical willing buyer would pay to a hypothetical willing seller, neither being under compulsion to buy or to sell and both having reasonable knowledge of the relevant facts.[145] Using this definition, a fractional interest in a business or investment entity or in a piece of tangible property will not have a value equal to the entire value of the entity or property multiplied by the fraction unless the fraction carries with it the right to make decisions for the whole, such as the right to make investment and distribution decisions and the right to require the sale of the whole. This is so because, in determining the value of a possible purchase of a fractional interest, a hypothetical buyer, unrelated to the seller, will not assign any value to the fact that she and the seller, acting together, could control these decisions.[146]

This valuation principal, initially resisted by the IRS but consistently upheld by the courts, makes it possible for a taxpayer to make value disappear by transferring assets to an entity and then transferring minority interests in that entity for the benefit of her intended donees.[147] The entity transfer could take the form of any one of the transfers I discussed earlier. It could be a gift, perhaps one protected by the annual gift tax exclusion, a sale, or a transfer to a GRAT. Valuation discounts of 35% - 40% for this type of gift are common. If the taxpayer has given away a sufficient portion of the entity during her life so that she is left with a minority interest at death, the valuation of her remaining interest will also be discounted for estate tax purposes.

8. Qualified Personal Residence Trusts

A qualified personal residence trust (a "QPRT") permits a taxpayer to discount, for gift tax purposes, the value of a transfer of her family residence to a trust for her children by the retained value of her right to live in it for a number of years and the retained value of her right to get

144 Crummey v. Comm'r, 397 F.2d 82, 88 (9th Cir. 1968); Cristofani v. Comm'r, 97 T.C. 74, 84-85 (1991).

145 Treas. Reg. §§ 20.2031-1(b), 25.2512-1.

146 *See* Task Force on Fed. Wealth Transfer Taxes, *supra* note 113, at 102 n.327.

147 In Rev. Rul. 93-12, 1993-1 C.B. 202, the IRS conceded that valuation discounts for fractional interests in an entity transferred to family members were allowable even though the family members together controlled the entity after the transfer.

the house back if she dies within the retained term. The QPRT is a popular planning technique for taxpayers with valuable homes and insufficient other assets to plan with. If the taxpayer outlives the term of her trust, the value of the home will be excluded from her wealth transfer tax base. The value of the initial gift of the remainder is, of course, not excluded, but the balance is. Suppose, for example, that a 50 year old taxpayer transferred her $1,000,000 home to a 20 year QPRT. She will have made a taxable gift of the value of the remainder, $559,000 if the IRS's interest rate is 1.8% at the time of the transfer. She will have removed $440,660 from her transfer tax base if she lives for 20 years, as well as all future appreciation in the value of the residence.

Many people use this fairly simple strategy, including taxpayers who, in principle, are supporters of the wealth transfer tax system. In fact, Bloomberg recently reported that former President Bill Clinton and former Secretary of State Hillary Clinton transferred their home in Chappaqua, New York to QPRTs in 2011.[148]

9. Use of Grantor Trusts

If a trust is treated as wholly owned by its grantor, it is typically referred to as a grantor trust. If a trust is a grantor trust, it pays no taxes on its income. Instead, the grantor pays all the income taxes even though the income will eventually pass (for example) to her children, not her. It is simple to arrange for a trust to be both a grantor trust and a trust that holds assets that will not be includable in the gross estate of its grantor. A trust is a grantor trust, for example, if the grantor's spouse is a trustee with dispositive powers or if a non-trustee, such as the holder of a power of appointment, can make dispositive decisions with respect to trust property. Neither of these powers is sufficient to cause the trust property to be included in the grantor's gross estate. By paying income taxes on trust income, the grantor is increasing the value of trust assets by depleting her own assets that would otherwise have been included in her gross estate.[149]

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148 Richard Rubin, *Wealthy Clintons Use Trusts to Limit Estate Tax They Back*, BLOOMBERG BUS. (June 17, 2014, 12:00 AM), http://www.bloomberg.com/news/articles/2014-06-17/wealthy-clintons-use-trusts-to-limit-estate-tax-they-back (last visited Nov. 16, 2015) ("Bill and Hillary Clinton have long supported an estate tax to prevent the U.S. from being dominated by inherited wealth. That doesn't mean they want to pay it."). *But see* Philip Bump, *The Clintons Have a Very Complicated Tax Life. Here's How to Understand It.*, WASH. POST: THE FIX (June 18, 2014), http://www.washingtonpost.com/blogs/the-fix/wp/2014/06/18/the-clintons-have-a-very-complicated-tax-life-heres-how-to-understand-it/ (last visited Nov. 16, 2015).

