Let's Protect Our Economy and Democracy from Paris Hilton: The Case for Keeping the Estate Tax

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I. INTRODUCTION

Repeal of the federal estate tax has recently dominated the tax news.[1] When President Bush signed the bill temporarily repealing the estate tax[2] or "death tax" as dubbed by the proponents of repeal, he did so with great fanfare and he invited a number of the proponents of estate tax repeal to the White House for the signing ceremony.[3] Both the proponents and the opponents saw positive aspects of the new law. This was one of the few occasions in politics where both victors and losers could legitimately claim victory beyond the usual spin that we normally see in politics.[4] Federal estate tax repeal has been heralded as a victory for the Republicans, the Democrats, the American people, and the President.[5]

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1. *See, e.g.*, Jonathan Weisman, *House Passes Permanent Estate Tax Repeal,* WASH. POST, Apr. 14, 2005, at A4; Editorial*, Paris Hiltonomics*, WALL ST. J., Apr. 14, 2005, at A18; Leonard E. Burman, William G. Gale & Jeffrey Rohaly, *Options to Reform the Estate Tax*, 2005 TNT 61-17, Mar. 1, 2005.

The Federal estate tax is a tax imposed on the estates of decedents. It is generally imposed on the fair market value of the assets owned by the decedent at death and thus, has been accused to be a form of double taxation. As we will see in this paper, the Republican Congress has taken aim at this tax in two ways, (1) by increasing the exemption amounts and (2) by reducing the tax rates on estates. Because only the wealthiest Americans are subject to the estate tax, repeal of this tax has generated great debate over the propriety of giving tax breaks to millionaires and even billionaires.

2. *See* The Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (June 7, 2001) ("EGTRRA"). In addition to temporarily repealing the estate tax, this act also repealed the generation skipping tax. We will discuss later why this repeal is scheduled to be short lived.

3. Among the dignitaries attending were Vice-President Dick Cheney, Secretary of the Treasury O'Neil, and members of the House and Senate.

4. Political spinning generally refers to explanations offered by hired spokespersons highlighting the positive side of a political argument over another. For example, after the 2000 presidential election, Al Gore and his supporters highlighted and continue to highlight their win of the popular vote. *See* http://www.runalgore.com (last visited on Apr. 5, 2006).

5. This was a proclamation by Iowa Senator Charles Grassley. *See* MICHALE J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 206 (Princeton

The proponents of repeal could claim that they finally passed a law that actually repealed the estate tax—albeit for only one year, 2010,[6] with a phoenix like reappearance in 2011.[7] This was a great victory for them because they had accomplished what was unthinkable just a few short years ago.[8] They had accomplished something that proponents of repeal had failed to do even when they controlled the White House and both houses of Congress.[9]

The opponents of repeal were able to heave a sigh of relief because they were able to stop this unstoppable freight train. With the estate tax making a reappearance in 2011, they breathed life into their positions and lived on to fight another day. The opponents of repeal could also regroup and prepare for the onslaught that is sure to come.[10] Following immediate passage of the estate tax repeal, it looked like they were losing the battle. However, due to large deficits caused in part by the tax cuts pushed by the Bush White House,[11] the opponents of repeal are in a stronger position. The economic devastation caused by hurricane Katrina and the 2005 hurricane season also helped their cause by focusing attention on hurricane relief and causing the deficit to grow.[12] At least one commentator thinks that the estate tax is more like a zombie—it just will not go away.[13]

It is fair to say that the proponents of repeal have not mounted a sound economic argument for repeal and have relied instead on emotional arguments.

University Press 2005). Mr. Graetz and Mr. Shapiro only partially agree with the Senator's assessment. They believe that President George W. Bush won big, but that democrats like Charles Rangel of New York lost. *Id.* at 216-17. The focus of the book was to outline the political battle that made temporary repeal of the estate tax possible. The authors also attempt to sound the alarm against a bigger battle yet to come—the fight over tax progressivity. This issue will be addressed later.

6. *See* § 901(b) of EGTRRA, I.R.C. § 2011. The section provides that the Internal Revenue Code of 1986 shall be applied and administered to estates, gifts, and transfers as if the provisions and amendments of the section had never been enacted.

7. *See* § 901(a)(2) of EGTRRA, I.R.C. § 2011, which states that the estate tax comes back in 2011. As we will see later, this is to comply with Congressional budget rules.

8. In their book, Graetz and Shapiro stated that: "[a]s recently as 1997, the leaders of the National Federation of Independent Businesses (NFIB)—the single most important coalition member [of the repeal movement] believed repeal unrealistic." GRAETZ & SHAPIRO, *supra* note 5, at 13.

9. *Id.* at 12.

10. *See* WILLIAM H. GATES SR. & CHUCK COLLINS, WEALTH AND OUR COMMONWEALTH—WHY AMERICA SHOULD TAX ACCUMULATED FORTUNES, at 104, (Beacon Press 2002).

11. *See* Ruth Carlitz & Richard Kogan, *CBO Data Show Tax Cuts Have Played Much Larger Role Than Domestic Spending Increases in Fueling the Deficit* (Jan. 31, 2005), http://www.cbpp.org/1-25-05bud.pdf; *see also* Edmund L. Andrews, *Deficit Study Disputes Role of Economy*, N.Y. TIMES, Mar. 16, 2004, at A18.

12. *See* Dustin Stamper, *GOP Hoping For Resurrection Of Estate Tax Reform In 2006*, 2005 TNT 220-2 (Nov. 16, 2005); *see also* Ruth Carlitz, *Deficits Frame Coming Debate On Estate Tax* (July 8, 2005), http://www.cbpp.org/7-8-05tax.pdf.

13. *See* Raymond J. Keating, *Tax Cut Permanency: The Death Tax*, Small Business & Entrepreneurship Council (Apr. 7, 2005), http://www.sbecouncil.org/content/display.cfm?ID=89.

Their arguments, however, have been politically successful. The question we face is whether we should make tax policy based on emotions or based solely on strict economic analysis. In this paper, the author will argue for the latter.

This article will address the potential dangers of permanently repealing the estate tax and will dissect the arguments put forth by both opponents and proponents of repeal. Part II will outline the political climate that made temporary repeal of the estate tax possible. Part III will provide a brief history of the estate tax. Part IV will address, in depth, the politics of estate tax repeal and what repeal proponents are really after—progressivity (the notion that the higher income earners should pay more in taxes). Part V will discuss the potential economic impact of estate tax repeal on our economy, our democratic system, and race relations. Part VI will dissect, in detail, the arguments for repeal and expose the weaknesses of these arguments. Part VII will present the arguments against repeal and discuss whether they still make sense today. Part VIII will address the prospect of permanent repeal and discuss the current political climate regarding repeal. Finally, Part IX will conclude that the estate tax should not be repealed because it is the only tax that attempts to prevent uncontrolled wealth accumulation, and the potential damage of permanent repeal to our economy and our democratic system are not worth the gamble.

II. THE POLITICAL PUZZLE OF ESTATE TAX REPEAL

The amount of political debate that the estate tax repeal has attracted is somewhat puzzling. After all, this is a tax that is only levied on the wealthiest Americans. Only 1-2% of Americans would ever be subject to the estate tax.[14] Yet, there appears to be a groundswell against this tax. This can be partly attributed to the political acumen of the repeal proponents[15] who were politically masterful. Their cause was also tremendously helped by dubbing the estate tax, the "death tax."[16] Such a nexus between estate taxes and death

14. GRAETZ & SHAPIRO, *supra* note 5, at 3. As we will see later, the fact that this small number of taxpayers will ever be subject to the estate tax has been used by both proponents and opponents of repeal. In his veto message to the repeal of estate tax bill passed by Congress during his presidency, President Clinton, on August 31, 2000, remarked that repeal would benefit only 2% of all taxpayers and that more than half of the benefits of repeal would go to one-tenth of one percent of families. *See* 36 WKLY. COMP. PRES. DOC., at 1986 (Aug. 31, 2000). According to President Clinton, the estate tax should be kept because it fell on a small segment of the population. Proponents of estate tax repeal took the opposite view and argued that it should be eliminated because the amount of taxes raised was too low.

15. *See* GRAETZ & SHAPIRO, *supra* note 5, at 10. The authors expressed political admiration for the repeal opponents who "bided their time during the 1990s, winning votes and support wherever they could, patiently awaiting their next opportunity." *Id.*

16. *Id.* at 14. This was an appeal to emotions because death is a subject everyone can relate to and will face at one time or another. Additionally, death is a time when, according to Christian and other religious beliefs, you meet your maker and the ultimate decision about your soul is made. This is really an

easily taps emotions. To draw the parallel between death and the estate tax, many Republican candidates were encouraged to hold press conferences in funeral homes.[17] It is doubtful that the average American was concerned about funeral processions of the wealthy being disturbed by the IRS. Even though the rich pay large amounts of taxes, the average American shares Leona Hemsley's belief that "taxes are for the little people."[18] Therefore, it is counterintuitive to think that the average American would favor a tax cut for the rich. The average American is concerned that she might somehow become subject to the estate tax because she believes she is far wealthier than she is.[19] This reflects the optimism of American society and this is probably a good factor for the economy, as it leads people to work harder and to take more chances because they believe they can actually become rich.[20] On the other hand, this economic optimism causes the average American to underestimate the levels of inequality in this country and to overestimate their chances of moving up the economic ladder.[21]

Economic aristocracies are instinctively rejected by the American psyche, yet the average American does not understand that wealth concentrations and the protection of such wealth concentrations will lead to economic

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inconvenient time for the IRS to show up and collect its dreaded taxes. As we will see later, this is a powerful emotional argument. The counter argument is that tax policy should be made strictly on economic analysis.

17. GATES & COLLINS, *supra* note 10, at 58.

18. This quote is attributed to Leona Hemsley, a very wealthy individual, as reported by her former housekeeper. Apparently, the housekeeper was conversing with Mrs. Hemsley and stated that Mrs. Hemsley must be paying lots of taxes. Mrs. Hemsley apparently replied: "We don't pay taxes. Only the little people pay taxes." Robert Andrews, Mary Biggs & Michael Seidel, THE COLUMBIA WORLD OF QUOTATIONS (Columbia University Press 1996), *available at* http://www.bartleby.com/66/43/27743.html.

19. This is partly because a larger percentage of Americans own stock investment in their retirement portfolios. The number has been reported to be more than half of Americans or 70% of the voting public. GRAETZ & SHAPIRO, *supra* note 5, at 8. This creates a changed view of wealth. According to a CNN poll conducted in 2000, 39% of Americans believe they are in the top 1% of wealth or will be there soon. GATES & COLLINS, *supra* note 10, at 119.

20. A warning about statements on what impacts the economy positively or negatively: As the novice student of economics understands, our current economy is too large and too complex to make infallible predictions about the impact of tax cuts or any other factors on the economy. GRAETZ & SHAPIRO, *supra* note 5, at 227-28.

21. *See* GATES & COLLINS, *supra* note 10, at 119. What drives this American economic optimism is the belief that hard work eventually pays off. To the average American, it is no accident that the richest person in the land, Bill Gates, is a self-made man. Prior to his death, Sam Walton, founder of Wal-Mart, was probably richer than Bill Gates, and was also a self-made man. Americans love Sam's story from rags to riches because, after all, this is what we are all about--rewarding hard work. This explains, in part, why the average American does not believe in the notion of economic inequality being rampant. The average American believes that although in the United States the playing field is not perfectly leveled, it is more leveled than in a lot of other countries. The average American also believes that this level playing field causes our economic optimism which, in turn, is the cause of our economic success.

aristocracies. Part of the reason why we fail to understand the danger of wealth concentrations is our own economic success. Our economy remains strong when other economies, such as Japan's, have stalled.[22] In light of this great economic success, arguing that there are people who are getting too rich falls on deaf ears. In the 1930s, President Franklin Deleanor Roosevelt was able to make the case against great concentrations of wealth because Americans were out of work and were in dire economic conditions. Hence, a strong, articulate voice forcefully putting the blame on the richest of the rich made sense to them. Today, F.D.R.'s voice would be lost in the wilderness.

