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Afterlife of the Death Tax

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AFTERLIFE OF THE DEATH TAX

SAMUEL D. BRUNSON*

More than a century ago, Congress enacted the modern estate tax to help pay for World War I. Unlike previous iterations of the estate tax, though, this one outlived the war and accumulated additional goals beyond merely raising revenue. The estate tax helped ensure the progressivity of the tax system as a whole, and it limited the hereditary ability to accumulate wealth.

This modern estate tax almost instantly met with opposition, though. The opposition has never been sufficient to entirely eliminate the estate tax, but it has severely weakened its ability to raise revenue and to prevent the accumulation of wealth. As a result, today's estate tax is functionally a zombie: it accounts for less than one percent of federal revenues and does little to prevent the accumulation of wealth among a small group of citizens. The estate tax largely serves to evoke fear and costly tax planning, but it only manages to bite the largest and slowest estates.

Although the estate tax has proven hard to kill, it is time for Congress to end it definitively and transfer its functions as revenue raiser and impediment to wealth accumulation to the income tax. To effect that transfer, Congress needs to do three things: First, it should treat death as a realization event and tax estates on their assets' unrealized appreciation. Second, it should treat the receipt of an inheritance as gross income in the hands of heirs, thereby requiring heirs to pay income tax on their inheritance. Third, Congress should eliminate the step-up in basis and, instead, assign basis to inherited property under ordinary basis rules. By making these three changes, Congress can put to rest the zombie estate tax, while, at the same time, revivifying taxation at death.

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INTRODUCTION

In many ways, the current estate tax is a zombie, neither fully alive nor fully dead. Certainly it raises revenue. It raises far less than it did in its prime, though, the result of serious limitations and gross unpopularity that leave it hobbled.[1] Although it has been seriously wounded, it lumbers on, not yet dead, and virtually impossible to kill.

Not that politicians have not tried to kill it. In fact, on September 27, 2017, the Trump administration presaged the estate tax's death in its framework for a promised fundamental tax reform.[2] The nine-page framework, while light on details, laid out the administration's priorities. One of those priorities was the repeal of the estate tax.[3]

The estate tax has been the *bête noire* of at least some legislators even before the modern estate tax was conceived. As early as 1898, Populist Senator William V. Allen decried the estate tax, arguing that the country should tax estates while the "husband is alive, when he is competent to earn a living for his family and to accumulate[.] Why wait until his widow is in weeds and his children in tears before you undertake to collect anything from his estate?"[4]

At least some corners of the Republican Party have shared Senator Allen's distaste for the estate tax from the early decades of the twentieth century. Congress enacted the modern estate tax in 1916.[5] By the 1920s—the new estate tax's infancy—Secretary of the Treasury Andrew Mellon argued for its repeal or, at least, its reduction.[6] Democrats, and some Republicans, opposed him, and for the first half of the decade, decedents faced significant estate tax volatility, with Congress raising the tax rate dramatically, then slashing it a couple years later.[7] It survived, though, and, over its first half-century, Congress experimented with it until, in 1976, Congress enacted the current version of the estate tax, integrating it with the gift tax.[8]

While the estate tax has always had enemies, by the end of the twentieth century, those enemies grew more organized and vocal. The late 1980s saw the births of several groups bent on eliminating the estate tax.[9] By the beginning of the twenty-first century, eliminating the tax had transformed into an integral part of the Republican legislative agenda.[10]

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1. *See infra* notes 29–32.
2. Julie Hirschfeld Davis & Alan Rappeport, *Sweeping Trump Tax Plan Vague on Details and Cost*, N.Y. TIMES, Sept. 28, 2017, at A1.
3. UNIFIED FRAMEWORK FOR FIXING OUR BROKEN TAX CODE 6 (2017), https://www.treasury.gov/press-center/press-releases/Documents/Tax-Framework.pdf [https://perma.cc/DL7U-THT2] ("The framework repeals the death tax and the generation-skipping transfer tax.").
4. 31 CONG. REC. 5081 (1898).
5. David J. Herzig, *The Income Equality Case for Eliminating the Estate Tax*, 90 S. CAL. L. REV. 1143, 1149 (2017).
6. JOSEPH J. THORNDIKE, THEIR FAIR SHARE: TAXING THE RICH IN THE AGE OF FDR 21 (2013).
7. *Id.* at 21–22.
8. Herzig, *supra* note 5, at 1157.
9. MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 12–13 (2005).
10. *Id.* at 268.

If it has always had its opponents, why did the United States enact an estate tax in the first place? Today, proponents of the estate tax point to three functions it serves: it raises revenue, it increases the progressivity of the federal tax system, and it reduces hereditary concentrations of wealth.[11] It is important to note two things about these functions. First, when Congress originally enacted the estate tax, its members appear to have been principally, and perhaps solely, motivated by the revenue the estate tax would produce. Second, the modern estate tax performs relatively poorly at each of these three goals.

While some early proponents of the estate tax appear to have supported it as a way to limit the hereditary transfer of wealth,[12] the actual enactment of the modern estate tax did not occur as a result of these arguments. Rather, the principal purpose motivating Congress to enact the estate tax was a need for revenue, not considerations of progressivity or breaking up the transmission of wealth.[13] Congress's original enactment of the estate tax was driven by the exigencies of entering World War I, which demanded additional revenue.[14] The modern federal estate tax was not the federal government's first foray into estate taxation, however. Three times prior, in 1797, 1862, and 1898, Congress had imposed a tax triggered by decedents' deaths.[15] Like the modern estate tax, each of those taxes corresponded to increased revenue needs precipitated by wars (an impending war with France, the Civil War, and the Spanish-American War, respectively).[16]

Unlike the modern estate tax, though, these precursor taxes each went away after the war (or, in the case of France, the threat of war) ended.[17] Their disappearance when the revenue was no longer needed bolsters the case that, in Congress's mind, the primary purpose of estate taxation was to raise the revenue necessary to fight in a war.