149 President Obama's proposal doesn't reach this aspect of grantor trust treatment because it does not discuss the income tax treatment of grantor trusts, except to the

10. Private Annuities When Annuitant Has Shorter Than Average Life Expectancy

Section 7520 of the Code requires the IRS to value annuities the terms of which are determined by the duration of an individual's or individuals' lives using tables that reflect mortality assumptions as to the population as a whole unless the measuring life can be shown to be terminally ill, meaning she has an incurable illness or other deteriorating physical condition and at least a 50% probability that she will die within one year.[150] This means that the value of an annuity the term of which is measured by the life of a 50 year old person who has only a 5 year life expectancy will be valued as if her life expectancy were that of a normal 50 year old – about 30 years. If this 50 year old taxpayer sold $1,000,000 worth of assets to her children's trusts in exchange for a lifetime annuity of $44,944 she would not have made a taxable gift because the value of the right of a 50 year old person with a normal life expectancy to receive $44,944 for life is worth $1,000,000. If she then dies within the expected 5 years, she will have removed about $775,000 from her taxable estate.

11. Lifetime Taxable Gifts

Most taxpayers are reluctant to make taxable gifts once their exemption has been used because of a reluctance to pay gift taxes. But the payment of gift taxes is actually a good means of excluding property from a taxpayer's transfer tax base. If a taxpayer lives three years after making taxable gifts, the amount she pays in gift tax will not be included in her or her spouse's transfer tax base. This has the effect of lowering the top marginal estate tax rate from 40% to 28.6%.

12. Use of Dynasty Trusts

All of the techniques I have just discussed remove value from the taxpayer's transfer tax base. With careful planning and the judicious use of her GST exemption, they can be removed from her children's and grandchildren's transfer tax base as well by the use of long-term trusts established in jurisdictions that have abolished the rule against perpetuities. Current law permits a taxpayer a GST exemption of $5,430,000. Early use of the exemption in combination with one or more of the techniques I have just discussed can result in a very substantial trust that can pass down multiple generations without any wealth transfer tax.

President Obama's revenue proposal would limit the duration of a GST exemption to 90 years. But even with that limitation, it will often

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extent that it recommends prohibiting "the grantor from engaging in a tax-free exchange of any asset held in the trust." *See* DEP'T OF THE TREASURY, *supra* note 113, at 198.

[150] Treas. Reg. § 25.7520-3(b)(2)(i), (b)(3).

be possible for property to pass to a taxpayer's great-grandchildren without being subject to an additional wealth transfer tax. For many taxpayers, most of whom will never know their great grandchildren, this will be sufficient.

The Future

It is impossible to predict the future of our transfer tax system but I do have some thoughts to share about future possibilities in light of the commonly accepted reasons for keeping the system. We'll look at the goals of the system and then examine the extent to which the system fulfills these goals. The advocates of the wealth transfer tax system generally list the following four goals:

1. Raise revenue,
2. Increase progressivity of the tax system,
3. Back-up the income tax, and
4. Break up concentrations of wealth.

Raising Revenue

In its almost 100-year history, the system has never raised significant revenue when compared to the revenue the federal government raises from other sources. The wealth transfer tax system's share of total revenues has ranged from a low of .55% in its first year of existence to a brief high of almost 10% in the 30s. For most of its life its share has been less than 2%. The last time its share hit 2% was in fiscal 1977 before the reductions made by the Tax Reform Act of 1976 had come into effect.[151] In fiscal 2013, the most recent year for which these figures are available, the federal government collected only $19.83 billion in estate and gift taxes out of total revenues of $2.8 trillion, or only .7% of the whole.[152] Given its history and more importantly its recent political past, it is unlikely that it will ever be responsible for a significant amount of federal revenue. Even if President Obama's proposals were adopted, estate and gift tax revenues would increase to only $35.5 billion, or about 1.2% of the total.

This, of course, is not a trivial amount. The question is whether the transfer tax system with all of its separate rules and its separate and truly intrusive enforcement mechanism is the appropriate source of these additional amounts. The Staff of the Joint Committee on Taxation

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[151] David Joulfaian, The Federal Estate Tax: History, Law, and Economics Table 6.1 (June 14, 2013) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579829.

[152] *See infra* Appendix, Table 2.

prepared a report on Fairness and Tax Policy[153] for the Senate's public hearing on fairness and tax policy that began in March of 2015. Table 4 in that report predicts that in 2015 the 574,000 taxpayers with incomes of $1,000,000 or more will pay 33.1% of their incomes in taxes.[154] The amount they pay will be about $602 billion. A 1% increase in average tax rates would completely replace all of the revenue earned from the wealth transfer tax system in 2013; a 2% increase would replace 2013 revenues plus the additional amount President Obama expects to earn with his proposed reforms.