Closely connected with this notion of economic optimism is the natural sense of responsibility that we normally feel toward our offspring and family members. That sense of responsibility is so powerful that it goes beyond the grave.[23] If we want to take care of our families while we are alive, it is a very easy step to desire to take care of those who survive us. The proponents of estate repeal were able to tap into this feeling by claiming that enough was enough and that the government's taxation powers ought to end at death's door. This is a powerful emotional argument and it elevated the pro-repeal argument to a moral cause.[24] The opponents of repeal would have been more successful if they had taken the focus away from the death tax argument and asked the public whether they really wanted to give Paris Hilton a tax break.[25] The opponents of repeal should have dubbed repeal of the estate tax, the "Paris Hilton" tax cut.[26] Had they done this, the opponents of repeal would have forced a debate about equality of opportunity and the American dream.[27] The opponents of repeal should have focused on the evils of wealth accumulation which, over time, will lead to economic inefficiency and even an undemocratic system.[28] They should have focused on the disservice that is done to children

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22. *See Japan Economy Slides to Recession*, BBC NEWS, Feb. 16, 2005, at http://news.bbc.co.uk/2/hi/business/4269421.stm.

23. *See* Barbara A. Hauser, *Death Duties and Immortality: Why Civilization Needs Inheritances*, 34 REAL PROP. PROB. & TR. J. 363, 380 (Summer 1999).

24. *See* GRAETZ & SHAPIRO, *supra* note 5, at 255.

25. *Id.* at 256.

26. *See* E.J. Dionne Jr., Editorial, *The Paris Hilton Tax Cut*, WASH. POST, Apr. 12, 2005, at A21. In the article, the author stated that only the truly wealthy benefits from estate tax repeal. Prior to writing this article, I once asked my 15-year old daughter and 16-year old niece who was Paris Hilton. They both rolled their eyes and explained to me that she came from a very rich family and was famous for being famous. I did not quite understand how someone could be famous for being famous, but I soon understood that they meant that she had no talent and no apparent skills except for being pretty and rich. Andrew Carnegie would have been proud of my daughter's and niece's disdain for such ill-gotten fame.

27. *Id.*

28. *See* KEVIN P. PHILLIPS, WEALTH AND DEMOCRACY: THE POLITICS OF THE AMERICAN RICH 405 (Broadway Books 2002).

when great wealth is left to them.[29] As Andrew Carnegie clearly saw, it may be devastating to leave large sums of money to heirs who have not earned them. These sorts of bequests generally do not create an environment where talent is nurtured. In other words, inheriting a few million dollars may actually be a hindrance to developing a strong work ethic. Surely, there are exceptions to this rule.[30] But the danger goes beyond just creating lazy heirs; left unchecked, accumulation of wealth will lead to economic decline and even the destruction of our democratic system.

Consequently, unchecked accumulation of wealth should be taken much more seriously in this country. Many Latin American countries and other countries that have suffered stagnated economies and impossible social problems for years have one thing in common—a great disparity of wealth.[31] The United States seems to be following their lead in widening its wealth and income disparity.[32] Our economy and democratic systems are very strong, but they are not infallible. "We can [either] have a democratic society or . . . great concentrate[ion of] wealth, ... [but] [w]e cannot have both.[33] Repealing the estate tax permanently will certainly lead to a greater concentration of wealth, and ultimately a weaker democratic system because great concentration of wealth has a tendency to decrease democratic opportunities.

To illustrate the point, it was once suggested by a very wealthy individual that individual voting power should parallel the amount of taxes one pays.[34] This is a shocking proposition that would be rejected outright by the overwhelming majority of Americans. Unfortunately, current facts reveal that this is already indirectly taking place in the United States through the power of lobbying. Today, in America, only the wealthy have the means to pay expensive lobbyists. This explains why the estate tax, a tax that only impacts

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29. Andrew Carnegie was a staunch proponent of the estate tax and opposed leaving vast amounts of money to one's heirs. He believed that "each generation should 'have to start anew with equal opportunities. Their struggle to achieve would, generation after generation, bring the best and the brightest to the top.'" GATES & COLLINS, *supra* note 10, at 38-39 (quoting Andrew Carnegie). *See* Mary R. Wampler, *Repealing The Federal Estate Tax: Death to the Death Tax, Or Will Reform Save The Day?*, 25 SETON HALL LEGIS. J., 525, 527 (2001).

30. Donald Trump is a famous exception to this rule. Apparently, he inherited valuable real estate from his father, but was able to increase the value of his inheritance through hard work and wise investments.

31. The common example that social scientists cite for this proposition is usually Brazil, a country of enormous natural resources rivaling the United States, but saddled by a persistent stagnant economy partly due to an enormous inequality of wealth.

32. *See* Isaac Shapiro, *New IRS Data Indicate Rising Income Inequality, CBPP Says,* 2005 TNT 200-18 (Oct. 18, 2005); *see also* EDWARD N. WOLFF, TOP HEAVY: A STUDY OF THE INCREASING INEQUALITY OF WEALTH IN AMERICA 1-2 (The Twentieth Century Fund Press 1995).

33. PHILLIPS, s*upra* note 28, at 418 (quoting future Supreme Court Justice Louis Brandeis).

34. *Id*. at 419-20. This was a proposal made by Texas billionaire H.L. Hunt.

the wealthiest of the wealthy,[35] is in danger of being permanently repealed at a cost of over a trillion dollars over ten years.[36] If the proponents of repeal ultimately lose the battle and the estate tax survives, the only potential harm is that a few millionaire heirs would receive a few millions less from their inheritances. Perhaps this would lead them to work harder to recoup these few millions, like Andrew Carnegie would have wanted them to,[37] or they could move to Bermuda to nurse their wounds.[38] If they win the battle, Paris Hilton gets to pick the next President. Some, on the other hand, dismiss these concerns and believe that, due to the cyclical nature of both market and politics appropriate balances will be maintained.[39]

III. HISTORY OF THE ESTATE TAX

Taxation upon death is not a modern invention. Arguably, a form of estate taxation has existed as far back as ancient Egypt.[40] Land transferred upon death was subject to a ten percent tax.[41] This tax was based on the theory "that 'full title rested only in the ruler,' and that the heirs had to pay a redemption fee."[42] Similarly, the Greeks and Romans also imposed taxation upon death. The Romans taxed the property received, not the property transferred; hence, it was an inheritance tax.[43] Throughout history, death taxes have been imposed in different forms and the Europeans brought this idea with them to America.[44]

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35. According to a recent report, this year's higher exemption means that only 6,343 estates or 0.27% of estates will face estate taxes this year. *See* Kent Hoover, *Higher Exemption Means 0.27% of Estates Face Tax This Year* (Jan. 30, 2006), at www.buffalo.bizjournals.com. (last visited on Apr. 5, 2006).

36. *See The Estate Tax: Myths and Realities*, CTR. ON BUDGET & POLICY PRIORITIES, at http://www.cbpp.org/estatetaxmyths.pdf (revised on June. 13, 2006). More conservative estimates by the bi-partisan joint tax committee on taxation put the loss of revenues in the $662.2 billion range for the first ten years and over 800 billion for the second ten years. *See* GATES & COLLINS, *supra* note 10, at 99.

37. GATES & COLLINS, *supra* note 10, at 39.

38. *See* David Ignatius, Op-Ed, *Smash-Mouth Litigation*, WASH. POST, Nov. 24, 1999, at A23. Upon his father's death (the famous football team owner Jack Kent Cooke), John Kent Cooke was unable to put a winning bid for the Washington Redskins team, the football team owned by his father. Instead, the estate sold the team to Daniel Snyder, the highest bidder, who made his fortune in the computer business. John took his cut of the sale (estimated at $100 million) and moved to Bermuda. *Id.* This illustrates the triumph of talent over inherited wealth. Mr. Snyder added real value to society and was handsomely rewarded for it.

39. The argument being that in the United States, society generally alternates its focus from public purpose to private interest and vice versa in a natural balance. Thus, if private wealth becomes too large, natural forces will force such wealth into private hands.

40. Wampler, *supra* note 29, at 528-29. *See also* Hauser, *supra* note 23, at 366.

41. Hauser, *supra* note 23, at 366.

42. *Id.*

43. *Id.* at 367.

44. *See id.* at 372-76.

One of the earliest versions of the estate tax came in 1797 when Congress passed a stamp duty on legacies and intestate shares of personalty. This tax was repealed in 1802.[45] During the Civil War, Congress imposed a death duty in 1862, but repealed it in 1870.[46] The estate tax as we know it today made its first appearance in the United States in 1916 and the gift tax was enacted in 1932.[47] These taxes were a result of a growing movement in favor of taxing large fortunes in order "to strike hard and deep" at the wealth of the plutocracy existing at the time.[48] The Tax Reform Act of 1976 unified the estate tax and the gift tax into a single graduated rate and a cumulative exemption that applies to all taxable transfers made by individuals at death and during their lifetime.[49] Congress also enacted the generation skipping transfer tax, generally taxing transfers to remote generations bypassing the previous generation (generally transfers to grandchildren while bypassing children) as if the transfer was made to each succeeding generation.[50] Prior to the 2001 partial repeal of the estate tax, the unified estate and gift tax could reach a tax rate as high as sixty percent.[51]

Under the Economic Growth and Tax Relief and Reconciliation Act of 2001 ("EGTRRA"), tax rates on estates are gradually reduced from 2001 to 2010 at which time the estate tax is completely repealed. The tax rate is reduced to fifty percent for estates of those who die after December 31, 2001. The five percent surtax on transfers exceeding $10 million is also eliminated. Under EGTRRA, the graduated tax on estates is gradually decreased to forty-five percent between 2002 and 2009.[52] The exemption amount is also increased to $3.5 million.[53] In 2010, when the estate tax is repealed, the stepped-up basis rule will no longer be applicable.[54] Instead, taxpayers will

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45. *Id*. at 375.
46. Hauser, *supra* note 23, at 375.
47. *Id*. at 375-76.
48. *Id*. at 375.
49. *Id*. at 376.
50. *See* I.R.C. § 2601 (1990).
51. Gift tax rates effectively began at 37 percent on cumulative taxable transfers exceeding $675,000 and reached 55 percent on cumulative taxable transfers exceeding $3 million. Additionally, a 5 percent surtax has been imposed on cumulative taxable transfers between $10 million and $17,184,000, which has the effect of phasing out the benefit of the graduated rates.

Charles P. Rettig, *Recent Legislation Aims to Replace the Estate Tax with a Modified Carryover—Basis Tax Regime*, 24 L.A. LAW. 32, 33-34 (Nov. 2001). For transfers in excess of $17,184,000, a flat tax of 55 percent was imposed. *Id.* For a detailed description of these pre-2001 rates, *see id.*

52. *See* I.R.C. § 2001(c)(2) (2001).
53. *See* I.R.C. § 2010(c) (2004).
54. The stepped-up basis rule is provided currently in section 1014 of the tax code. The section generally provides that the basis of property received from a decedent shall be the fair market value of the property at the time of death. For a discussion of the basis rule, *see* Rettig, *supra* note 51, at 35.

receive the lesser of (1) the decedent's basis in the assets transferred or (2) the fair market value of the assets. In order to comply with the Byrd rule, the estate tax is oddly scheduled to be fully reinstated in 2011, the year following its repeal.[55]

One of the purposes of the estate tax (in addition to raising revenues) was "to reduce the wealth being amassed by powerful families, thereby avoiding the creation of a natural aristocracy in this country. . . ."[56] Under this rationale, as long as the danger of wealth accumulation is present, the estate tax should be kept. Others believe that the purpose of the estate tax was simply to raise revenue at a time (before World War I) when the country needed more revenue.[57] This time having past, their conclusion is that the estate tax should be repealed.

The estate tax has been subject to attack long before EGTRRA. In the 1920s, Andrew Mellon[58] staged an attack on the estate tax. Although he was viewed as attempting to personally benefit from repeal of the estate tax, the reality may be that he only believed that estate taxation should be left to the states and that it destroyed private capital.[59] Following his attacks on the estate tax, this tax was pretty much left alone until the 1990s when it attracted the focus of lobbyists like Pat Saldona and was significantly cut by EGTRRA.