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11. Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 270 (1983); M.C. Mirow & Bruce A. McGovern, *An Obituary of the Federal Estate Tax*, 43 ARIZ. L. REV. 625, 627 (2001).

12. For example, at the turn of the century, Andrew Carnegie "proposed drastic limitations on the passage of wealth at one's death." Mirow & McGovern, *supra* note 11, at 627. And in 1907, President Theodore Roosevelt declared that there was no social value to allowing wealthy individuals to transmit their "enormous fortunes" to their heirs. Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223, 229 (1956).

13. Joseph J. Thorndike, *The Century of the Estate Tax: Made for Revenue, Not Redistribution*, 152 TAX NOTES 1330, 1332–33 (2016). In fact, in the first decade of the twentieth century, President Theodore Roosevelt made it clear that he believed the concentration of wealth to be inevitable, and that government should only break up such concentrated wealth if the money were being used "to the detriment of the general public." Camden Hutchison, *Progressive Era Conceptions of the Corporation and the Failure of the Federal Chartering Movement*, 2017 COLUM. BUS. L. REV. 1017, 1062 (2017).

14. Paul L. Caron, *The One-Hundredth Anniversary of the Federal Estate Tax: It's Time to Renew Our Vows*, 57 B.C. L. REV. 823, 825 (2016).

15. Eisenstein, *supra* note 12, at 225, 227. In fact, Congress also imposed a type of inheritance tax in its abortive 1894 income tax. In that case, though, the tax treated inheritance as income and was struck down by the Supreme Court as part of its general holding that the 1894 income tax was unconstitutional. *Id.* at 227 & n.22.

16. Caron, *supra* note 14, at 824–25.

17. *Id.*

The modern estate tax, on the other hand, is over a century old.[18] Although Congress significantly lowered the income tax's top marginal rates after World War I ended, it retained the estate tax to continue as "a significant feature of the revenue system."[19] In fact, with the exception of a one-year disappearance in 2010,[20] the modern federal estate tax has survived through times of war and times of peace, through periods of high revenue needs and lower revenue needs.

The estate tax has become largely ineffective at accomplishing either of its primary goals. It raises a vanishingly small percentage of federal revenue and has done little to prevent dynastic wealth.[21] At the same time, though, it exists as a shadow taxpayers need to be aware of and as an obstacle that they plan around.[22] As a zombie tax regime, the estate tax will only achieve its goals to the extent that taxpayers fall within its reach. Not all taxpayers can easily avoid the estate tax, of course: for a billionaire to avoid it, she would have to make significant charitable bequests and otherwise reduce her estate by an enormous percentage. But by and large, the estate tax captures decedents who failed to take proper measures to avoid it.

In spite of the short reach of the estate tax, decedents' relative ease in avoiding it, and Republicans' anti-estate tax rhetoric, Congress has thus far been unsuccessful in killing the estate tax. The moment has arrived, though. Congress should finish the job it began, eliminating the estate tax and replacing it with a post-estate tax. This post-estate tax would comprise three changes to current income taxation: (a) treating death as a realization event and taxing decedents' estates on their unrecognized gains; (b) replacing the current federal estate tax with a federal inheritance tax instead;[23] and (c) eliminating the special step-up in basis on inherited assets and replacing it with ordinary cost basis.

This Article will proceed to discuss the replacement of today's zombie estate tax with a post-estate tax regime as follows: Part I will describe why I characterize the estate tax as a zombie. It will lay out the estate tax's failings both in raising revenue and in curtailing income inequality. Part II will then explain in greater detail what the post-estate tax would look like. It will discuss each of the three parts of the post-estate tax and how they will function.

The post-estate tax poses certain technical questions that would have to be addressed, including both how estates will pay and how it will deal with the antiabuse regimes that will die with the estate tax. Part III will explain how many of the details should be structured. Finally, Part IV will look at questions of tax fairness. It will

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18. *Id.* at 823.

19. STEVEN A. BANK, KIRK J. STARK & JOSEPH J. THORNDIKE, WAR AND TAXES 81 (2008).

20. Matthew B. Gaudin, Note, *The Federal Estate Tax and the National Debt: Why the Debt Forces a Defense of the Tax*, 45 IND. L. REV. 159, 160 (2011) ("In 2010, [the Economic Growth and Tax Reconciliation Relief Act] entirely eliminated the estate tax."). I will discuss the one-year disappearance of the estate tax *infra*.

21. *See infra* Part I.

22. The costs imposed by planning around the estate tax are deadweight losses, costs that provide no benefit for society at large. *See infra* notes 77–78 and accompanying text.

23. For an explanation of the differences between inheritance and estate taxes, see *infra* notes 104–106 and accompanying text.

explain how to ensure that the post-estate tax can be implemented fairly, especially with respect to vertical equity concerns.