Increasing Progressivity

Those who believe a tax system should be progressive generally assume that a dollar has a smaller value to a wealthy person than to a poorer one. If this is true, social welfare as a whole would be increased by a tax system that results in a redistribution of income so that on an after-tax basis taxpayers with the lowest share of total income have a higher share than they had before taxes.[155]

Although there is a debate about just how progressive our current income tax system is, it is a progressive system. Throughout the period from 1980 to 2011, the post-income tax shares of taxpayers in the bottom four quintiles of income were larger after tax than their before-tax shares. Conversely, in each of these years, the share of the top quintile of taxpayers declined on an after-tax basis.[156] Similarly the Kawani and Reynolds-Smolensky progressivity indices show a gradual increase in progressivity since 1986.[157]

How does or should the wealth transfer tax system contribute to progressivity? The estate tax can perhaps be viewed as an additional income tax, one paid at the time of death on all assets not consumed by the decedent during her lifetime.[158] Seen in this way, the estate tax has

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153 *See* Joint Comm. on Tax'n, Fairness and Tax Policy, JCX-48-15, at 1 (Feb.27, 2015), https://www.jct.gov/publications.html?func=startdown&id=4737 (last visited Nov. 16, 2015).

154 *Id.* at 20 tbl. 4.

155 This is assuming there is no additional disutility associated with the process of taking the dollar and maintaining a system that regularly does this. The current system maintains a near guarantee of an audit of every estate over $20 million. Each estate that meets this threshold can reasonably expect their family books and records to be inspected by the IRS. Even if no additional estate tax is ever due as a result of this intrusive audit, there must be some significant disutility associated with this sort of invasion of privacy for either the sake of pursuing revenue or breaking up dynastic wealth. *See* Repetti, *supra* note 49, at 830 ("economist Leon Faucher, who argued that inheritance maximizes utility because it confers benefits on the transferor and transferee.")

156 Joint Committee on Tax'n, JCX-48-15, *supra* note 153, at 12, tbl.1.

157 *Id*., at 10, fig.3.

158 Blattmachr & Gans, *supra* note 115, at 395-96.

the effect of raising the top income tax bracket from its present 43.4% (39.6% plus the 3.8% Medicaid tax) to 66.04%.[159] The opposing view would be that the solution to a lack of progressivity in the income tax is simply to fix the income tax rather than to maintain an entirely different system.

Some believe that increasing the progressivity of the income tax system would have the effect of "locking in invested capital and encouraging current consumption rather than savings."[160] The existence of the estate tax is also thought to encourage current consumption.[161] There is little empirical evidence of either effect. To the extent that higher income tax rates encourage capital lock-in, the elimination of section 1014's basis step up at death would go a long way toward resolving that issue.

Backing –Up the Income Tax System

Hank L. Gutman, former chief of staff for the Joint Committee of Taxation, in a 1983 article in the Virginia Law Review, criticized the income base of our tax system as one bearing little resemblance to what economists would describe as income.[162] Again, if the problem is a problem with the income tax, why not fix the income tax?

One of Gutman's major criticisms of the income tax base is its exclusion of gains accruing during a decedent's lifetime as a result of section 1014's basis step-up. Ironically, the political justification for maintaining the basis step-up is the existence of the estate tax. Proponents argue that it would be unfair to subject unrealized appreciation to two taxes, an income tax and an estate tax. If the wealth transfer tax system were repealed, the arguments against a basis adjustment system or even a system of capital gains at death would be much weaker. In fact, in many of the earlier repeal efforts carryover basis was an integral part of the proposal.

To the extent that the concern certain trusts and estates attorneys expressed in 2001 over the possibility that the absence of a gift tax will encourage taxpayers to make large gifts of appreciated assets to taxpayers in lower tax brackets is a real one,[163] simple provisions can be en-

159 This is the sum of the original 43.4% plus a 40% tax on the 56.6% remaining after paying the original income tax.

160 Gutman, *supra* note 129, at 1188.

161 Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 Yale L.J. 283, 295-96 (1994); Karen C. Burke & Grayson M.P. McCouch, *Turning Slogans Into Tax Policy*, 27 Va. Tax Rev. 747, 750 (2008) (unsympathetic analysis of the argument).

162 Gutman, *supra* note 129, at 1189-90.

163 *See President's Tax Relief Proposals*, *supra* note 115 (statement of Lauren Y. Detzel, Attorney, Dean Mead Egerton Bloodworth Capuano & Bozarth, P.A.).

acted to reduce the likelihood of these transfers. These provisions could include, for example, the taxation of the proceeds of a sale of gifted property by a donee within a fixed number of years after receipt of a gift as if the sale had been made by the donor. A similar provision was once applicable to gifts to trusts.[164]

Breaking-Up Large Concentration of Wealth

One of the stated purposes of the wealth transfer tax system is the destruction of concentrations of wealth.[165] Why should this be a goal of any system? Those that support the break-up of dynastic wealth as a goal assume its appeal is self-evident. The primary reason offered in support is the idea that those who control great wealth will be able to exercise undue political influence. Others concerned with this issue point out that it is "unclear what kind of equality of political power democracy requires" and that if this is a problem the better solution is to create a remedy that applies "directly to the use of money for political purposes."[166] Still others argue that some concentration of wealth in the hands of private individuals provides a necessary balance against a po-

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164 I.R.C. § 644 (repealed 1997).