IV. THE POLITICS OF ESTATE TAX REPEAL

The estate tax battle is credited for bringing together the Congressional Black Caucus, a number of conservative chambers of commerce, the log cabin Republicans, a few aristocratic billionaires, and the founder of Black Entertainment Television ("BET"). Normally, these groups do not have much in common politically, but the possibility of dividing a few billion dollars among themselves is enough to make them forget their differences. For Bob Johnson, the founder and significant shareholder of BET, the evil of the estate tax is especially bad for African-Americans because just at a time when the American economy is beginning to produce its first African-American

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55. Named after West Virginia Senator Robert Byrd, the Byrd rule excludes congressional amendments that would have revenue implications beyond the ten-year budget planning window. This rule can be suspended with a 60-vote super majority of senators. Since the proponents of repeal were unable to gather this super majority vote, the estate tax must make reappearance in 2011 to satisfy the Byrd rule. GATES & COLLINS, *supra* note 10, at 95.

56. Susan K. Hill, *Leaping Before We Look?: Repeal of the Estate Tax Credit and the Consequences for States, Americans, and the Federal Government*, 32 PEPP. L. REV. 151, 157-58 (2004). One of the major catalysts for the estate tax was President Franklin D. Roosevelt, who was famous for railing against uncontrolled personal wealth accumulation.

57. *Id*.

58. Andrew Mellon was Secretary of the Treasury under Presidents Harding, Coolidge and Hoover.

59. GRAETZ & SHAPIRO, s*upra* note 5, at 221-23.

billionaires,[60] the estate tax is rearing its ugly head to snatch these gains back.[61] Mr. Johnson recently sold BET (allegedly for $2.5 billion) to Viacom at a huge personal profit for himself.[62]

As we will see later, the proponents of estate tax repeal have played a masterful political game. For example, they put a Black farmer at the forefront of estate repeal, Mr. Chester Thigpen, a self-made man and a grandchild of slaves.[63] The proponents of repeal are so bent on ensuring that Mr. Thigpen's farm stays in his family that if a few billionaire partisans of theirs benefit, they are willing to take this risk.

In this political game, the proponents of repeal have also adopted methods that would have made Lee Atwater[64] proud. For example, even though few family farms would ever be subject to the estate tax[65] and the decline of family farms is often caused by policies adopted in favor of mega farms,[66] the family farmer is a good poster child for estate repeal. Also, any potential economic argument against repeal is met with an emotional reminder that death is not the right time to impose taxes. The approaches taken by the two camps are quite telling: in vetoing the estate tax repeal bill that he was presented with, President Clinton made a number of economic arguments as to why estate tax repeal was not the right decision for the nation;[67] President George W. Bush, on the other hand, signed estate tax repeal with little explanation for the bill.[68]

The proponents of repeal try to mask the true cost of repeal in two ways: (1) the federal tax credit allowed for state estate taxes is reduced and then disallowed,[69] creating an extra burden on the states, and (2) the cost of the tax cut is back loaded to explode in 2011-2020 to about $750 billion just when the

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60. Mr. Johnson was the first African-American billionaire and is now followed by Oprah Winfrey. GRAETZ & SHAPIRO, *supra* note 5, at 172.

61. *See id.* at 173.

62. *Id*. at 172.

63. *Id*. at 62.

64. Lee Atwater was a trusted advisor to Presidents Nixon, Reagan, and George H. W. Bush. He was famous for an aggressive brand of attack politics and was dubbed "the Darth Vader of the Republican Party." His most noted campaign was the 1988 presidential election in which he helped candidate George H. W. Bush overcome a 17% lead by Michael Dukakis by running the "Willie Horton" ad—a political advertisement about a Black convicted murderer who committed rape while on furlough from his life sentence in Massachusetts while Mr. Dukakis was governor. *See* Lee Atwater—Biography, at http://en.wikipedia.org/wiki/Lee_Atwater (last visited Apr. 5, 2006)*; see also* GRAETZ & SHAPIRO, *supra* note 5, at 231.

65. *See* Clinton, *supra* note 14, at 1986.

66. Alex E. Snyder, Note, *Saving the Family Farm Through Federal Tax Policy: Easier Said than Done*, 62 WASH. & LEE L. REV. 729, 737-38 (2005).

67. Clinton, *supra* note 14, at 1985-86.

68. *See* accompanying legislative history to EGTRRA.

69. *See* I.R.C. § 2011(2001).

baby boomers are set to retire and collect on social security and Medicare.[70] This will cause enormous fiscal pressure.

Unfortunately, this is politics, and concern for economic accuracy is not at the forefront. What is at stake is a massive shift of the burden of paying for government from the wealthy to the middle class, and it appears that the engineers of such changes are winning. If estate tax is repealed permanently, the shortfall in revenue would have to be made up somewhere. This is simple math.[71] If estate tax repeal (a tax imposed mostly on the rich) can be packaged in such a way that opponents of repeal are forced to give enormous political grounds to their opponents,[72] this does not bode well for eventual attacks on progressivity where the argument will likely be that imposing a higher percentage of tax on higher income is penalizing success. The estate tax debate illustrates that mounting arguments explaining the benefits of progressivity will not be enough because in politics, "when you are explaining, you are losing."[73]

In their book, *Death by a Thousand Cuts: The Fight Over Taxing Inherited Wealth*, Michael J. Graetz and Ian Shapiro did a brilliant job recounting the political gamesmanship behind the repeal of the estate tax. [74] They explained that the fight over the estate tax was started by lobbyists Jim Martin and Pat Soldano, who were heavily funded by families like the Gallos and Mars.[75] These lobbyists put together a powerful repeal coalition composed of gays, women, and minorities.[76] More importantly, they developed a distinct philosophical and moral appeal.[77] They developed a message that was simple and to the point.[78] They defined their client as the working rich,[79] someone most Americans can identify with because the average American believes he

70. *See* Clinton, *supra* note 14.

71. *See* Paul A. Vocker, *Foreword* to WILLIAM H. GATES SR. & CHUCK COLLINS, WEALTH AND OUR COMMONWEALTH: WHY AMERICA SHOULD TAX ACCUMULATED FORTUNES, at xi (Beacon Press 2002). Paul Vocker, past chairman of the Federal Reserve, expresses perplex at the repeal of the estate tax. He states that while no one likes taxes, they are necessary to our system of government. He also states that if one source of revenue is lost, it would have to be made up by another source.

72. *See* Burman, *supra* note 1.

73. *See* GRAETZ & SHAPIRO, *supra* note 5, at 127.

74. *See e.g.,* GRAETZ & SHAPIRO, *supra* note 5.

75. *Id*. at 18-19. The Gallos are world renowned wine makers and the Mars own a food conglomerate.

76. *Id*. at 20-21.

77. *Id*. at 10.

78. *Id*. at 39.

79. GRAETZ & SHAPIRO, *supra* note 5, at 48.

has a good chance of joining the ranks of the rich.[80] This was particularly potent because the working rich potentially number in the millions.[81]

On the other side, there was no true organized group which opposed repeal of the estate tax.[82] The natural opponents of repeal, such as organized labor, the insurance industry, and non-profit organizations, found themselves ill-equipped to mount a counterattack. Organized labor found it notoriously difficult to rally around this issue because tax issues divide its membership.[83] Even though non-profit organizations would be hurt by repeal, they found it difficult to be in conflict with major donors who generally oppose the estate tax.[84] The life insurance industry also found itself in the same position and could not come out opposing repeal.[85] The opposition found themselves explaining their positions and, therefore, losing the battle.[86] They were simply outmaneuvered by an opponent willing to say anything, even likening the estate tax to the holocaust,[87] and that treated their cause like a crusade.[88]

Nevertheless, the battle is not completely lost. Congress postponed the vote on permanent repeal several times and pushed attempts for permanent repeal to 2006 and beyond because the Republican leadership could not assure victory.[89] There is a current thinking in Congress that, due to the cost of hurricane Katrina that devastated New Orleans and the surrounding area and the huge deficits that we are facing, permanent repeal may not be appropriate.[90] If permanent repeal is not made prior to 2010, the demographics in the country will make permanent repeal politically difficult because the first "[b]aby boomers will reach age 65 and become eligible for Social Security and Medicare [benefits]. . . .[91] Thus, some believe that the estate tax will not be

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80. *See id*. at 8; *see also* GATES & COLLINS, *supra* note 10, at 119.

81. GRAETZ & SHAPIRO, *supra* note 5, at 103.

82. *See id*. at 117; *see also* Krisanne M. Schlachter, *Repeal of The Federal Estate and Gift Tax: Will It Happen and How Will it Affect Our Progressive Tax System?*, 19 VA. TAX. REV. 781, 798 (Spring 2000).

83. GRAETZ & SHAPIRO, *supra* note 5, at 110-11.

84. *Id*. at 113-14. This was the classic situation of not wanting to bite the hand that fed you; estate repeal is a sensitive and very important economic issue to large donors and they generally favor repeal—if charitable organizations took on large donors on this issue, they run the real risk of alienating them, with dire consequences to their causes.

85. *Id*. at 247.

86. *Id*. at 127. This is because in the age of sound bites and 24 hour newscasts, the attention span of the public is very short and if your position is not well packaged, it will not be digested by the public.

87. *Id*. at 213.

88. GRAETZ & SHAPIRO, *supra* note 5, at 217.

89. Stamper, *supra* note 12.

90. *Id*.

91. Brooks J. Holcomb, *Death Taxeulogy May Be Premature*, ARIZ. ATT'Y, 16, 18, (Dec. 2001); Rettig *supra* note 51, at 39.

permanently repealed, but that Congress will simply extend or liberalize the estate tax provisions in effect in 2009.[92]

This delay has bought some time for the opponents of repeal. If they can marshal a good story, the tide can be reversed. If they cannot, then more than just estate tax repeal may be in jeopardy because the forces behind estate tax repeal will not stop there. The opponents of repeal are bent on redistributing the burden of government; their next target will be progressivity.[93] They will not be easily defeated. They will not be dissuaded even by Alan Greenspan, former chairman of the Federal Reserve Board, who opposed repeal of the estate tax without offsetting increase in taxes,[94] or David Walker, head of the General Accounting Office, who warned that the only way that a federal government financial meltdown can be avoided is to raise taxes.[95] Surveys have shown that the average American taxpayer still supports progressivity,[96] however, this may not be enough to preserve it in the long run because support has been slipping.[97]

Although the battle over estate tax is not over, it is clear that if, as some believe, the estate tax is important to progressivity[98] and is an important back stop to the income tax,[99] we are indeed entering that slippery slope toward eroding this important taxation tenet.

V. IMPACT OF REPEAL

According to some estimates, repeal of the estate tax will ultimately cost the government close to one trillion dollars.[100] This is a big number regardless of the size of the economy. As the late Senator Everett Dirksen liked to say, '"a billion here, a billion there, and pretty soon enough you're talking about real money.'"[101] It would seem that no reasonable person would argue that a trillion dollars is not serious money. Yet, this is exactly what the proponents of estate tax repeal have argued. They have argued that because the taxes

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92. Rettig, *supra* note 51, at 39.

93. GRAETZ & SHAPIRO, *supra* note 5, at 279-82.

94. *See* Joel Friedman & Ruth Carlitz, *Greenspan Rejects Estate Tax Repeal Without Offsets* (2005), at http://www.cbpp.org/7-22-05tax.pdf.

95. *See* Dustin Stamper, *GAO Chief Again Warns Tax Increases May Be Necessary*, 2005 TNT 238-2 (Dec. 13, 2005).

96. Schlachter, *supra* note 82, at 807 n.149 (citing a 1994 survey that found that 60-66% of those surveyed favored progressive tax rates).

97. *See id*.

98. *Id*. at 810; *see* William Blatt, *The American Dream in Legislation: The Role of Popular Symbols in Wealth Tax Policy*, 51 TAX L. REV. 287 (1996).