I. A ZOMBIE ESTATE TAX

It is likely that, in spite of the sustained attack on the estate tax, its opponents will find it difficult to fully revoke. President Bush, after all, could only eliminate it for a single year.[24] And in spite of the 2017 tax reform framework's prioritizing the elimination of the estate tax,[25] Congress almost immediately faced dissent from within the Republican party.[26] Ultimately, in spite of controlling the presidency and both houses of Congress,[27] the estate tax survived. Congress did manage to weaken the estate tax by doubling the exemption amount, but the estate tax lives on.[28]

Even though estate tax repeal is not as inevitable as political rhetoric makes it appear, perhaps it is time for its proponents to rethink the benefits of the estate tax. Even though the estate tax survived the latest—and perhaps the most likely—attempt at revocation, Congress has significantly neutered its ability to raise revenue or to limit inequality. There is no inherent reason why the estate tax could not effectively raise federal revenue. In the first quarter-century of the modern estate tax's existence, it raised between one and ten percent of federal revenue.[29] In fact, the height of its revenue-raising prowess came in 1936, when the estate tax was responsible for raising eleven percent of federal revenues.[30] Since the end of World War II, the estate tax has never raised more than 2.5% of federal revenues,[31] and in recent years, it has come nowhere near that 2.5% mark. In 2015, the estate tax raised a historically low 0.6% of federal revenues, the result of a high exemption amount and a low tax rate.[32]

In 2017, even with no estate planning, a decedent only owed estate tax to the extent the value of her estate exceeds $5.49 million.[33] And as of 2018, she will only pay taxes to the extent the value of her estate exceeds $10 million, adjusted for inflation.[34] Moreover, she only owed taxes at a 40% rate,[35] a rate that is virtually identical to the 39.6% top marginal rate applicable at the time to such a taxpayer on her income.[36]

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24. *See* Michael M. Gleeson, *Frustrated Estate Planners Look in Vain for Help from Congress*, 133 TAX NOTES 666, 666 (2011).
25. *See supra* note 3 and accompanying text.
26. Richard Rubin, *GOP Support Ebbs for Estate-Tax Repeal*, WALL ST. J., Oct. 6, 2017, at A2.
27. Marie Sapirie, *The Rise and Fall of the Destination-Based Cash Flow Tax*, 157 TAX NOTES 1670, 1670 (2017).
28. H.R. 1, 115th Cong. § 11061(a) (2017).
29. Caron, *supra* note 14, at 825.
30. Graetz, *supra* note 11, at 269.
31. *Id.*
32. Caron, *supra* note 14, at 826–27.
33. Rev. Proc. 2016-55 § 3.35, 2016-45 I.R.B. 707.
34. I.R.C. § 2010(c)(3)(C) (Supp. V 2018).
35. *Id.* § 2001(c) (2012).
36. *See id.* § 1(i)(3)(A)(ii). In 2018, the inflation-adjusted unified credit is $11.18 million. Rev. Proc. 2018-18 § 3.35, 2018-10 I.R.B. 392.

If the sole purpose behind having an estate tax were to raise revenue, these figures would be damning. A tax intended solely to raise revenue must raise revenue. Otherwise, the complexity and distortions it creates in taxpayer behavior are not offset by the benefits it provides to society.

But, while revenue concerns motivated Congress to enact the estate tax, revenue is not the only benefit the tax provides. As mentioned above, proponents also point out that, in theory, the estate tax can increase the tax system's overall progressivity and can break up the dynastic transmission of wealth.[37] In fact, as Congress made adjustments to the estate tax as part of the Revenue Act of 1932, it justified the estate tax not solely as a way to raise revenue, but also as a tool to break up and redistribute private fortunes.[38]

In a progressive tax system, tax rates increase as taxpayers move up some scale.[39] That scale is often income, but can also be wealth, consumption, or other financial measures.[40] The federal estate tax clearly qualifies as progressive; in 2017, decedents could exempt from estate taxation the first $5.49 million that they left to their heirs.[41] Because each decedent can take advantage of this exemption, a married couple could effectively leave almost $11 million to their heirs in 2017 without paying the estate tax.[42] Estates in excess of the exemption amount pay taxes on that excess at a forty-percent tax rate.[43] Moreover, between 2018 and 2025, the exclusion amount for individuals (and thus for married couples) has doubled.[44] In other words, only married couples who have enough wealth to leave more than $22 million to their heirs in 2018 even face the estate tax.[45] In 2015 (when the exemption amount was $5 million), only 0.2% of decedents paid the estate tax.[46] With the higher exemption amount, that percentage will likely be significantly lower.

While that clearly puts the estate tax in the progressive category, though, it is not entirely clear how much progressivity it adds to the tax system. On the one hand, economist David Joulfaian has calculated that, in 2008, decedents who filed estate tax returns paid significantly more in estate taxes than they had paid in income taxes

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37. *See supra* note 11 and accompanying text.
38. Herzig, *supra* note 5, at 1152.
39. Donna M. Byrne, *Progressive Taxation Revisited*, 37 ARIZ. L. REV. 739, 742 (1995).
40. *Id.*
41. I.R.C. § 2010(a); Rev. Proc. 2016-55 § 3.35, 2016-45 I.R.B. 707. The exclusion amount is adjusted annually for inflation. I.R.C. § 2010(c)(3)(B).
42. *See* Robert B. Smith, *Should We Give Away the Annual Exclusion?*, 1 FLA. TAX REV. 361, 372 n.31 (1993).
43. I.R.C. § 2001(c). Technically, estates face twelve marginal tax rates, but the highest rate applies to estates in excess of $1 million. *Id.* Because the unified credit exceeds $1 million, however, no estate will cycle through the lower rates.
44. I.R.C. § 2010(c)(3)(C) (Supp. V 2018).
45. Note, too, that even where a decedent's estate exceeds the exemption amount, it is possible that she will owe no estate tax. She can, for example, donate the excess to charity. Charitable contributions reduce the size of the taxable estate. *Id.* § 2055(a) (2012). But she can also reduce the size of her taxable estate while not divesting any of her assets. For instance, if the decedent owns a partnership interest in a family limited partnership, rather than owning assets directly, the decedent can reduce the value of her distributive share of partnership assets. *See, e.g.*, Estate of Giustina v. Comm'r, 111 T.C.M. (CCH) 1551 (T.C. 2016).
46. Caron, *supra* note 14, at 826–27.

the prior year and that the ratio of estate taxes to income taxes grew as estate size grew.[47] The year before death may not be representative of an individual's real tax burden, though, so to correct for that, Dr. Joulfaian looked at the ratio of estate tax to income taxes paid over the last ten years of a decedent's life. Even there, the amount decedents paid in estate taxes on average doubled the amount of income taxes they had paid over the last decade of their lives.[48]

Of course, in 2008, the exemption amount was $2 million (or about $9 million less than in 2018), while the estate tax rate, at forty-five percent, was five percentage points higher than 2018.[49] With the increased exemption amount and the decreased tax rate, the amount by which a decedent's estate tax exceeds her income tax is likely to be lower, and perhaps significantly lower.