165 Albeit, this occurred at historically varying exemption levels (*e.g.*, originally at $50,000, going up to $100,000 then back down to $50,000 and then down yet again to $40,000, where it remained from 1935 until 1942) and at wildly different top rates (starting at 10%, the top rate reached 77% for 36 years, from 1941 to 1977). Taxpayers understandably have a difficult time planning their financial affairs. Death tax proponents frequently justify the levy by observing that the present exemption is high and would apply to very few taxpayers. But as long as the tax exists, the levels and rates can be changed. A taxpayer who is looking to plan her retirement and the succession of a family farm or business must engage in wasteful planning in order to prepare for the different scenarios.

In addition, families have to prepare not simply to pay a tax, but also to have their family enterprise audited. The IRS has allocated substantial resources to auditing estate tax returns, and it has the discretion to set the levels at which it audits. In 2012, every estate was subject to a 15% chance of audit, estates over $5 million were audited at a 59% rate, and every single return of an estate over $10 million was audited. G. Michelle Ferreira & Jeremiah Coder, *High Probability of Estate Tax Audit Necessitates Advance Preparation*, GreenbergTraurig (Dec. 30, 2013), http://www.gtlaw.com/News-Events/Publications/Alerts/173590/High-Probability-of-Estate-Tax-Audit-Necessitates-Advance-Preparation (last visited Nov. 16, 2015); *see also* Richard A. Behrendt, *Expect An Audit: The Estate Tax Audit Rate Is Skyrocketing*, Wealth Management.com (Feb. 11, 2009), http://wealthmanagement.com/data-amp-tools/expect-audit-estate-tax-audit-rate-skyrocketing (last visited Nov. 16, 2015). Since this is now the exemption level for most couples, it would be consistent for the IRS to audit practically every single return, as they could do so with the same resources they already possess. However, if the exemption level goes back down, there is no guarantee that the IRS will not decide to continue to audit every return.

166 Thomas Nagel, *Liberal Democracy and Hereditary Inequality*, 63 Tax L. Rev. 113, 118 (2009).

tentially abusive government. Private wealth may be necessary to counter-balance incumbent elected officials who have the advantage of speaking from their offices when running for elections.[167] It also provides a source for funding a wide variety of charitable activities that are beneficial to the community at large but might not be supported by the government. Although destroying wealth concentrations is often stated to be an important goal of our wealth transfer tax system, as Beckert's charts show,[168] it has never played a very important role in Congressional decisions to enact or strengthen the system.

The identity of our nation's most wealthy has been estimated each year by *Forbes* magazine since 1982 when it publishes its annual list of the wealthiest 400 individuals. An examination of these lists through the years shows a gradual dispersal of wealth and a big turnover. In 2002, for example, *Forbes* reported that 20 years after its first 400 list was published only 58 individuals on the original list remained on the current list.[169]

The 2014 list was accompanied by what Forbes calls a "self-made score." Using this score, only 67 individuals on the current list inherited what Forbes considers a fortune, and less than half, only 164, had wealthy parents.[170] Going back to the early days of *Forbes* when it published a rich list of 30 individuals, the descendants of only one of those individuals seem to have made it to the current list, and only four of the families of those descendants made it onto *Forbes*' 2014 list of the wealthiest 185 families.[171] One of the four families is composed of the descendants of Henry Phipps, son of a Philadelphia cobbler, and An-

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167 Louis Kaplow, *On the Taxation of Private Transfers*, 63 TAX L. REV. 159, 171 (2009) (". . .private concentrations of wealth can also provide useful countervailing power against abusive government. It may be difficult to unseat entrenched incumbents without private wealth. Ownership of media outlets by various rich individuals may better enable them to resist government interference."); *see* Karl Zinsmeister, *Defending the Kochs: A History of Big Money & Social Change*, REAL CLEAR POLITICS (Mar. 13, 2015), http://www.realclearpolitics.com/articles/2015/03/13/defending_the_kochs_a_history_of_big_money__social_change_125917.html (last visited Nov. 16, 2015) ("In the end, it was a handful of major donors who refused to be silenced, backed by thousands of small givers and volunteers, who brought to fruition the most consequential public-policy reform in the history of the United States."); *see also* McCaffery, *supra* note 161, at 347 ("Private wealth can also counterbalance government power, and private investment decisions are typically more efficient than public ones.").

168 *See* BECKERT, *supra* note 41.

169 *See* William P. Barrett, *The March of the 400,* FORBES (Sept. 30, 2002, 12:00 AM), http://www.forbes.com/forbes/2002/0930/400080.html (last visited Nov. 16, 2015).

170 *See* Agustino Fontevecchia, *The New Forbes 400 Self-Made Score: From Silver Spooners to Bootstrappers,* FORBES (Oct. 2, 2014, 5:26 PM), http://www.forbes.com/sites/afontevecchia/2014/10/02/the-new-forbes-400-self-made-score-from-silver-spooners-to-boostrappers/ (last visited Nov. 16, 2015).