99. *See* Richard J. Joseph, *Estate Taxation is Integral to Income Taxation*, 2005 TNT 205-42 (Oct. 25, 2005); *see also* Clinton, *supra* note 14.

100. CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 36, at 1.

101. GATES & COLLINS , *supra* note 10, at 91 (quoting Senator Everett Dirksen).

collected on estates represent a small percentage of the total amount of taxes collected by the federal government, the government can do without it.[102] Michael J. Graetz and Ian Shapiro[103] have chronicled the successful political campaign of the proponents of repeal and have warned that the proponents of repeal are really after the bigger prize of progressivity.[104] If they are right, then there is much more at stake than just a trillion dollars. This is a battle for a redistribution of wealth that has never been seen on this Earth because it involves the wealthiest country this Earth has ever seen. The authors are rightfully concerned if progressivity is the ultimate prize. The average citizen should also be concerned because there has been a gradual shift of the tax burden to the middle and lower class.[105] In fact, Alan Greenspan and others have been credited to shifting the tax burden more to the payroll tax, so much so that the average worker now pays more in payroll tax than income tax.[106] Because there is an income limit on the payroll tax,[107] and the truly wealthy derive a large portion of their income from investments, they are totally exempt from this shift in emphasis.

No one can be certain about the consequences of permanently repealing the estate tax. Due to the complexity of our economic system, arguments can be made regarding the impact of any economic factor. Certainly, repealing the estate tax will increase the income inequality that has been rising in the United States over the last several years.[108] In fact, the United States is perceived as "the most polarized and inequality-ridden nation of the major Western nations."[109] If this inequality continues, it may lead to a plutocracy.[110] This is because throughout history, there has been a long connection between wealth and politics.[111] This rise to a plutocracy is bound to create social and political

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102. *See* Wampler, *supra* note 29, at 534.

103. GRAETZ & SHAPIRO, *supra* note 5.

104. *Id.* at 281-82.

105. PHILLIPS, *supra* note 28, at 221-22. Examples include a whopping $1.65 trillion in corporate-claimed depreciation for the 1982-87 period and a rate structure established by the Tax Reform Act of 1986 which provided a rate structure that peaked for the middle class but not for millionaires.

106. *Id.*

107. The limit for 2006 is $94,200.00. Social Security Online at http://ssa-custhelp.ssa.gov/cgi-bin/ssa.cfg/php/enduser/std_adp.php?p_faqid=240&p_created=956850562&p_sid=anuoY*hi&p_lva=&p_sp=cF9zcmNoPTEmcF9zb3J0X2J5PSZwX2dyaWRzb3J0PSZwX3Jvd19jbnQ9MzEmcF9wcm9kcz0mcF9jYXRzPSZwX3B2PSZwX2N2PTEuOSZwX3BhZ2U9MQ**&p_li=&p_topview=1. *See* www.ssa.gov, for a complete discussion and history of the social security or payroll taxes.

108. *See e.g.,* Shapiro, *supra* note 32.

109. PHILLIPS, *supra* note 28, at xi.

110. *Id.* at 422.

111. *Id.* at 300-01.

problems and, according to some analysts, will eventually lead to a failure of the American civilization because things that get top heavy tend to collapse.[112]

It is important to remember that there are those who would argue just the opposite. That is, permanent repeal of the estate tax will have an overall positive impact on the economy. Some will dismiss the social impact of permanent repeal and predict that unburdening taxpayers from estate taxation will increase productivity because people will realize that they can leave even more money to their heirs and, thus, will work harder in order to do so.

Wealth inequality will certainly exacerbate the racial polarization in this country because minorities, particularly African-Americans, will be on the short end of this wealth inequality. In an important book entitled *The Hidden Cost of Being African-American: How Wealth Perpetuates Inequality,*[113] Thomas M. Shapiro details the massive advantages created by wealth and how wealth inequality between the races perpetuates inequality of opportunities in school, housing, and ultimately careers. His focus was mainly on advantages enjoyed by offspring of Whites over offspring of Blacks. His major premise is that wealth, not necessarily income, is the cause of economic disparity between the races. According to Mr. Shapiro, Blacks of similar income as Whites are still disadvantaged due to greater wealth enjoyed by Whites. This greater access to wealth (or "head start assets," [114] as he calls them) is what leads to better housing opportunities, better school opportunities, and ultimately better career opportunities.[115]

Arguably, our political leaders will not sit idly and let the economy and democratic system deteriorate to the level of second or third world countries. No one can imagine that this will happen. Then again, at the peak of the Roman Empire, very few predicted its decline. Similarly, very few predicted the decline of the British Empire. The genius of our democratic system is that the pendulum might swing back to a more realistic distribution of wealth once it is realized that income and wealth distribution are dangerously out of sync.[116] Some even hope that corporate greed, such as depicted in the Enron

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112. Throughout history, wealth disparities in a society have ultimately led to the corrosion of the society and its ultimate collapse. *See id.* at 373. GATES & COLLINS , *supra* note 10, at 22. There are many reasons for this, including economic and other decisions being made by the few instead of the many and the withdrawal from productive activities by those who feel not a part of the society.

113. THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY (Oxford University Press 2004).

114. SHAPIRO, *supra* note 113, at 51.

115. *See id.* at 51-55.

116. PHILLIPS, *supra* note 28, at 413.

case, might hasten that day.[117] History has certainly shown that we, as a society, have been able to make necessary adjustments to our economy.[118]

While there is little doubt that taxation affects economic behavior, the direct impact of taxes on economic behavior is not without controversy.[119] In the current economic environment, for example, it is taken for granted that a tax of seventy percent would be confiscatory and would negatively impact productivity. Yet, in the 1900s there was such a level of tax on income and productivity was not negatively impacted. In fact, this was a period of increasing productivity.[120] Clearly, repeal of the estate tax would have social consequences as, at the very least, this would facilitate wealth concentration. As this wealth is passed from one generation to the next, there is bound to be less for the rest of us. The boundless opportunities that the United States seems to offer are what have kept the country economically strong. There is a danger that just as corporate greed can lead a corporation or a few corporations to dominate a segment of the economy and produce anti-competitive tendencies resulting in economic inefficiency, the same can happen with unchecked individual greed. The government deals with corporate greed through anti-trust laws. There is no such law for individuals. Estate taxation is the only check on uncontrolled wealth accumulation. At the very least, it serves as a warning to the next generation that the wealth of the previous generation may not be passed on wholly. Thus, if the next generation wants to keep the lifestyle they have become accustomed to, they need to add value to their inheritance.

What will be the result of the repeal proponents' success? We might become the next Brazil.[121] If the opponents of repeal are wrong, then Paris Hilton gets a few million less from her inheritance and has to sign a few more movie deals to keep her lifestyle. If the proponents of repeal are wrong, then she picks the next President, and the middle class will have to pay a higher bill for government expenditures.

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117. *Id.* at 412-13.

118. For example, we made necessary adjustments after the great depression of the 1930s to prevent bank failures. Income was also redistributed by a progressive income tax system and new jobs were created by F.D.R.'s New Deal. Some argue that World War II was the engine that got us out of the depression. This may be so, but I have always argued that the war, in economic terms, represented huge outlays of government expenses.

119. *See* GRAETZ & SHAPIRO, *supra* note 5. Precise economic analysis on any matter is often not possible because many factors impact the typical economic analysis. Additionally, these factors although variable cannot be controlled. Hence, one is generally left with theories and hypotheses that are seldom completely reflected by true economic reality.

120. JOEL B. SLEMROD, DOES ATLAS SHRUG?—THE ECONOMIC CONSEQUENCES OF TAXING THE RICH 3, (Howard University Press 2000).

121. GRAETZ & SHAPIRO, *supra* note 5, at 282.

VI. ARGUMENTS FOR REPEAL

There are many arguments favoring repeal of the estate tax. The following are the major arguments put forth by proponents of repeal.

A. *Death Should Not Be a Taxable Event*

One of the most potent arguments for repeal is embodied in the moniker for the estate tax used by proponents of repeal—the death tax. This immediately puts opponents of repeal on the defensive. To illustrate this point, sponsors of the bills attempting to repeal the estate tax usually named the bills "Death Tax Elimination Acts."[122] Calling the estate tax the "death tax" also points to the absurdity of imposing a tax on a person for dying.[123] The rationale for the repeal of estate tax contained in the legislative history of such bills is surprisingly sparse of economic discussion. For example, in the 2001 Death Tax Elimination Act, the reasons for change in the bill were stated to be a finding that "the estate, gift, and generation-skipping transfer taxes are unduly burdensome on all taxpayers, and particularly decedents' estates, decedents' heirs, and businesses, such as small business, family-owned businesses, and farming businesses. The Committee further believes it is inappropriate to impose a tax by reason of the death of a taxpayer."[124]

It is surprising that the proponents of repeal did not provide some economic rationale for the repeal. It is also surprising that the legislative history reports that the estate tax is unduly burdensome on all taxpayers, notwithstanding credible reports that only 1-2% of all taxpayers will ever face this tax.[125] The proponents of repeal ignore these types of statistics, preferring instead to rely on the emotional argument that it is just plain wrong to impose a tax on a taxpayer just for dying.[126] The problem with this argument is that the tax is not imposed on the deceased; it really impacts the living heirs as less wealth is passed on.

Tax policy should be based on sound economic analysis. In deciding whether we should keep the estate tax, the issue should be whether the heirs/recipients of the deceased's properties have realized income on the receipt of such properties. The answer is clearly yes because up to the time of death, the decedent owned all of her properties and the heirs generally have no

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122. H.R. REP. NO. 107-37, at 1 (2001).

123. Mark Bernstein, *Should Governments Play Robin Hood? The Effects of the Repeal of the Estate Tax On Wealth Apportionment*, 12 CARDOZO J. INT'L & COMP. L. 187, 191 (2004).

124. H.R. REP. NO. 107-37, at 25.

125. According to credible reports, the estate tax is not as burdensome on taxpayers as claimed by the opponents of the estate tax. The Center on Budget and Policy Priorities states that "roughly 99 percent of estates pay no estate tax at all." CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 36, at 1.

126. GRAETZ & SHAPIRO, *supra* note 5, at 14.

right to such property.[127] Having been so enriched, it would be appropriate and just that the recipient of property pay tax on such receipt, especially when they expended no labor to receive such property. Congress, however, chose not to tax such receipt of wealth. Moreover, currently estates are entitled to a large increasing exemption from the estate tax.[128] This exemption, coupled with the nontaxability of recipients of bequests and inheritances provided by I.R.C. § 102, and the fair market value basis provided by I.R.C. § 1014, means that a large amount of transfers from decedents escape taxation. Inherited wealth has been equated to a lucky windfall and, as such, especially ripe for taxation because it is the purest form of "getting something for nothing."[129] From a social policy standpoint, it appears that nothing is gained from exempting large property transfers from tax. As Andrew Carnegie noted, permitting or encouraging such large trans-generational transfers of property may even be a curse.[130] Echoing Andrew Carnegie's notion, a recent *Time Magazine* article argued that the rich and the super rich are not economically innovative and that the bulk of innovation comes from the upper middle class because offspring of the upper middle class understand that to maintain their economic status they have to be economically competitive, otherwise they run the risk of falling behind.[131]

The arguments for repeal provided by the legislative history of EGTRRA have been made by farm advocates.[132] One argument is that small farms provide a high standard of living to their communities, in addition to being morally attractive, by preserving the family values and diligent industry that begot this great nation.[133] The small farmers are seen as poor, righteous taxpayers who need relief from the estate tax, especially in light of the fact that rich taxpayers can generally avoid much of the estate tax by hiring fancy tax lawyers and accountants.[134] This argument does not take into consideration the increasing large estate tax exemptions that are provided to small farms.[135] In

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127. The novice tax student learns that any wealth accretion is potentially gross income under I.R.C. § 61 unless a specific code section provides otherwise. Congressional policy for this rule is clearly so that Congress can have maximum flexibility in determining when and what type of income should be taxed.