In fact, the Center on Budget and Policy Priorities estimated that estates of individuals who died in 2017 would pay an average effective tax rate of seventeen percent on the value of the estate.[50] And, while those averages increase with estate size, according to the Tax Policy Center's model, taxable estates worth more than $20 million paid an average effective rate of nineteen percent.[51]

While the estate tax likely continues to add to the progressivity of the overall U.S. federal tax system, then, it adds less progressivity today than it did in earlier decades.[52] The goal of a tax system that is progressive overall continues to be an important one, but, for the estate tax to significantly aid that progressivity, Congress would need to fix it.[53]

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47. David Joulfaian, *What Do We Know About the Behavioral Effects of the Estate Tax?*, 57 B.C. L. REV. 843, 847 (2016).

48. *Id.*

49. David Austill & Mehmet C. Kocakülâh, *Death of Death Taxes: Not Likely*, 123 TAX NOTES 433, 435 (2009).

50. CHYE-CHING HUANG & CHLOE CHO, CTR. ON BUDGET & POL'Y PRIORITIES, TEN FACTS YOU SHOULD KNOW ABOUT THE FEDERAL ESTATE TAX 2 (2017), https://www.cbpp.org/sites/default/files/atoms/files/1-8-15tax.pdf [https://perma.cc/R79D-TRE3].

51. *T16-0277 - Current Law Distribution of Gross Estate and Net Estate Tax by Size of Gross Estate, 2017*, TAX POL'Y CTR. (Nov. 30, 2016), http://www.taxpolicycenter.org/model-estimates/baseline-estate-tax-tables-nov-2016/t16-0277-current-law-distribution-gross-estate [https://perma.cc/SW65-33BG].

52. According to IRS Statistics of Income data, in 2009, taxable estates worth between $3.5 million and $5 million paid an average effective estate tax rate of 6.5%. Estates worth between $5 million and $10 million paid 17.5%, between $10 million and $20 million paid 24.5%, and estates worth more than $20 million paid estate taxes at a 20.7% rate. By 2013, estates worth less than $5 million paid no estate tax. Between $5 million and $10 million, the effective estate tax rate had fallen by more than four percentage points, to 13.1%. The effective tax on estates worth between $10 million and $20 million had fallen to 21.6%, a drop of three percentage points. Meanwhile, the tax on estates worth more than $20 million had risen by 0.1 percentage points to 20.8%. *See SOI Tax Stats - Estate Tax Data, by Year of Death*, IRS, https://www.irs.gov/uac/soi-tax-stats-estate-tax-statistics-year-of-death-table-1 [https://perma.cc/E3MA-VZ6P] (last updated Oct. 12, 2018) (follow "2009" and "2013" hyperlinks).

53. Caron, *supra* note 14, at 836–37 ("With the nation mired in the slowest post-recession recovery since the 1930s, the estate tax should be enlisted to begin to put our fiscal house in order and stem the growth of income inequality in America.").

Finally, proponents of the estate tax argue that it is an important tool in breaking up dynastic wealth. Academics have raised a number of reasons why the transmission of dynastic wealth should be limited. Some argue that wealth concentration—like what occurs in the intrafamilial transfer of wealth—harms economic growth.[54] Wealth allows its holders significant influence on politicians and on the media. When that wealth stays within a single family, that influence will not benefit from the new ideas and experiences the holders bring with them.[55]

In the United States, approximately fifty percent of wealth is inherited wealth.[56] And the estate tax is doing little to break up that dynastic wealth. In recent years, only about 0.2% of decedents have even paid the estate tax,[57] and effective rates are far from confiscatory.[58] While the estate tax is meant in part as a tool in the fight against wealth inequality, the estate tax is losing. Between 1978 and 2012, the share of wealth held by the 0.1% richest families more than tripled, from seven percent to twenty-two percent.[59] In the meantime, the share of wealth held by the bottom ninety percent has fallen from a high of thirty-five percent in the mid-1980s to about twenty-three percent in 2012.[60]

These numbers reflect both dynastic and self-made wealth, though the ratio of the two is unclear.[61] No matter what percentage of that wealth is dynastic, though, the estate tax has been unable to prevent the growth of income inequality.

Why is the estate tax, as progressive as it is on paper, so ineffective at breaking up dynastic wealth and otherwise preventing the consolidation of wealth into fewer and fewer hands? As a result of the high exemption amount and the relatively low tax rate, few Americans pay the estate tax, and those who do contribute a relatively miniscule amount of revenue to the federal government. In 2013, 2.6 million Americans died. Of those decedents, 11,300 filed estate tax returns, and only 4700 owed any estate tax.[62] In other words, about 0.4% of decedents' estates filed an estate tax return and 0.2% paid the estate tax. The amount they paid in estate taxes constitutes significantly less than one percent of federal revenue.[63]

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54. James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 849 (2001).

55. *Id.* at 850. Those assertions are contestable, of course. To sidestep that debate, Professor Miranda Perry Fleischer has suggested focusing on an ill of dynastic wealth that is less controversial: that there is "something antithetical to this country's democratic ideals about being able to transfer power and influence to one's heirs." Miranda Perry Fleischer, *Divide and Conquer: Using an Accessions Tax to Combat Dynastic Wealth Transfers*, 57 B.C. L. REV. 913, 915 (2016).