171 *See* Barrett, *supra* note 169.

drew Carnegie's accountant. Based on *Forbes'* studies over the past 34 years, there seems to be sufficient social mobility among the very top layer of our society. Although the estate tax may have accelerated some of this dispersal, a large part of it is attributable to the sharing of wealth among multiple generations of descendants. John D. Rockefeller, for example, has about 200 descendants,[172] only one of whom, David Rockefeller, Sr. is on the current 400 wealth list.[173]

If the destruction of dynastic family wealth is assumed to be a goal of the tax system, a periodic wealth tax would be a more appropriate method of accomplishing that. The federal government, however, is constitutionally prohibited from imposing this tax; imposition of a wealth tax by the states would have the effect of increasing the current level of interstate competition for the residence of wealthy individuals. As a result, a wealth tax seems an unlikely possibility.

It may be that the estate tax is the only practical path to wealth dispersal. But, in its current form, it can't do much to achieve this goal and is probably doing more to promote wealth concentration by encouraging the creation of long term trusts, protected from transfer tax by the allocation of a transferor's GST exemption.

The repeal movement is not going away. There are currently at least 6 bills that have been introduced in Congress this year that would repeal our wealth transfer tax system.[174]

For those who would like to see our wealth transfer tax system survive, I'll conclude by sharing an idea for a somewhat different approach that addresses what I think are the principal objections to the system, apart from objections to its complexity, and the compliance burdens it places on families and on the IRS.

The principal objection to the estate tax is a concern that it stifles economic growth by discouraging savings and removing capital from the private sector in order to pay estate taxes and that it causes hardship on the families of deceased owners of closely held businesses who have to use resources during life to plan for future estate taxes and who may ultimately be forced to sell some of their interests in the business or

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172 *See* Carl O'Donnell, *The Rockefellers: The Legacy of History's Richest Man*, FORBES (July 11, 2014, 11:52 AM), http://www.forbes.com/sites/carlodonnell/2014/07/11/the-rockefellers-the-legacy-of-historys-richest-man/ (last visited Nov. 16, 2015).

173 *See #211 David Rockefeller, Sr.,* FORBES, http://www.forbes.com/profile/david-rockefeller-sr/ (last visited Nov. 16, 2015).

174 The FairTax [sic] Act of 2015, H.R. 25, 114th Cong. § 103 (2015); The Fair Tax Act of 2015, S. 155, 114th Cong. § 103 (2015); Death Tax Repeal Act, H.R. 173, 114th Cong. § 2 (2015); Farmers Against Crippling Taxes Act, H.R. 186, 114th Cong. § 2 (2015); Permanently Repeal the Estate Tax Act of 2015, H.R. 725, 114th Cong. § 2 (2015); Death Tax Repeal Act of 2015, H.R. 1105, 114th Cong. § 2 (2015). (Since the day this speech was delivered, H.R. 1105 was passed by the House of Representatives on April 16, 2015).

assets of the business to pay estate tax obligations.[175] Death, after all, is not a liquidity event.

Removing capital from the private sector was a concern of that first economist of capitalism, Adam Smith. He characterized these types of taxes as "more or less unthrifty taxes that increase the revenue of the sovereign, which seldom maintains any but unproductive labourers at the expense of the capital of the people, which maintains none but productive."[176]

My idea is not entirely original. It borrows from some earlier income tax proposals such as the USA Tax Plan suggested by Senators Nunn and Domenici in 1995[177] and the Modern Optimal Savings Tax suggested by David Cay Johnson at the Heckerling Institute on Estate Planning in 2015.[178] It imports these ideas into the estate tax and then combines them with elements from section 2056A's qualified domestic trust. The idea is simple to describe but perhaps complex in actual application.

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175 Of course, more than interests in family businesses might need to be liquidated in order to pay an estate tax. Family secrets, and private videos such as those that might comprise a component of the right of publicity, are also fair game for the estate tax under I.R.C. § 2033. Estate of Andrews v. United States, 850 F. Supp. 1279, 1288-89 (E.D. Va. 1994). This could mean that the IRS has the right to review the personal files of the decedent to determine the correct valuation of the right. *See* Ray D. Madoff, *Taxing Personhood: Estate Taxes and The Compelled Commodification Of Identity*, 17 VA. TAX REV. 759, 798 (1998); *see also* Paul Caron, *Estate Planning Implications of the Right of Publicity*, 68 TAX NOTES 95, 97 (1995) ("The cash-strapped heirs would be hard pressed in this situation to respect the decedent's privacy wishes that the right of publicity is designed to protect. Proper planning for the publicity-shy celebrity may be to impose restrictions on the right of publicity to accord with his privacy interests without subjecting the heirs to an estate tax burden."); Mitchell M. Gans, Bridget J. Crawford & Jonathan G. Blattmachr, *Postmortem Rights of Publicity: The Federal Estate Tax Consequences of New State-Law Property Rights*, 117 YALE L.J. POCKET PART 203, 203-05 (2008) (noting that the first *Playboy* centerfold was a nude of Marilyn Monroe the posthumous publication of which her heir was unable to enjoin. Had her heir had the right, the value of it would be included in the estate, regardless of her desire not to exercise it; and suggesting that statutes be rewritten to "limit a decedent's ability to control the disposition of any postmortem rights of publicity"); David Horton, *Indescendibility*, 102 CALIF. L. REV. 543, 595-96 (2014) ("their estate tax liability may be so large that their personal representative will need to sell their publicity rights to pay it - resulting in the very exploitation of their image that they assiduously avoided while alive.").