128. The exemption is currently $2,000,000. I.R.C. § 2010(c) (2006).

129. JOHN A. BRITTAIN, INHERITANCE AND THE INEQUALITY OF MATERIAL WEALTH, 13 (The Brookings Institution 1978).

130. GATES & COLLINS, *supra* note 10, at 133 (citing ANDREW CARNEGIE, GOSPEL OF WEALTH).

131. *See* Jeffrey Kluger, *Ambition: Why Some People Are Most Likely To Succeed*, TIME MAGAZINE, November 14, 2005, at 48.

132. *See* Stephanie A. Weber, *Rethinking The Estate Tax: Should Farmers Bear The Burden of A Wealth Tax?*, 9 ELDER L.J. 109 (2001).

133. *Id*. at 128-29.

134. *Id*.

135. *See* I.R.C. § 2032A (2006). The section provides special treatment to family farms and family-owned businesses for purposes of the estate tax. Generally, these sections permit these taxpayers to use

fact, it has been argued that estate tax repeal only benefits large farms and, thus, has a negative impact on small farms.[136] Therefore, it has been advocated that the estate tax should remain on large farm holdings and if this forces them to sell their assets, this would benefit the small farmer who would be in a better competitive position.[137]

B. *Inefficiency of the Estate Tax*

Proponents of estate tax repeal have argued that the tax should be repealed because it only raises a small percentage of the federal government's revenues, as low as 1.4%.[138] They have argued that "administration and enforcement cost to the IRS approaches the amount of money that the tax raises for the [T]reasury."[139] This argument does not take into account the amount of credit the federal government allows for the estate tax imposed by states, the so-called "pick-up tax."[140] This is an indirect federal payment to the states. Arguably, this amount should be counted as an amount raised by the federal government. Moreover, this argument ignores that the purpose of the estate tax, in addition to raising revenue, is to redistribute wealth.[141] The issue should be whether this purpose is still a valid economic goal. In order to address the rising wealth inequality in the United States, the estate tax should be buttressed, not eliminated.

C. *Unpopularity of the Estate Tax*

Another argument that has been used effectively by proponents of repeal is the unpopularity of the estate tax.[142] This argument is particularly weak because no form of taxation will ever be popular. Taxes are a necessary part of our modern economy and '"are what we pay for civilized society."'[143] It is understandable that the unpopularity of the estate tax can be used for political advantage. In fact, politicians routinely bash the IRS for quick political approval.[144] Playing such political games is unfair to the IRS because the IRS

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special valuation methods in order to avoid liquidating the estate in order to pay the estate tax.

136. *See* Snyder, *supra* note 66, at 778.

137. *Id.* at 777.

138. Bernstein, *supra* note 123, at 191 n.23.

139. *Id.* at 191.

140. I.R.C. § 2011 (2006). Elimination of the state estate tax credit is creating havoc with state budgets. This issue will be addressed later.

141. *See* Hill*, supra* note 56.

142. Bernstein, *supra* note 123, at 191.

143. *Id.* at 188 (quoting Oliver Wendell Holmes).

144. *See, e.g.*, Tom Ehrenfeld, *Veteran of a Taxing Job: Remaking the IRS,* BOSTON GLOBE, Apr. 10, 2005, at E2. This article was a review of former IRS commissioner Charles Rossotti's book on his 1997-2002 reign at the IRS. In the book, Commissioner Rossotti recounted the many challenges he faced at the

does not write the tax laws; this is also counterproductive and may even be dangerous in the long run as this undermines our voluntary tax system. The government plays a vital role in our society and economy; weakening it will lead to a weakened society. Finally, as James Madison warned, the decision to tax or not to tax "should never be turned over to democratic politics, as people will predictably act in their own self interest."[145]

D. The Estate Tax Causes Economic Distortions

The estate tax has also been perceived as causing economic distortions. While it is true that one of the goals of taxation should be to cause as little economic distortion as possible, this is not always possible. The reality is that those subject to taxation will always try to lessen or eliminate its impact. When there are ways to avoid a tax, taxpayers will entertain them and pay their advisors to achieve such tax avoidance as long as it costs them less than the actual tax. Not even a flat tax would be exempt from economic distortions as taxpayers would, no doubt, attempt to hide income. The only tax that would arguably achieve little economic distortion in its administration is a poll tax. However, such taxes are normally very unpopular and it is doubtful that a poll tax could achieve significant political support in the United States.

One of the more interesting ways taxpayers have attempted to avoid the estate tax is through expatriation, the "ultimate estate planning tool."[146] The idea is for a wealthy U.S. citizen or resident to move to a foreign country and denounce U.S. citizenship. Upon death, the former U.S. citizen's estate would not be subject to the estate tax. Congress was made aware of these types of schemes and attempted to prevent them by enacting I.R.C. § 877.[147]

IRS. Incidentally, I worked at the IRS while Mr. Rossotti was Commissioner. I do not remember any remarkable impact of his reign except that the IRS granted a very large contract to the consulting firm Booz-Allen. However, I must note that most of the structural changes that Mr. Rossotti sought did not involve the office I worked for (the Chief Counsel's office)—an office that works mostly of technical legal matters.

145. Bernstein, *supra* note 123, at 192 (quoting THE FEDERALIST NO. 10 (James Madison)).

146. *See* Michael G. Pfeifer & Joseph S. Henderson, *Expatriation: The Ultimate Estate Planning Tool?*, SK024 AM. L. INST. AM. BAR ASSOC. 551 (2004); Richard A. Westin, *Expatriation and Return: An Examination of Tax-Driven Expatriation by United States Citizens, and Reform Proposals*, 20 VA. TAX REV. 75 (2000).

147. Generally, section 877 imposes a tax upon a non-resident alien who lost U.S. citizenship within a 10-year period if such loss of citizenship was for tax avoidance purposes. Giving up one's citizenship seems an extreme measure but some taxpayers are apparently willing to go that far to protect their wealth for the next generation. One super wealthy U.S. citizen entered into the following scheme in order to avoid the estate tax: He moved to Belize, renounced his U.S. citizenship, and was appointed a consular official of Belize to be established in his hometown of Sarasota, Florida. Essentially, not much changed regarding this individual. Westin, *supra* note 146, at 89.

E. The Estate Tax is Unfair and Offensive to Capitalism

It has been said that the estate tax is inherently unfair and offensive to capitalism.[148] However, for the following reasons, the estate tax is a necessary component of our capitalist system.

If the economic odds are staked in favor of one party versus another, then such a system would not promote competition, the cornerstone of capitalism. After all, how can anyone compete against the heirs of a Sam Walton, who start off with a $32 billion headstart? Redistributions of wealth through the estate tax may be the surest way to ensure the continued viability of our capitalist system. Such redistribution of wealth tends to level the playing field without punishing the wealth maker because, notwithstanding claims by opponents of the estate tax, the wealth maker is not subject to the estate tax. This is because at the time the tax is imposed, the wealth maker is dead and no longer subject to any form of taxation. Notwithstanding an estate tax, the offspring of the wealth maker will still have a tremendous advantage by having access to this wealth.[149]

Some have called for a wealth tax to ensure the balance of distribution of goods and services.[150] Such a wealth tax would be imposed on the wealth maker while still alive and arguably could encourage consumption over saving.[151] This is an approach which engenders considerable debate. While it is not nonsensical that a wealth tax could discourage saving and encourage consumption, the same can be said regarding the income tax, especially with regard to its progressive features. Taxes are arguably "a disincentive to economic activity, so a tax on income is, to some extent, a disincentive to work."[152] The reality, however, is that people work hard and accumulate

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148. Capitalism has been defined as '"an economic system characterized by private or corporate ownership of capital goods, by investments that are determined by private decision and by prices production, and the distribution of goods that are determined mainly by competition in free market.'" Bernstein, *supra* note 123, at 192-93 (quoting MERRIAM-WEBSTER'S COLLEGATE DICTIONARY (10th Ed. 1993)). *See also*, JOHN DAVID ROSE, RESCUING CAPITALISM FROM CORPORATISM: GREED AND THE AMERICAN CORPORATE CULTURE (authorHouse 2005). In this interesting book, the author addresses the ethics of the current market economy and the reasons why we got there. Among the reasons why we got there the author discusses the notion of "corporate personhood," a theory that a corporation as an entity separate and apart from its shareholders should have constitutional protections (e.g. the Fifth Amendment) just like its shareholders. This theory has arguably been used by corporations to protect themselves from liability on their egregious business conduct. This is indeed a fascinating theory of which I first became aware during a presentation made by one of my colleagues at a luncheon presentation at the FAMU College of Law.

149. This is a very important advantage and may be the most important, but it is often ignored. It has been said that up to 43% of wealth is passed on intervivos. SHAPIRO, *supra* note 113, at 65.

150. BRITTIAN, *supra* note 129, at 88; *See* CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 36, at 3.

151. Weber, *supra* note 132, at 126.

152. Bernstein, *supra* note 123, at 215.

wealth for a number of reasons, including "the need 'to gratify their egos, to gain prestige, to gain power--and simply out of habit.'"[153] Estate taxation would also not endanger the accumulation of great wealth because such wealth is invariably not acquired through savings; great fortunes tend to occur suddenly and do not come from the process of saving.[154]

The impact of the estate tax on savings is also ambiguous, the "tax may discourage work and saving for people subject to it, but it has the opposite effect on heirs who—expecting smaller bequests—choose to work harder and save more."[155] On a macroeconomic level, the correlation between a tax on wealth and a country's overall savings rates is dubious at best.[156] Other countries that have no wealth tax or an anemic tax system on the wealthy (either through lack of laws or lack of enforcement of such laws), on the other hand, have experienced great wealth disparities, persistent social problems, and anemic economic growth.[157]

Finally, the negative impact of taxes on a country's overall economy is unclear. For example, Sweden has one of the highest income tax rates in the developed world and still boasts a stable economy.[158] The Swedes readily accept the notion of redistribution of wealth and have taken "a socialist[ic] approach to redistributive welfare with a capitalistic approach to the private market."[159]

F. We Have Outgrown the Estate Tax

Another interesting argument against the estate tax is that we may have outgrown it.[160] Under this argument, the estate tax has performed its role in

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153. Hauser, *supra* note 23, at 380 (quoting Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 8 (1992)).

154. BRITTAIN, *supra* note 129, at 11. Once great wealth is accumulated, it tends to be passed on from generation to generation. *Id*. Hence, if there is not a system to prevent such passing of great wealth, opportunities for the best and the brightest who may not necessarily be the heirs of the wealthy will be choked off.

155. Burman, *supra* note 1.

156. According to national accounts data, there appears to be no correlation between a country's tax on wealth and overall savings. Among the countries with a wealth tax, savings range from 4.0 percent to 10.5 percent. For countries without a wealth tax, savings range from 3.6 percent to 11.6 percent. *See* WOLFF, *supra* note 32, at 54.

157. The common example that social scientists cite for this proposition is usually Brazil, a country of enormous natural resources rivaling the United States, but saddled by a persistent stagnant economy partly due to an enormous inequality of wealth. Countries in Latin America such as Brazil and Mexico are prime examples.

158. *See* Bernstein, *supra* note 123, at 204.

159. *Id*. at 202 (quoting Deborah Kenn, *One Nation's Dream, Another's Reality: Housing Justice in Sweden*, 22 BROOK J. INT'L L. 63, 77 (1996)).

160. *See e.g.,* Hauser, *supra* note 23.

society and the traditional justifications for the estate tax such as (1) being an incentive to work, (2) providing equality of opportunity, (3) preventing wasteful lives, (4) being a payment for a debt owed to the government, (5) preventing large fortunes from amassing, (6) meeting the requirements for a fair tax, and (7) encouraging philanthropy, are no longer valid. This argument is attractive, especially in light of our economic success as a nation. The support for this argument, however, is weak.[161]

The traditional justifications for imposing an estate tax as articulated above appear to retain their potency in today's economy. Repealing the estate tax will increase inequality of wealth and this is bound to cause economic harm. On the other hand, the only potential harm of retaining the estate tax is preventing a few heirs from receiving unfettered inheritances. More importantly, any argument regarding the negative impact of the estate tax on the economy is highly suspect. In essence, "anyone predicting the economic consequences of tax changes is claiming to know the unknown."[162] For certain, there are answers. Rather, this "reflects the reality that the economy is so complex that you can find an economist to defend or impeach almost any claim about taxes."[163] A more eloquent way to put it is to borrow the words of Mark Twain: '"The art of prophecy is very difficult—especially with respect to the future.'"[164] Yet, this is exactly what the proponents of estate tax repeal have proffered to do.