56. Repetti, *supra* note 54, at 849.

57. Caron, *supra* note 14, at 824.

58. *See supra* notes 50–51 and accompanying text.

59. Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 20625, 2014), http://www.nber.org/papers/w20625 [https://perma.cc/83LX-YRD9].

60. *Id.* at 3.

61. *Id.*

62. *Key Elements of the U.S. Tax System: How Many People Pay the Estate Tax?*, TAX POL'Y CTR.: BRIEFING BOOK, http://www.taxpolicycenter.org/briefing-book/how-many-people-pay-estate-tax [https://perma.cc/JM5G-HJAU].

63. Andrew Lundeen, *The Estate Tax Provides Less than One Percent of Federal*

In contrast, although during the first year of the modern federal income tax, it only reached almost two percent of American households,[64] today, more than fifty-five percent of American households pay the federal income tax.[65] Where the income tax shifted from a class tax to a mass tax,[66] the estate tax has gone the opposite direction. No longer just a class tax, the modern estate tax is a steroidal class tax.

Even as a steroidal class tax, though, it does little to stem inequality. In 2016, decedents' estates paid about $18 billion in estate taxes.[67] That is less than ten percent of the $192 billion reported on the 12,411 estate tax returns filed that year.[68] It is about twenty-six percent of the amount of wealth held by the six heirs to the Wal-Mart fortune.[69] And it is a miniscule fraction of the total wealth held by the top one percent wealthiest Americans.[70]

By and large, then, the current incarnation of the estate tax fails at both its original purpose (raising revenue) and its subsequent adopted purposes (maintaining progressivity and reducing economic inequality). It perhaps serves a rhetorical purpose, proclaiming that society cares about economic inequality, but it is time to rethink whether merely asserting that message is sufficient reason to keep the estate tax. If we let go of the estate tax, we can replace it with an alternative that can successfully raise revenue, maintain progressivity, and combat the accumulation of wealth among a limited group of people.

II. A POST-ESTATE TAX: WHAT COMES NEXT

While I will recommend a replacement for the estate tax in the following pages, I must note that there is no pressing need to revoke and replace the estate tax. Its

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Revenue, TAX FOUND. (Apr. 7, 2015), https://taxfoundation.org/estate-tax-provides-less-one-percent-federal-revenue [https://perma.cc/QF3A-B5HF]. Professor David Herzig argues that the miniscule percentage of federal revenue raised by the estate tax is the direct result of estate tax rates failing to keep up with gross domestic product. Herzig, *supra* note 5, at 1193–94.

64. THORNDIKE, *supra* note 6, at 5.

65. *See T16-0121 Tax Units with Zero or Negative Income Tax Under Current Law, 2011-2026*, TAX POL'Y CTR. (July 11, 2016), http://www.taxpolicycenter.org/model-estimates/tax-units-zero-or-negative-income-tax-july-2016/t16-0121-tax-units-zero-or-negative [https://perma.cc/B9NH-NYZT].

66. THORNDIKE, *supra* note 6, at 6.

67. *SOI Tax Stats - Estate Tax Statistics Filing Year Table 1*, IRS, https://www.irs.gov/statistics/soi-tax-stats-estate-tax-statistics-filing-year-table-1 [https://perma.cc/9K92-S2KJ] (last updated Oct. 9, 2018) (follow "2016" hyperlink).

68. *See id.*

69. JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY 10 (2013).

70. In 2015, the net value of assets held by households and nonprofits was $84.9 trillion. Neil Shah, *Americans Get Richer, and Pare Their Debt*, WALL ST. J., June 12, 2015, at A2. Meanwhile, the percentage of wealth held by the top one percent was somewhere between thirty-three and forty-two percent of total personal wealth. Jesse Bricker, Alice Henriques, Jacob Krimmel & John Sabelhaus, *Measuring Income and Wealth at the Top Using Administrative and Survey Data*, BROOKINGS PAPERS ON ECON. ACTIVITY 261, 262, 292 (2016). Even if half of the $84.9 trillion is held by nonprofits, that means that the top one percent owns property worth between $14 trillion and $18 trillion. The annual estate tax, then, amounts to 0.1% or less of the value of the assets held by the top one percent of Americans.

current incarnation is that of a zombie "slowly stumbl[ing] along in search of brains upon which to feed, exhibiting little personality or ability to think."[71] It may threaten an estate if the estate comes within its grasp, but it is relatively easy to avoid the dangers it poses.

Certainly, in its current incarnation, the estate tax does little to raise revenue or to combat inequality. But these faults of the estate tax do not arise because of anything inherent to the idea of taxing decedents' estates. Rather, they come from deliberate choices Congress has made to neuter the estate tax.[72] The estate tax could effectively raise revenue and reduce inequality if Congress decided to let it do so.[73]

The problem is, there is no indication that Congress intends to do so. While Congress may lack the political will to actually do away with the estate tax, there is no reason to believe that it has the will to make the estate tax effective, either. It seems likely that the estate tax will persist, albeit in its current crippled form, in which it continues to reach few estates and raise little money.

In spite of the estate tax's limitations and unpopularity, it seems unlikely to go away of its own accord. In 2017, congressional Republicans may have had their best chance of eliminating the estate tax. They passed a tax reform bill without getting a single Democratic vote.[74] The original version of the bill passed by the House of Representatives eliminated the estate tax for decedents who died after 2024.[75] By the final enacted version, though, the estate tax had been weakened, but not killed. The enacted bill doubled the exemption amount but eliminated the eventual repeal of the estate tax.[76]

Still, perhaps it is time for estate tax proponents to band together with its opponents to definitively kill the estate tax. There is little benefit in allowing it to continue limping along, adding complexity and inefficiency to the tax law without compensating for that complexity and inefficiency. Moreover, eliminating the estate tax will also eliminate a certain amount of deadweight loss.[77] A tax produces deadweight loss when its cost to taxpayers exceeds the revenue it provides for the government.[78] The existence of the estate tax "notoriously impel[s] many people to engage in other sorts of complicated estate tax avoidance activities."[79] If the

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71. Adam Chodorow, *Death and Taxes and Zombies*, 98 IOWA L. REV. 1207, 1211 (2013).