176 SMITH, *supra* note 1, at 814.

177 USA Tax Act of 1995, S. 722, 104th Cong. § 50 (1995). The "USA" stands for "unlimited savings allowance."

178 David Cay Johnston *A Transfer Tax for the 21st Century Economy*, 49 U. MIAMI HECKERLING INST. ON EST. PLAN. ch. 11 (Lloyd Leva Plaine Distinguished Lecture, 2015); *see also* David Cay Johnston, *An Estate and Gift Tax for the 21st Century Economy*, 146 TAX NOTES 547, 547-48 (Jan. 26, 2015).

Under this proposal, a decedent's executor would have the option of deferring the estate tax on selected assets provided they were placed in a qualified trust. I'll refer to this type of trust as a "Capital Preservation Trust." Because the principal object of the proposal is to prevent the estate tax from discouraging and interfering with the formation and preservation of capital stock and the transmission of family businesses to the next generation, the assets permitted to be placed in a Capital Preservation Trust (a "CPT") would be investment and business assets. Personal assets, such as art and antiques and the like and real estate used for personal purposes, would not be permitted investments of a CPT. Assets placed in a CPT would not be subject to the estate tax until they were removed from the trust. The removed assets would be subject to estate tax at the rate they would have been subject to if they had not been placed in a CPT at the original decedent's death. Income tax would be imposed on a CPT in a manner similar to the tax currently imposed on an electing small business trust (an "ESBT") at the highest marginal rate bracket[179] except that there would be no tax on unrealized appreciation at the death of the decedent unless, as a separate matter, the basis adjustment rules of section 1014 are repealed. Distributions to beneficiaries would not be subject to income tax but would be subject to the deferred estate tax.

Presumably distributions would not occur until beneficiaries are ready to convert investment assets to personal use. The conversion would generally cause a liquidity event. At that point imposing an estate tax would no longer interfere with the nation's stock of investment capital. To protect the government's interests in ultimately receiving the payment of estate taxes, a CPT would have to have either an institutional trustee with the power to withhold taxes from distributions or would have to provide some kind of security to the government. In order to satisfy at least partially the proponents of the wealth transfer tax system who advocate it as a means of preventing dynasties from exerting undue political influence, safeguards could be put in place to prevent assets held in a CPT to be used for lobbying or other political purposes.

There are two principal distinctions between this approach and the type of deferral now permitted under section 6166. First, the scope of the deferral is much broader. It would not be limited to closely held business interests. It would apply to all kinds of investment assets that are productively deployed. Second, the risk of future investment loss as well as possible future investment gain would be shared between the government and the decedent's beneficiaries.

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[179] I.R.C. § 641(c)(1)-(2).

The fact that this proposal would permit the families of decedents to keep their investments in the capital market should remove one of the principal objections to the wealth transfer tax system. And, if the investments or businesses prosper, the government would share in the family's prosperity.[180]

Conclusion

Whether this idea would appeal to either the opponents or the proponents of the wealth transfer tax system is hard to predict. I'm just dropping another idea into the hopper of potential solutions to compete with repeal, capital gains at death and a possible exchange of the estate tax for an inheritance tax.[181]

What I can say is that debate over the future of the transfer tax system is likely to rage on for the rest of my professional career and the careers of a good many of you in the audience. The debate is probably good for us on a number of levels. It gives us plenty of interesting ideas to debate and talk about. And the legislative changes that seem to appear with increasing frequency prevent our clients from letting their estate plans grow stale.

180 The CPT would also help ameliorate the problems associated with taxing the descendible right of publicity. *See* Madoff, *supra* note 175, at 798, 810. The right of publicity could remain in the CPT unused if the decedent or heirs did not wish to exploit the family memories and secrets. If, however, the family later decided to sell them, the government would then get its due.

181 Lily L. Batchelder, *What Should Society Expect from Heirs? The Case for a Comprehensive Inheritance Tax*, 63 Tax L. Rev. 1, 2-3, 87 (2009).