G. The Estate Tax Does Not Meet the Requirements for a Good Tax

We have all heard the adage that the only things in life that are certain are death and taxes. This is recognition that one cannot avoid paying taxes. Those who toil in the underground economy may not pay income taxes but they surely are exposed to sales taxes. Another well-engrained truism in the United States is that to pay as little taxes as possible is acceptable behavior. The income tax system depends on voluntary compliance and will be obliterated if taxpayers refuse to comply with its rules.[165] Faced with this reality, those in charge of our income tax system (Congress, Treasury, and the

161. For example, regarding the argument that inheriting great wealth is a disincentive to work, the counter argument is that people work for reasons other than accumulating wealth. *Id.* at 380. With regard to the estate tax helping in providing equality of opportunity, there is an attempt to discredit Andrew Carnegie as the proponent of this view and as having been given too much credit just because he was rich. *Id.* at 381. This is not fair to Mr. Carnegie who devoted considerable efforts to his position, even testifying before Congress on the issue. *See* GATES & COLLINS, *supra* note 10, at 38.

162. GRAETZ & SHAPIRO, *supra* note 5, at 227.

163. *Id.* at 227-28.

164. *Id.* at 278 (quoting Mark Twain).

165. To the taxpayer caught in an IRS audit, the tax system may not seem voluntary, but the truth is that the system will come to a grinding halt if there is mass noncompliance.

IRS) attempt to come up with taxes that meet the following goals: fairness, neutrality, efficiency, and simplicity.[166] The estate tax has been attacked as not meeting the requirements for a good tax.

The estate tax arguably fails to meet the fairness test because it fails the notion of vertical and horizontal equity.[167] This is because recent legislation has exempted large numbers of people from the reach of the tax. Additionally, through tax techniques, taxpayers have been able to blunt the impact of the estate tax. The estate tax has been described as "a penalty to those taxpayers who fail to plan ahead or who do not have the liquid assets necessary to pay estate planners."[168]

It has been argued that the estate tax fails the neutrality principle because taxpayers change their behavior due to the tax.[169] For example, the estate tax impacts the level of donations to charities.[170] Moreover, it has been argued that the estate tax is inefficient because the total costs of administering this tax includes governmental costs as well as costs taxpayers incur in hiring lawyers and accountants.[171] Finally, it has been argued that the estate tax is unduly complicated because taxpayers have to hire tax lawyers to work through the maze of regulations promulgated by the IRS when they are faced with estate tax issues. Even if they do not face complicated issues, a typical estate tax return, schedules, and accompanying instructions total seventy-three pages[172] and the IRS conservatively estimates that it takes the typical taxpayer over 40 hours to comply with estate tax rules.[173]

These arguments against the estate tax are valid. However, they would be valid against a number of other taxes. Most taxes, if not all, fail the simplicity test. There are many reasons for this, including constant tinkering with the tax code by Congress. Also, tax neutrality is seldom achieved because taxpayers enter into transactions always mindful of the potential impact of taxes and generally attempt to avoid any negative impact. With regard to the efficiency and unwarranted complications arguments, these charges can be made against the income tax system as a whole. Moreover, the qualities of a good tax should be goals that the tax system should strive for.

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166. Schlachter, *supra* note 82, at 792.

167. *Id*. at 793.

168. *Id*.

169. *Id*. at 794.

170. In his veto of the estate tax repeal bill passed by Congress, President Clinton stated that estate tax repeal would cost charities up to $6 billion. Other estimates range higher, as high as $20 billion. *See* Clinton, *supra* note 14. *See also*, Schlachter, *supra* note 82, at 801.

171. *See* Schlachter, *supra* note 82, at 794-95.

172. *Id*. at 796.

173. *Id*.

If we scrap every tax that does not meet the requirements of a good tax, the whole tax system would be set aside.

Interestingly, there are those who take the opposite position and claim that the estate meets the requirements of a good tax as advocated by Adam Smith because it is: (1) progressive, (2) certain and not arbitrary, (3) levied at a time most convenient to the payor, and (4) the administrative costs of such tax are relatively low.[174]

Notwithstanding the arguments for repeal, some of which make sense, it may be wiser to keep the estate tax because it promotes progressivity and is a check on uncontrolled accumulation of wealth.

VII. ARGUMENTS AGAINST REPEAL

For the past sixty years, the United States has enjoyed increasing economic prosperity. Arguably, the world has never seen such wealth before. There are many reasons for this economic bounty,[175] but our free market system is given the lion's share of the credit. Other countries such as Brazil seem to have almost as many natural resources as the United States, and yet they have not achieved our level of prosperity. Our economic system has been a work in progress for the past two centuries and the fact that we are achieving success even where others, such as Japan, have faltered should be a tribute to our system. This is arguably not an environment that calls for change. This success fuels the notion of invincibility and the hard lessons of the past are being set aside. The early settlers of America were seeking political and economic asylum from aristocratic systems. They disdained these systems and created a new system where one's station in life was to be determined by hard work and one's character, not the accident of birth.[176] They generally succeeded. Repeal of the estate tax is a step toward undoing what the early settlers fought against. Attempting to keep our wealth to ourselves and attempting to pass it to our offspring is a natural tendency.[177] Left unchecked, this natural tendency may create an economic aristocracy where birth rights determine one's prosperity. If the estate tax is permanently repealed, this will create favorable conditions for this economic aristocracy.

Are the rationales for an estate tax still valid today? Does it still make sense to impose an estate tax? It appears that it still makes sense to impose an estate tax because there is some empirical data to support the rationales for the

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174. Hauser, *supra* note 23, at 389.

175. This country is blessed with prosperous lands, immense natural resources, a well-educated population and a democratic system that protects private property.

176. GATES & COLLINS, *supra* note 10, at 2, 7.

177. Bob Johnson, the founder of BET, once stated: "Once I'd found the way to accumulate the wealth, I started thinking about how I could retain it." GRAETZ & SHAPIRO, *supra* note 5, at 173.

estate tax. The major arguments in favor of retaining the estate tax are that: (1) it provides an incentive to work and prevents wasteful lives, (2) it helps in providing equality of opportunity, (3) it is a payment of a debt owed to the government, (4) it prevents large fortunes from amassing, and (5) its repeal will negatively affect family farms, small businesses, the states, and charities.

A. The Estate Tax Provides an Incentive to Work and Prevents Wasteful Lives

We have all heard of the heir or heiress who chooses an unproductive life instead of a life filled with meaningful work. Of course, there are exceptions to this rule. There are offspring of rich people who crave the workforce and are eager to expand on the riches left by their predecessors. Overall, however, one has to conclude that being born rich has to be a great disincentive to work hard because economic success is already achieved.[178] Some have argued that recipients of large inheritances withdraw from productive work.[179] There are those who would disagree. It may not be possible to conclusively demonstrate the accuracy of either side of the argument. However, there does not need to be a perfect correlation between inheritances and a decline in productive work before action is taken. If inheritance has a tendency of causing a disincentive to work, then the impact of inheritances should be lessened.

B. The Estate Tax Buttresses Equality of Opportunity

Equality of opportunity should be the heart of our capitalist system. President Franklin D. Roosevelt rallied against uncontrolled accumulation of wealth because such wealth makes men uncompetitive as they naturally gravitate to retaining this advantage over other men.[180] This is a natural state of affairs. Due to this tendency, ambition and innovation suffer as the wealthy are mostly concerned in retaining their wealth and advantage over others and become risk adverse. Inequality of wealth is a major cause of inequality of "income and other measures of economic success" as the wealthy have more

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178. Kluger, *supra* note 131.

179. Hauser, *supra* note 23, at 378. The anecdotal support for this premise is readily available. In fact, it has been suggested that the opponents of repeal could have used the slogan: "Bush Favors Tax Break for Rich Murderers," featuring Patricia Hearst and Michael Skakel. GRAETZ & SHAPIRO, *supra* note 5, at 233-34. The evidence also includes Luke Weil, heir to the Autotote gaming fortune, who gloats about being so rich that Brown University could not throw him out even though he failed to meet their academic requirements. *Id.* at 234. The unproductive lives of Paris Hilton, heiress to the Hilton hotel fortune, and Nicole Ritchie, daughter of Pop icon, Lionel Ritchie, have also been well documented. *Id.*

180. Kluger, *supra* note 131.

access to opportunities.[181] These inequalities have been persistent in the United States[182] and may be even hazardous to our democracy, as wealth inequalities tend to encourage political corruption.[183] Some have dismissed wealth disparity as mainly a factor of age,[184] but even adjusting for age, there is clear evidence that some tend to accumulate much greater wealth than others.[185] The wealth disparity in the United States seems to be increasing in recent years and may have reached epidemic proportions.[186] Across the racial line, it may be even worse as "[t]he average African-American family holds only 10 cents of wealth for every dollar that whites possess."[187] While some claim that rising tides lift all boats, recent studies have shown that wealth gains tend to be concentrated upward in the last few years. [188] In other words, the rich are getting richer and everyone else is not. In the 1920s, the United States was the land of opportunity and Europe was not. Consequently, the United States attracted ambitious Europeans who were stifled by lack of opportunities in Europe. Today, the trend is reversed and Europe appears to be the land of opportunity.[189] The United States, conversely, has been called the most unequal country in the civilized world.[190] If this is true, this is bound to exacerbate social and economic problems.

This concept of equality of opportunity and dispersion of wealth and economic power is as old as our republic.[191] Disposing of these principles to feed the greed of a few seemed unimaginable a few years ago, but this is the reality of today. It is as if Mellonism is back in full swing.[192]

The growing inequality of income and wealth is bad news for our economy and our democratic system and will limit opportunities for everyone

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181. Bruce K. MacLaury, *Foreward* to JOHN A. BRITTAIN, INHERITANCE AND THE INEQUALITY OF MATERIAL WEALTH (The Brookings Institution 1978).

182. *See* WOLFF, *supra* note 32, at 7.

183. PHILLIPS, *supra* note 28, at xii.

184. BRITTAIN, *supra* note 129, at 51.

185. *See id.* at 52.

186. In 1989, the top 1% of wealth holders in the United States controlled 39% of all household wealth. The wealth of the bottom 40% showed an absolute decline. Almost all the absolute gains in real wealth occurred in the top 20% of wealth holders. WOLFF, *supra* note 32, at 7; *see also* PHILLIPS, *supra* note 28, at xii.

187. SHAPIRO, *supra* note 113, at x. For a more detailed breakdown of wealth disparities, *see* WOLFF, *supra* note 32, at 16-20.

188. WOLFF, *supra* note 32, at 11-13.

189. *Id.* at 2.

190. GATES & COLLINS, *supra* note 10, at 14; *see* WOLFF, *supra* note 32, at 2, 24.

191. Vocker, *supra* note 71, at xii.

192. Mellonism refers to the period in the 1920s during which Andrew Mellon was Secretary of the Treasury. During that period, the Republicans passed a number of tax cuts that saved wealthy individuals up to $4 billion a year in taxes. This was a huge amount of tax savings at a time when the federal budget was only about $3 billion. PHILLIPS, *supra* note 28, at 219.

but the super rich. If this trend continues, opportunities in education, transportation, and career will be privatized by the super rich.[193] We have already seen a sharp decline in education opportunities as Pell grants, which covered eighty-five percent of college costs in 1965, are now covering only thirty-nine percent of college costs.[194] Inequality of wealth is bad for the economy[195] and everybody, even the super rich. It will lead to more prisons and more gated communities.[196]

Historians warn us that societies fail due to great concentrations of wealth and inflexibility in the face of needed change.[197] The bottom line is that we have to make a decision whether we really want a meritocracy where people with the best talents end up on top, or whether we want something less than that. If we are not careful in our choice, we could become Brazil, with opportunities only for the few.[198]

This notion of equality of opportunity is especially important for minorities who because of past and continuing discrimination have not been able to accumulate wealth. Our current wealth inequality is about to get even larger because we are about to transfer as much as $136 trillion from one generation to another.[199] This is a tremendous amount of money or "transformative assets,"[200] and such transformative assets have the capability of transforming a middle class family to an upper class family or at least solidifying their status.[201] Because African-Americans will share little of that bounty, their lack of opportunities will continue. Thus, it has been argued that "what is really being handed down from generation to generation is the profound legacy of reproducing racial inequality."[202]

For those receiving money from Mom and Dad, who worked hard all of their lives, the notion that such receipt of money is continuing the legacy of racial inequality is a hard and bitter pill to swallow. But if one truly believes that the genius of the American dream is based on the premise that "those who work equally hard will reap roughly equal rewards," [203] receiving a large sum of money for no reason other than being born in the right family is outside the

193. GATES & COLLINS, *supra* note 10, at 19.

194. *Id*. at 20.