72. *See supra* notes 33–36.

73. *See, e.g.*, Paul L. Caron & James R. Repetti, *The Estate Tax Non-Gap: Why Repeal a "Voluntary" Tax?*, 20 STAN. L. & POL'Y REV. 153, 154 (2009) ("We conclude that the estate tax is clearly not voluntary and is apparently more efficient than commonly thought in taxing transfers it was designed to reach.").

74. Sarah Almukhtar, Audrey Carlsen, K.K. Rebecca Lai, Blacki Migliozzi, Alicia Parlapiano, Jugal K. Patel & Rachel Shorey, *How Each House Member Voted on the Tax Bill*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/interactive/2017/12/19/us/politics/tax-bill-house-live-vote.html [https://perma.cc/2ZA9-QJZF]; Jasmine C. Lee & Sara Simon, *How Every Senator Voted on the Tax Bill*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/interactive/2017/12/19/us/politics/tax-bill-senate-live-vote.html [https://perma.cc/9QU2-VXGF].

75. TAX CUTS AND JOBS ACT, H.R. REP. NO. 115-409, at 44 (2017) (citing § 1602(a)(1)).

76. H.R. 1, 115th Cong. § 11061(a) (2017).

77. Lee Anne Fennell, *Death, Taxes, and Cognition*, 81 N.C. L. REV. 567, 635 (2003).

78. *Id.* at 619 n.191.

79. *Id.* at 635.

government can raise the same amount of revenue with less avoidance opportunity —and thus less deadweight loss—it makes sense to eliminate the estate tax and replace it with another, more efficient source of revenue.

Therefore, unless Congress intends to fix the estate tax—an intent that it has signaled fairly clearly that it will not make—it makes little sense to allow the estate tax to continue limping on, at least if there is an alternative that will better meet the goals of the estate tax.

And there are such alternatives. I propose three changes to the income tax that will help it replace the estate tax both with respect to the estate tax's original purpose (that is, to raise revenue) and its current purported purposes (that is, to maintain progressivity and to limit the concentration of wealth). Those three changes would be to treat death as a realization event, treat the receipt of inheritances as gross income to the heir, and replace the step-up in basis with ordinary basis rules.[80] These three changes, in tandem, will provide a more effective and more efficient death tax than the current estate tax, hobbled by high exemption amounts and significant unpopularity.

A. Death as a Realization Event

As a general rule, taxpayers do not have to include gain in their gross income until a realization event occurs.[81] In the earliest days of the modern federal income tax, it was unclear whether the tax could even reach those gains if they accrued in prior years.[82] The Supreme Court definitively put that confusion to rest in 1921, when it affirmed that gain had "been repeatedly declared to be taxable income within the meaning of the constitutional amendment and the acts of Congress."[83]

Around that same time, the Court embraced realization as a quasi-constitutional requirement for including gain in a taxpayer's gross income.[84] The realization rule

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80. None of these proposals are new. The latter two, in fact, have been included in U.S. tax law at discrete points in the past. Under the short-lived federal income tax of 1894, taxpayers included inheritances in gross income. Revenue Act of 1894, ch. 349, § 28, 28 Stat. 509, 553. And in 1976, Congress eliminated and replaced the step-up in basis with a carryover basis. Fred W. Peel, Jr., *Capital Losses: Falling Short on Fairness and Simplicity*, 17 U. BALT. L. REV. 418, 422 (1988). As the result of pushback from taxpayers and tax planners, though, the step-up in basis returned to inheritances four years later. *Id.* at 422 n.30. In 1983, Professor Harry L. Gutman wrote that "[t]here is no conceptual justification for excluding accrued but unrealized gain from the income tax base simply because the holder of the property has died." Harry L. Gutman, *Reforming Federal Wealth Transfer Taxes After ERTA*, 69 VA. L. REV. 1183, 1236 (1983).

81. Jeffrey L. Kwall, *When Should Asset Appreciation Be Taxed?: The Case for a Disposition Standard of Realization*, 86 IND. L.J. 77, 79 (2011). In certain circumstances, the tax law may permit or require taxpayers to mark their property to market. Samuel D. Brunson, *Elective Taxation of Risk-Based Financial Instruments: A Proposal*, 8 HOUS. BUS. & TAX L.J. 1, 19–20 (2007).

82. Kwall, *supra* note 81, at 84.

83. Merchs.' Loan & Tr. Co. v. Smietanka, 255 U.S. 509, 520 (1921).

84. Eisner v. Macomber, 252 U.S. 189, 212 (1920) ("We are clear that not only does a stock dividend really take nothing from the property of the corporation and add nothing to that of the shareholder, but that the antecedent accumulation of profits evidenced thereby, while

says that economic income will not be taxed until something happens that unlocks the value of that income.[85] In the ensuing century, scholars have broadly agreed that the realization requirement, while administratively convenient, is not constitutionally mandated.[86] With a couple small exceptions, the realization rule is still an important and fundamental part of the federal income tax.[87]

The Internal Revenue Code (the "Code") provides that realization occurs upon the "sale or other disposition of property," at which time a taxpayer includes in gross income the difference between the amount realized and her adjusted basis in the property.[88] Under current law, the tax law does not treat death as a realization event.[89] That exclusion means that a decedent pays no taxes on any appreciated property she holds when she dies. The Joint Committee on Taxation estimates that this exclusion of capital gains at death reduced federal revenue in 2016 by about $32.9 billion.[90]