Appendix Table 1

[1] Year	[2] # Deaths	[3] # Returns*	[4] % Returns of Deaths	[5] Exemption Amount	[5a] Inflation Adjusted to 2014 $	[6] Top Estate Tax Bracket	[7] At Taxable Estate of	[7a] Inflation Adjusted to 2014 $	[8] Inflation Adjusted to 2014 $
1916	1,001,921	2,365	0.24%	$ 50,000	$ 1,085,945	10%	$ 5,000,000	$ 108,594,500	21.719
1920	1,142,558	12,483	1.09%	$ 50,000	$ 593,400	25%	$ 10,000,000	$ 118,680,000	11.868
1930	1,343,356	8,139	0.61%	$ 100,000	$ 1,417,580	20%	$ 10,000,000	$ 141,758,000	14.1758
1940	1,417,269	19,044	1.34%	$ 40,000	$ 676,360	70%	$ 50,000,000	$ 845,450,000	16.909
1950	1,452,454	31,896	2.20%	$ 60,000	$ 589,380	77%	$ 10,000,000	$ 98,230,000	9.823
1960	1,711,982	69,405	4.05%	$ 60,000	$ 479,880	77%	$ 10,000,000	$ 79,980,000	7.998
1970	1,921,031	149,432	7.78%	$ 60,000	$ 366,060	77%	$ 10,000,000	$ 61,010,000	6.101
1980	1,989,841	145,617	7.32%	$ 161,563	$ 464,170	70%	$ 5,000,000	$ 14,365,000	2.873
1990	2,148,463	63,988	2.98%	$ 600,000	$ 1,086,600	55%	$ 3,000,000	$ 5,433,000	1.811
2000	2,403,351	121,715	5.06%	$ 675,000	$ 928,125	55%	$ 3,000,000	$ 4,125,000	1.375
2001	2,416,425	120,576	4.99%	$ 675,000	$ 902,475	55%	$ 3,000,000	$ 4,011,000	1.337
2002	2,443,387	92,679	3.79%	$ 1,000,000	$ 1,316,000	49%	$ 3,000,000	$ 3,948,000	1.316
2003	2,448,288	73,340	3.00%	$ 1,000,000	$ 1,287,000	49%	$ 3,000,000	$ 3,861,000	1.287
2004	2,397,615	65,703	2.74%	$ 1,500,000	$ 1,879,500	48%	$ 3,000,000	$ 3,759,000	1.253
2005	2,448,017	58,000	2.37%	$ 1,500,000	$ 1,818,000	47%	$ 3,000,000	$ 3,636,000	1.212
2006	2,426,264	49,924	2.06%	$ 2,000,000	$ 2,348,000	46%	$ 3,000,000	$ 3,522,000	1.174
2007	2,423,712	46,251	1.91%	$ 2,000,000	$ 2,284,000	45%	$ 3,000,000	$ 3,426,000	1.142
2008	2,471,984	47,320	1.91%	$ 2,000,000	$ 2,198,000	45%	$ 3,000,000	$ 3,297,000	1.099
2009	2,437,163	28,780	1.18%	$ 3,500,000	$ 3,860,500	45%	$ 3,500,000	$ 3,860,500	1.103
2010	2,468,435	11,128	0.45%	repealed	repealed	repealed	repealed	repealed	1.086
2011	2,515,458	26,859	1.07%	$ 5,000,000	$ 5,260,000	35%	$ 5,000,000	$ 5,260,000	1.052

Sources:

Col. 2 Nat'l Vital Stat. Rep., *Number of Deaths, Death Rates, and Age-Adjusted Death Rates, by Race and Sex: United States 1940, 1950, 1960, 1970, and 1980-2013* (p. 4, Tab. 1), http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_02.pdf (last visited Nov. 16, 2015); U.S. Dep't of Comm., *Mortality Statistics 1931* (p. 5, Tab. D), http://www.cdc.gov/nchs/data/vsushistorical/mortstatsh_1931.pdf (last visited Nov. 16, 2015).

Cols. 3-6 David Joulfaian, *The Federal Estate Tax: History, Law and Economics* (p. 2-6, Tab. 3.1; p. 4-4, Tab. 4.1) http://news.heartland.org/sites/default/files/joulfaian_ssrn-id1579829.pdf (last visited Nov. 16, 2015). For the years 1916-1930, Kathy Medve, *Estate Tax Returns Revisited, 1916-1931* (p. 68, Tab. 1), http://www.irs.gov/pub/irs-soi/16-31estxrtre.pdf (last visited Nov. 16, 2015).

Col. 7 Darien B. Jacobson, Brian G. Raub & Barry W. Johnson, The Estate Tax: Ninety Years and Counting (p. 122, Fig. D), https://www.irs.gov/pub/irs-soi/ninetyestate.pdf (last visited Nov. 16, 2015).