195. *Id*.

196. *Id*. at 23.

197. *Id*. at 22.

198. GATES & COLLINS, *supra* note 10, at 23; *see also* GRAETZ & SHAPIRO, *supra* note 5, at 282.

199. GATES & COLLINS, *supra* note 10, at 95. This estimate is so high due to predictions of wealth caused by the dot.com revolution. Since the dot.com bust, the estimates have been kept to a much more reasonable $9 trillion—still an incredible amount of wealth. SHAPIRO, *supra* note 113, at 32.

200. SHAPIRO, *supra* note 113, at 10.

201. *Id*.

202. *Id*. at 32.

203. *Id*. at 87.

American dream. It should be noted that the estate tax is not enough to stop the rising wealth inequalities; it can only slow it down. This is because a large amount of wealth transfer (up to forty-three percent) is made inter vivos.

C. The Estate Tax is Payment for a Debt Owed to the Government

Warren Buffet has famously stated that if he grew up in Bangladesh, he would not be Warren Buffet.[204] This is recognition by one of the world's richest men that he is a product of his society and that society has added real value to his wealth.[205] There is no doubt that Mr. Buffet added tremendous value to this society and was a "self-made man," but even he recognized that without societal support and the opportunities provided by this society, he would have had no chance to become as rich as he is.[206] Clearly, the values of a society that can produce such tremendous wealth should be protected. Mr. Buffet, along with Mr. Bill Gates Sr. (the father of the world's richest man), believe in American society, want to preserve it, and think one of the best ways to preserve it is through progressive taxation.[207] Both these men worked for their money and are not "self-made inheritors."[208]

The attack on the estate tax is part of an attack on the government as a whole. Ronald Reagan made this attack on the government popular by focusing on government wastes, and deemphasizing the positive aspects of government. This is a very dangerous game. Some think that the government is strong enough to withstand such attacks and that no one really wants to weaken the government. One thing is certain, the popularity of government is on the decline and gone are the days when government work was seen as inspiring and useful. At the very least, the attacks on the estate tax are part of a larger strategy to shift the current tax system toward a wage or labor tax.[209] If the government can no longer pay for its costs, the proponents of tax cuts would argue for government program cuts. As we have seen above, the government's impact on education is already seriously weakening.[210] Across the board, cuts on government programs will have a negative impact on society as many government programs are useful.

The government plays a very important role in our society. Major innovations in science and other fields are made only through government

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204. GATES & COLLINS, *supra* note 10, at 115 (citing *Warren Buffet Talks Business* (University of North Carolina, Center for Public Television, Chapel Hill, 1995)).

205. *Id*.

206. *See id*.

207. *Id*. at 121-22.

208. *Id.* at 134-35. This notion of self-made inheritors applies to individuals who inherit all or most of their wealth, but still cling to the notion that they were responsible for accumulating this wealth.

209. GRAETZ & SHAPIRO, *supra* note 5, at 272.

210. *See* GATES & COLLINS, *supra* note 10, at 20.

spending. This is because basic scientific research in emerging fields is often done by government scientists or through government grants due to the lack of profitability of such research. As the research matures and industrial application becomes more profitable, private industry has an incentive to take over this research and generally receive credit for it. If the government is unable to fund such basic research, scientific discoveries will greatly suffer.

Moreover, the most important role of the government is, perhaps, that of a referee and enforcer of the laws. If the government is weakened, its enforcement role will decline and predators in all spheres of society will have no check on their power. Recognizing the important role of the government, Gates, Buffet, and a host of the super rich, support the estate tax as one of the ways to preserve our economic and democratic systems and simply as a price to pay to be in the American economic system.[211]

The estate tax is also a way for the government to recoup its investments in society. The simple truth is that the many self-made millionaires in America would not be able to become rich without the tremendous investment the government has made in the school system, the roads, harbors, airports, railways, and the amazing infrastructure of this country, save nothing of the systems of currency and laws protecting property and life. Would private industry be able to create such infrastructure? Absolutely not! This is not a condemnation of private industry. This is a mere recognition that both government and the private industry play important but different roles in society. Extolling the virtues of one over the other is simply missing the point of this reality. The estate tax is also seen as an important '"backstop to the income tax."'[212] President Clinton had it right when he vetoed the repeal of the estate tax in 2000 and stated that the estate tax is simply a tax on untaxed income.[213]

This is particularly true in the case of appreciated property. Hence, the estate tax is a mere backstop to the income tax system. This argument makes sense because if the decedent had sold his property prior to his death, he would have to recognize income on the sale. Death can thus be equated to the ultimate disposition of property. While this sort of economic analysis makes sense, politically it is open to attack as too cynical. As we will see later, an

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211. In their book, Mr. Gates and Mr. Collins posed an interesting question in the form of a story: God's treasuries being low, God wants to auction the right of being born in America to the highest bidder of the next two people to be born. The lowest bidder will be born in an undeveloped third-world country. The question the authors pose is how much of your future income would you pledge to be born in America—fifty-five percent or more? GATES & COLLINS, *supra* note 10, at 122-23.

212. *See* Richard Joseph, *Estate Taxation is Integral to Income Taxation*, 2005 TNT 205-42 (Oct. 25, 2005); Hill, *supra* note 56, at 158 (quoting Krisanne M. Schlacter, *Repeal of the Federal Estate and Gift Tax: Will It Happen and How Will It Affect Our Progressive Tax System*, 19 VA. TAX REV. 781, 783 (2000)).

213. Clinton, *supra* note 14.

inheritance tax imposed on the recipients of the decedent's property may be more politically acceptable than an estate tax.

D. Preventing Large Fortunes From Amassing

There is nothing un-American about amassing a large fortune. However, it may be un-American to transfer this fortune from generation to generation and choke off opportunities for others. There have been studies suggesting a correlation between high concentrations of wealth and "poor economic performance in the long run."[214] Some will argue that there is not necessarily a connection between wealth transfer and lack of opportunities. This may be true if we had unlimited resources, but we do not. As Americans, we may be victims of too much economic optimism because it is not literally possible for every one of us to become economically successful. In fact, according to a shocking statistic, at least fifty-nine percent of Americans will spend one year below the poverty line.[215] For African-Americans, the statistic is a startling nine out of ten.[216] Clearly, redistribution of wealth is one of the ways to fight poverty. This redistribution can be made in a number of ways through the tax system. However, because our tax system is controlled by the political system, one must first win the political battle. One of the reasons President Clinton was so hated by the right is because he attempted to change the dynamics of economic conversation about the poor by concentrating on the working poor. Today, the focus is on the working rich and the would-be working rich.[217] It has been argued that focusing on estate tax repeal is a form of "a reverse Robin Hood tax that further redistributes wealth to the richest" among us.[218] Moreover, there is a real danger that family wealth and inheritance will cancel gains made by minorities in the classroom and workplace.[219]

The danger of large fortunes being passed down from generation to generation can be likened to a monopoly. If a few families have a monopoly over the wealth of this nation, only a few families will be making economic decisions that many families should be making. Economic decisions are bound to be distorted and economic stagnation will result.[220] The focus of macroeconomic decisions and tax decisions will be based on the values of the super rich and would be for their benefit. This is already happening in the case

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214. Hill, *supra* note 56, at 159-60 (quoting James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 831 (2001)).

215. SHAPIRO, *supra* note 113, at 37.

216. *Id.*

217. GRAETZ & SHAPIRO, *supra* note 5, at 48.

218. SHAPIRO, *supra* note 113, at 195.

219. *Id.* at 183.

220. GATES & COLLINS, *supra* note 10.

of the estate tax; a tax that only affects less than two percent of all Americans, but has been subject of intense Congressional debate. This is why repeal of the estate tax has been appropriately dubbed the "Paris Hilton Tax Cut."[221]

The proponents of repeal disagree with these claims and argue that repeal would cost the government very little money. This is because governmental revenues from the estate tax have always been anemic—only 1-2% of all revenues.[222] According to the Center on Budget and Policy Priorities, complete repeal of the estate tax would cost the government close to $1 trillion between 2012 and 2021.[223] More importantly, this would be another $1 trillion transferred to the coffers of the very rich, further compounding our rising wealth and income inequalities. The role of the federal income tax in the realignment of wealth in the United States cannot be overstated.[224]

In the face of such potent economic arguments, the proponents of repeal appeal to the emotions of the public and have successfully changed the focus of the debate to a "death" tax, the argument being that the time of death is not an appropriate time for someone to be taxed. The estate tax issue, however, is really not about death; it is about wealth and large concentrations of wealth. As a country, we have to make a decision on whether large concentrations of wealth are bad for our economy and bad for our democracy. We have to decide whether we want a large middle class or a plutocracy. Some have even called for a tax on wealth to combat this wealth disparity.[225] Such a tax is not likely to become law in the United States mainly because of the irrational belief held by a large segment of the population that they will someday become rich and will be subject to this wealth tax.[226] It should be noted that eleven Organization for Economic Cooperation and Development ("OECD") countries have a wealth tax[227] and that such wealth tax has not caused a capital flight[228]—one of the terrible effects of taxation on wealth argued by supply side economists. In fact, it has been argued that one of the benefits of a wealth tax may be to induce owners of property to invest in higher yield investments in order to be able to pay for this tax and still maintain their economic status.[229]

At the core of the estate tax debate are two contradictory notions: equal opportunity and "a family's ability to pass along advantages to their

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221. *See* Dionne, *supra* note 26.

222. Bernstein, *supra* note 123, at 191 n.23 (citation omitted).

223. GATES & COLLINS, *supra* note 10.

224. PHILLIPS, *supra* note 28, at 223.

225. Richard C. Leone, *Foreward* to EDWARD N. WOLFF, TOP HEAVY: A STUDY OF THE INCREASING INEQUALITY OF WEALTH IN AMERICA (The Twentieth Century Fund Press 1995).

226. Schlachter, *supra* note 82, at 810.

227. WOLFF, *supra* note 32, at 51.

228. See *id*. at 54-55.

229. *Id*. at 53.

children."[230] Equal opportunity means that financial success should go to those who are more talented and hard working.[231] Passing along advantages to one's offspring is no doubt giving them an advantage over others. Very few would argue that this should not be done. However, at a certain point, this is more than just passing along advantages; it is an attack on equal opportunity.[232] Some even think that it is just plain wrong to leave large sums of money to children,[233] and that such wealth transfers are made for family pride and do not exhibit true caring.[234] Some have even argued that the super rich add no value to the economy.[235] The implication is that they should be taxed out of existence. This is a harsh statement and very hard to prove. On the other hand, there are those who believe that the super rich should be rewarded, as their riches would eventually trickle down to the rest of us. Besides being ego deflating to those who are not rich, this trickle down theory just does not make sense. There is no reason why having a very wealthy class naturally translates to the rest of the population—just ask your average Brazilian. The truth may lie somewhere in between. It has been shown that taxes have "little impact on the [core] economic decisions" of the super rich.[236] Hence, taxing decisions should be made with little fear of the economic impact on the super rich.