There is no reason that the government needs to give up those billions of dollars in revenue. Realization does not occur solely upon the sale of an asset—it also occurs upon the "disposition" of an asset.[91] As Professor Jeffrey Kwall has highlighted, *disposition* can "encompass any transfer of property regardless of whether consideration is received by the transferor."[92] While traditionally, the tax law has excluded gratuitous transfers from the ambit of realization, there is no reason it must. And changing the rule would not merely increase federal revenue. Professor Kwall argues persuasively that treating death as a realization event makes the tax law fairer and reduces economic distortions that the current rule produces.[93]

Moreover, treating death as a realization event comports with the plain meaning of the statute. After all, if the Code meant to exclude gratuitous transfers from its

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indicating that the shareholder is the richer because of an increase of his capital, at the same time shows he has not realized or received any income in the transaction.").

85. Henry Simons describes realization like this:

> Suppose a man buys a Liberty Bond on January 1 for $90 and that on December 31 such bonds are selling for $100. He has "realized" no income. However, if he sells the bond at the latter date and puts the proceeds into unmarketable stock of a company prospecting for gold on Manhattan Island, he has "realized" income of $10.

HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 84 (photo. reprint 1980) (1938).

86. Henry Ordower, *Revisiting Realization: Accretion Taxation, the Constitution,* Macomber, *and Mark to Market*, 13 VA. TAX REV. 1, 8 (1993).

87. Jeffrey L. Kwall & Katherine K. Wilbur, *The Outer Limits of Realization:* Weiss v. Stearn *and Corporate Dilution*, 17 FLA. TAX REV. 47, 49 (2015).

88. I.R.C. § 1001(a) (2012).

89. Kwall, *supra* note 81, at 95 ("[D]eath does not constitute a realization event under current law . . . ."); *cf.* Campbell v. Prothro, 209 F.2d 331, 336 (5th Cir. 1954) ("It is true that efforts have been made to procure the enactment of statutes to change the rule that a gift does not make the donor taxable on unrealized appreciation in the value of the property given. Congress has so far not adopted, indeed has declined to adopt that view.").

90. STAFF OF THE JOINT COMM. ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2016-2020, at 33 (2017).

91. I.R.C. § 1001(a).

92. Kwall, *supra* note 81, at 89.

93. *Id.* at 92–97.

definition of realization events, it could have limited the recognition of gain to sales of property; the phrase "or other disposition" indicates that realization does not require that a taxpayer receive reciprocal benefit to trigger realization. The plain meaning of "disposition" is the "act of transferring something to another's care or possession, *esp. by deed or will*."[94] Treating death as a realization event, then, clearly comports with the plain meaning of the Code.

Even if the idea that death is not a realization event is too historically entrenched to permit us to give meaning to the plain language of the statute, Congress has the ability to designate death as a realization event. In a number of circumstances, Congress imposes taxes on income without requiring realization. Mark-to-market taxation, for instance, entirely disregards the realization requirement: a taxpayer subject to mark-to-market taxation instead pays taxes on the appreciation in her securities annually, whether she disposes of them or not.[95] The Code *requires* dealers in securities to mark their securities to market.[96] In addition, it permits dealers in commodities and traders in securities and commodities to elect mark-to-market taxation.[97] And any taxpayer who owns a section 1256 contract must mark that contract to market every year, and that contract is "treated as sold for its fair market value on the last business day of such taxable year."[98] Even if death does not constitute a realization event, then, Congress can designate it as a deemed realization event.

Is it fair to tax a decedent's estate on unrealized appreciation? Thanks to the time value of money, the ability to defer taxation provided an economic benefit to the decedent during her lifetime.[99] Even more tangible, an individual with appreciated property can tap into that appreciation—with no tax due—by borrowing against the property's increased value.[100] Because the decedent benefitted from the appreciation, it is fair to tax her on it.[101]

Even if the estate tax continues to withstand the political assaults on its existence, it is plagued with problems, including complexity, economic inefficiency, and expense.[102] Given the problems inherent in the estate tax, treating death as a realization event and taxing decedents on that now-realized appreciation would be both more effective and more administrable than the current estate tax regime.[103]

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94. *Disposition*, BLACK'S LAW DICTIONARY 572 (10th ed. 2014) (emphasis added).

95. Samuel D. Brunson, *Taxing Investment Fund Managers Using a Simplified Mark-to-Market Approach*, 45 WAKE FOREST L. REV. 79, 105 (2010).

96. I.R.C. § 475(a) (2012).

97. *Id.* § 475(e)–(f).

98. *Id.* § 1256(a).

99. Kwall, *supra* note 81, at 93.

100. William D. Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113, 1137 (1974).

101. For a more in-depth look at the fairness of my proposed post-estate tax regime, see *infra* Part IV.

102. Joseph M. Dodge, *A Deemed Realization Approach Is Superior to Carryover Basis (and Avoids Most of the Problems of the Estate and Gift Tax)*, 54 TAX L. REV. 421, 529 (2001).