TABLE 2. COLLECTIONS AND REFUNDS, BY TYPE OF TAX, FISCAL YEARS 2012 AND 2013

Type of tax	Gross collections [1]			Refunds [1, 2]	Net collections [1]	
	2012	2013	Percentage of 2013 total	2013	2013	Percentage of 2013 total
	(1)	(2)	(3)	(4)	(5)	(6)
United States, total	**2,524,320,134**	**2,855,059,420**	**100.0**	**364,353,723**	**2,490,705,698**	**100.0**
Business income taxes	**281,461,580**	**311,993,954**	**10.9**	**41,569,223**	**270,424,731**	**10.9**
Corporation	280,965,136	311,432,736	10.9	n.a.	n.a.	n.a.
Tax-exempt organization unrelated business income tax	496,445	561,218	[3]	n.a.	n.a.	n.a.
Individual and estate and trust income taxes [4, 5]	**1,387,836,515**	**1,564,354,494**	**54.8**	**314,223,682**	**1,250,130,812**	**50.2**
Individual income tax withheld	1,038,019,224	1,123,453,881	39.3	n.a.	n.a.	n.a.
Individual income tax payments [6]	333,383,066	416,204,540	14.6	n.a.	n.a.	n.a.
Estate and trust income tax	16,434,225	24,696,073	0.9	1,448,544	23,247,529	0.9
Employment taxes	**784,396,853**	**897,847,151**	**31.4**	**6,375,725**	**891,471,426**	**35.8**
Old-Age, Survivors, Disability, and Hospital Insurance (OASDHI), total [5]	772,464,824	884,440,425	31.0	6,156,524	878,283,901	35.3
Federal Insurance Contributions Act (FICA)	728,688,235	830,291,842	29.1	n.a.	n.a.	n.a.
Self-Employment Insurance Contributions Act (SECA)	43,776,589	54,148,583	1.9	n.a.	n.a.	n.a.
Unemployment insurance	7,158,984	7,895,992	0.3	146,745	7,749,247	0.3
Railroad retirement	4,773,045	5,510,733	0.2	72,456	5,438,277	0.2
Estate and gift taxes	**14,450,249**	**19,830,148**	**0.7**	**1,047,329**	**18,782,819**	**0.8**
Estate	12,340,655	14,051,771	0.5	963,243	13,088,528	0.5
Gift [7]	2,109,594	5,778,377	0.2	84,086	5,694,291	0.2
Excise taxes	**56,174,937**	**61,033,674**	**2.1**	**1,137,764**	**59,895,910**	**2.4**

n.a.—Not available.

[1] Excludes credits to taxpayer accounts, as well as excise taxes paid to the U.S. Customs and Border Protection and the Alcohol and Tobacco Tax and Trade Bureau.

[2] Includes overpayment refunds, refunds resulting from examination activity, refundable tax credits, and other refunds required by law. Also includes $2.8 billion in interest, of which $0.8 billion was paid to corporations and $2.0 billion was paid to all others (related to individual, employment, estate, gift and excise tax returns).

[3] Less than 0.05 percent.

[4] Collections include Presidential Election Campaign Fund contributions of $37.3 million for Fiscal Year 2012. Beginning with Fiscal Year 2013, Presidential Election Campaign Fund contributions are no longer included in Internal Revenue Service collections, but instead are reported separately in the U.S. Treasury Department collections.

[5] Collections of withheld individual income tax are not reported by taxpayers separately from Old-Age, Survivors, Disability, and Hospital Insurance (OASDHI) taxes on salaries and wages (under the Federal Insurance Contributions Act or FICA) and on self-employment income (under the Self-Employment Insurance Contributions Act or SECA). The OASDHI tax collections and refunds shown in this table are based on estimates made by the Secretary of the Treasury pursuant to the provisions of Section 201 (a) of the Social Security Act as amended and include all OASDHI taxes. Amounts shown for individual income tax withheld and individual income tax payments were derived by subtracting the FICA and SECA tax estimates from total individual income tax withheld and individual income tax payments. Refund estimates, and, therefore, net collection estimates, were not made for the components of income and OASDHI taxes.

[6] Includes collections of estimated income tax and payments included with individual income tax return filings.

[7] The American Taxpayer Relief Act (ATRA) of 2012 extended the $5 million gift tax exemption level that was established under the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010. The ATRA extended portability rules related to the passing of an exemption amount from a decedent to a surviving spouse and indexed the exemption amount to inflation. These tax law changes may have encouraged increased gifting in Fiscal Year 2012, which is reflected in the Fiscal Year 2013 gift tax collections.

NOTES:

Detail may not add to totals because of rounding.

Collection and refund data may not be comparable for a given fiscal year because payments made in prior years may be refunded in the current fiscal year.

Partnership and S corporation data are not shown in this table since these entities generally do not have a tax liability. Instead, they pass any profits or losses to the underlying owners, who include these profits or losses on their income tax returns.

SOURCE: Chief Fin. Officer, Fin. Mgmt., https://www.irs.gov/uac/SOI-Tax-Stats-Collections-and-Refunds,-by-Type-of-Tax-IRS-Data-Book-Table-1 (last visited Nov. 16, 2015).