Uncontrolled wealth accumulation also poses a danger to our democratic system. We have seen above that wealth concentration leads to power concentrations as public officials rely more and more on the rich to finance their elections. This means a decrease in the power of the ballot and social cohesion.[237] This will invariably lead to more political corruption,[238] and political offices will be sold to the highest bidders.[239] It is simply a fact that as wealth concentrates more in the hands of the few, this "political donor" class will have more access to Congress, and that access will sometimes

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230. SHAPIRO, *supra* note 113, at 36. This also presents the meritocracy versus inheritance dilemma. *Id.* at 61.

231. PHILLIPS, *supra* note 28.

232. Clearly, most would agree that the CEO of a company who receives his position just because he is the offspring of the chairman of the board is such an example. What about paying your child's college tuition? Most would agree that this is what is expected of parents and, hence, not a distortion of equal opportunity. Some would agree that it is merely a socially acceptable form of distorting equal opportunity. Getting rid of the estate tax and allowing families to pass millions of dollars through the generations is bound to distort equal opportunity.

233. GATES & COLLINS, *supra* note 10, at 132-33.

234. *Id.* at 133.

235. SLEMROD, *supra* note 120, at 4.

236. *Id.* at 17.

237. GATES & COLLINS, *supra* note 10, at 17.

238. PHILLIPS, *supra* note 28, at xii.

239. *Id.* at xvi. Senator McCain complained about the U.S. system of campaign financing as "an elaborate influence-peddling scheme in which both parties conspire to stay in office by selling the country to the highest bidder." *Id.*

prompt Congress to pass favorable tax breaks.[240] Passage of an estate tax bill favorable to the rich is one example. Finally, even if the ineffectiveness of the estate tax is accepted as fact, the tax may still serve the purpose of "providing the non-wealthy with a perception that entrenched wealth is under attack."[241]

E. Repeal of the Estate Tax Will Have a Negative Impact on Family Farms, Small Businesses, the States, and Charities

It has been argued that repeal of the estate tax will hurt the small family farm.[242] This is because the most effective income tax solutions to save the small family farm "are those that counteract the market dominance of agribusiness and help to reestablish local markets and stable prices for small family farmers."[243] Examples of such tax policies are "[c]ode sections that encourage ethanol production and collectivation through cooperatives."[244] This argument makes sense because if the small family farm must be saved, it must be saved while it is in business. Exempting small farmers from a tax that they will not be subject to either because they are out of business or they are exempt from it will not be helpful.[245]

There have been reform bills calling for exempting 99.5% of all American families from the estate tax.[246] Yet, these bills have been rejected. It appears that even an exemption that would exempt most small businesses from the estate tax will not be accepted by the larger-owned family businesses because in addition to a large exemption, they are looking for a permanent rate reduction.[247] It has been said that the fact "that the White House does not leap

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240. *See* Don Leatherman, *Perfectly Legal*, 41 TENN. B.J. 23 (June 2005) (book review) (reviewing a book addressing how the rich exploit the federal income tax laws for their own benefit); *see also* GATES & COLLINS, *supra* note 10, at 18.

241. Hauser, *supra* note 23, at 386 (citing George Cooper, *A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance*, 77 COLUM. L. REV. 161 (1977)).

242. *See* Snyder, *supra* note 66, at 771-73.

243. *Id.* at 778.

244. *Id.*

245. "[T]he American Farm Bureau Federation acknowledged to the *New York Times* that it could not cite a single example of a farm having to be sold to pay estate taxes." *See* CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 36.

246. *See* Gene Sperling, *The Case for Sensible Estate Tax Reform* (July 25, 2004), http://www.npr.org/templates/story/story.php?storyId=4725777.

247. *See* Jeffrey H. Birnbaum & Jonathan Weisman, *The 1% Split Over Estate Taxes: The Few at the Top of the Heap Disagree on How to Keep the Most,* WASH . POST, Aug. 12, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/08/11/AR2005081102013.html. It appears that the very rich are looking for rate reductions and would settle for a large exemption but not at the expense of rates. The merely rich are pushing for a large exemption because "a $3.5 million exemption . . . would have forced a mere [ninety-four] family-owned businesses and [sixty-five] family farms to pay any estate tax. . . [and] [o]nly [fifty-four of these] enterprises would have . . . to liquidate assets to pay the taxes[.]" *Id.*

to embrace plans that are more fiscally-responsible and protects estates of up to $5 million per couple makes transparent that the entire fight against 'death taxes' is a ruse. It is a fight for a massive tax break for the wealthiest one-half of one percent of estates.[248] Complete repeal means $13 billion in tax breaks to the wealthiest 750 estates in one year alone.[249] At a time when we are at war, when we are facing mounting deficits, and a poverty rate of over thirty percent among minority children,[250] giving such tax breaks to those who simply do not need it is at best irresponsible.

Small businesses, especially small newspapers, have argued that facing the estate tax has caused them to sell to larger outfits. The estate tax has thus been accused of causing a consolidation of newspapers in the hands of a few conglomerates such as the Garnett group, owner of *USA Today*. This argument fails to take two factors into consideration. First, the changes in the law made by Congress that permit such consolidation in the market are the true culprits. Second, once consolidation of newspapers is permitted, the smaller players come under pressures to either sell their businesses or compete head to head with the conglomerate. Many have chosen to sell ahead of being subject to an estate tax. Hence, the estate tax is not *the* cause of newspaper consolidations.

The states are also impacted by the estate tax. Because it has long been a belief that estates should only be taxed at the state level, the federal government implemented an estate tax credit whereby estates received a credit for state estate taxes paid.[251] This created a boon for the states without costing taxpayers additional taxes. As stated earlier, this credit is phased out during the first four years of EGTRRA, leaving some states with no estate tax because their estate tax system was tied with the federal estate tax.[252] Other states have an independent estate tax system, but may lose out if their residents move to non-estate tax states. Estates are allowed a federal tax credit for the amount of estate taxes that they pay to their respective states—the "pick-up tax."[253] While increasing the exemption on the estate tax, Congress also repealed the credit allowed for the state pick-up tax.[254] This has caused havoc on state budgets,[255] and they could lose up to $28 billion over a five-year period.[256]

248. *Id.*
249. *Id.*
250. *Id.*
251. Hill, *supra* note 56, at 162.
252. *See id.* at 164.
253. *See* I.R.C. § 2106(a)(4) (2001).
254. *See* I.R.C. § 901, P.L. 107-16.
255. Hill, *supra* note 56, at 166.
256. *See* Schlachter, *supra* note 82, at 800.

States might respond by enacting their own estate taxation scheme. However, the constitutionality of such taxes has been questioned.[257] Some states are barred by their constitution from imposing their own estate taxes.[258] Hence, these states will simply have to do without this much needed source of revenue. Permanent estate tax repeal will cause competition among the states as taxpayers move to states that have not enacted estate taxes.[259]

For political reasons, charities have not joined the fight against repeal of the estate tax, even though one effect of repeal would be a decrease in charitable donations.[260] This decrease is likely because the favorable tax treatment granted charitable donations would also be eliminated.[261] Some estimate that the decrease in charitable contributions will be in the $15-20 billion range per year.[262] Clearly charitable donations are made for a number of reasons, including wanting to advance a particular cause. Such reasons are independent of any tax incentives and will survive them. Nevertheless, tax incentives no doubt help in increasing the amount of charitable donations. Evidence of the impact of tax incentives can be seen in the higher charitable donations given by Americans as compared to countries like "Canada, which do not allow tax deductions for charitable gifts.[263]

VII. WHERE ARE WE NOW?

Congress has postponed the vote on making the estate tax permanent on several occasions.[264] This is recognition by the proponents of repeal that they do not have the vote to make repeal permanent. Currently, permanent repeal of estate tax is not very high on the Republican agenda, but this may change if our economic fortune changes. It is clear that the idea of tax cuts has not lost its appeal.[265] Hence, we will again see the debate over the estate tax take center stage in the near future. After all, Congress only has a few short years

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257. *See* Daniel B. Evans, *The Constitutionality of Decoupling*, 19 PROB. & PROP. 22 (2005) (questioning states' estate taxes that may reach property outside state borders). Such problems did not exist before EGTTRA because most states' estate taxes were simply equal to the amount of the federal estate credit. Hence, a state's estate taxes did not impose an additional cost to an estate. *Id.* at 23.

258. Hill, *supra* note 56, at 172. Examples include California and Florida.

259. Schlachter, *supra* note 82, at 800.

260. In his veto of the estate tax repeal bill passed by Congress, President Clinton stated that estate tax repeal would cost charities up to $6 billion. Other estimates range higher, as high as $20 billion. *See* Clinton, *supra* note 14. *See also*, Schlachter, *supra* note 82, at 801.

261. *See* I.R.C. § 2106 (2001).

262. Schlachter, *supra* note 82, at 801.

263. *Id.*

264. *See* GRAETZ & SHAPIRO, *supra* note 5.

265. *See, e.g.*, Wesley Elmore, *Senate Nears Completion on Tax Cuts, Waits on Conferees*, 2006 TNT 23-1 (Feb. 2, 2006); *see also* Wesley Elmore, *Senate Moves Ahead on Tax Cuts, With Substitute Amendment on Tap*, 2006 TNT 22-1 (Feb. 1, 2006).

to decide what it wants to do. For now, the confusing state of affairs is creating work for lawyers and accountants because advising clients on estate matters is now more challenging than ever.[266] As the debate rages on and the opponents do battle again, they will likely look at several options such as: (1) abolishing the estate tax and imposing an inheritance tax on the transfer of assets from decedents; (2) imposing a capital gains tax on capital assets at death; (3) eliminating the estate tax and the stepped-up basis on assets received from a decedent; (4) keeping the estate tax in its current form but providing large exemptions; or (5) a combination of the options. There are pitfalls to all the above options and some require a drastic change in thinking.[267] Consequently, it would be prudent to predict that Congress will opt for keeping the current form of the estate tax with increasing exemptions for small businesses and small farms.

IX. CONCLUSION

It is not clear what will ultimately happen to the estate tax. If the deficits that we are currently experiencing continue to add up, Congress may not have the stomach to give up on this arguably easy source of revenue. This article has argued that decisions on which taxes to impose should be based on sound economic analysis, not just sound bites and emotional appeal. While there are good arguments favoring repeal of the estate tax, the arguments opposing repeal are, on balance, stronger. Also, as we have seen above, economic analyses are very challenging and often cannot be precise because many uncontrollable factors impact such analysis. Nevertheless, there is ample evidence that concentration of wealth, over time, negatively impacts a country's economy.[268] This is because when wealth is concentrated, economic decisions are made by the few and not by the many. Additionally, the wealthy tend to be more concerned with preserving their wealth,[269] and over time this concern will overshadow all other concerns. The most potent counter argument to keeping the estate tax is our own economic success—despite enormous concentrations of wealth that we have seen in this country in the past two decades, our economy is still strong. Hence, concentration of wealth may not be so bad. This is indeed a formidable argument because it taps into American economic optimism, a powerful economic engine indeed. This is why the opponents of repeal are flat-footed in their reply.

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266. *See* Richard L. Zinn, *Puncturing the Paradigm: New Estate Planning and Drafting Consideration After the Economic Growth and Tax Reconciliation Act of 2001 (EGTRRA)*, 72 J. KAN. B.A. 30 (Feb. 2003).

267. Wampler, *supra* note 29.

268. *See* GATES & COLLINS, *supra* note 10.

269. GRAETZ & SHAPIRO, *supra* note 5.

Nevertheless, the estate tax should be kept because it enhances tax progressivity, an important tax policy, and it ultimately promotes equality of economic opportunities by lessening concentrations of wealth. It should be noted that this notion of equality of economic opportunities is not just a political philosophy; it is a sound economic principle. It is based on the notion of a free market society where the best ideas should win. As wealth gets concentrated, the holders of this concentrated wealth have greater impact on the decisions that are made in the market place. In a truly free market society, this is a good thing because they probably had the best ideas and this led to their wealth. However, if this wealth is passed on to the next generation just by virtue of being born in the right family, then there is no guarantee that the best ideas will be rewarded. Thus, over time, an economic aristocracy will rise to the detriment of us all.