103. *Id.*

B. An Inheritance Tax, Not an Estate Tax

In addition to treating death as a realization event, Congress should replace the zombie estate tax with an inheritance tax. Estate taxes and inheritance taxes differ in two primary ways. First, they differ in who they designate as the taxpayer. While the estate tax formally falls on and is paid by the decedent's estate, an inheritance tax falls on the heirs who receive the bequest.[104] Second, it naturally follows that while the estate tax is a wealth tax,[105] an inheritance tax has more in common with an income tax, inasmuch as it treats the receipt of an inheritance as taxable income.[106]

Inheritance taxes have at least three advantages over estate taxes. First, they do a better job of measuring ability to pay.[107] Second, they provide "a more equitable, efficient, and simple pattern of incentives for donors and heirs than the estate tax."[108] And third, they clarify *who* bears the tax, allowing society to understand better the fairness of its incidence.[109]

Current federal tax law provides that inheritances do not constitute gross income.[110] There is no intrinsic reason they could not, though. Of the fifty-two countries that impose some kind of estate or inheritance tax, thirty-five have chosen an inheritance tax.[111]

And the inheritance tax is not merely something that other countries use. As of 2017, eighteen states had some sort of death tax.[112] Of those eighteen jurisdictions, fourteen had an estate tax, while six had an inheritance tax.[113] While states that choose an inheritance tax rather than an estate tax make up a minority of states with

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104. George F. Karch, *The Apportionment of Death Taxes*, 54 HARV. L. REV. 10, 10 (1940) ("An inheritance or succession tax is levied theoretically against the right or privilege of each beneficiary to receive property passing after death, whereas an estate tax is levied theoretically upon the privilege of post-mortem disposition by the decedent, the tax being assessed upon the net estate of the decedent as a whole, rather than upon the amount received by each of the beneficiaries.").

105. Joseph M. Dodge, *Replacing the Estate Tax with a Reimagined Accessions Tax*, 60 HASTINGS L.J. 997, 1011 (2009).

106. Elizabeth R. Carter, *New Life for the Death Tax Debate*, 90 DENV. U. L. REV. 175, 186 (2012) ("Like an income tax, an inheritance tax taxes the receipt of property by a particular beneficiary.").

107. Lily L. Batchelder, *What Should Society Expect from Heirs? The Case for a Comprehensive Inheritance Tax*, 63 TAX L. REV. 1, 2 (2009).

108. *Id.* at 3.

109. *Id.*

110. I.R.C. § 102(a) (2012).

111. ALAN COLE, TAX FOUND., ESTATE AND INHERITANCE TAXES AROUND THE WORLD 8 (2015), https://files.taxfoundation.org/legacy/docs/TaxFoundation_FF458.pdf [https://perma.cc/5EG7-WKVA].

112. As of 2018, that number fell to seventeen. Jared Walczak, *Trends in State Tax Policy, 2018*, 87 ST. TAX NOTES 577, 581 (2018).

113. The numbers add up to twenty, not eighteen, because two—New Jersey and Maryland—had both an estate and an inheritance tax. Morgan Scarboro, *Does Your State Have an Estate or Inheritance Tax?*, TAX FOUND. (May 25, 2017), https://taxfoundation.org/state-estate-inheritance-tax [https://perma.cc/V7AW-XJ38].

some kind of death tax, they demonstrate that, as a theoretical matter, inheritance taxation can work in the United States.

There is nothing special about inheritances that somehow makes them ineligible for income taxation. In calculating gross income for federal income tax purposes, taxpayers must include several types of gratuitous transfers, including prizes and awards.[114] In addition, gross income includes many other types of unearned income, ranging from dividends[115] and interest[116] to found money.[117] In fact, while the modern income tax has decided that inheritances are not gross income, that conclusion was not inevitable. The short-lived 1894 income tax explicitly provided that income included "money and the value of all personal property acquired by . . . inheritance."[118]

Why did Congress decide to exclude bequests from gross income when it introduced the modern federal income tax? Congress did not explain its reasoning, either in 1913 when it enacted the rule or subsequently.[119] Without some compelling explanation, the exclusion of bequests has only its long history to rest on.

Even during that long history, people have questioned whether the tax law should exclude inheritances from income. According to Henry Simons, excluding inheritances "introduce[s] additional arbitrary distinctions."[120] Why is that? Because money is fungible; an individual's consumption does not depend on whether she earned income at work, as a return on investment, or as a gift or inheritance. The money will buy precisely the same amount and type of consumption, irrespective of its provenance.

True, the tax law does differentiate different types of income and treats them differently. Most notably, it taxes long-term capital gains at a lower rate than it taxes ordinary income.[121] But the tax law does not treat capital gains differently from ordinary income because capital gains represent a different type of consumption. Rather, it treats capital gains differently to ameliorate distortions caused by taxing gain at one point in time, instead of when it accrues.[122]

The receipt of a bequest or inheritance does not create these same distortions. In fact, treating bequests as income suffers from none of the economic distortions the income tax generally imposes. For instance, economic theory suggests that because taxing labor income decreases the after-tax benefits of work, on the margin it discourages work, encouraging taxpayers instead to substitute leisure.[123] Likewise,

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114. I.R.C. § 74(a).

115. *Id.* § 61(a)(7).

116. *Id.* § 61(a)(4).

117. Treas. Reg. § 1.61-14(a) (as amended in 1993) ("Treasure trove . . . constitutes gross income for the taxable year in which it is reduced to undisputed possession.").

118. Revenue Act of 1894, ch. 349, § 28, 28 Stat. 509, 553.

119. BORIS I. BITTKER, MARTIN J. MCMAHON, JR. & LAWRENCE A. ZELENAK, FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 5.01 (3d ed. 2002).

120. SIMONS, *supra* note 85, at 56.

121. I.R.C. § 1(h)(1).

122. Brunson, *supra* note 95, at 94–95. For instance, because gain is taxed when it is realized rather than when it accrues, taxpayers have an incentive to hold onto appreciated assets to defer the recognition of gain. *Id.* at 95.

123. Richard M. Hynes, *Taxing Control*, 38 J. CORP. L. 567, 575 (2013) ("On the other

as discussed above, taxing gains at realization encourages taxpayers to defer realizing their gains.

But taxing heirs on their receipt of bequests does not distort their economic decision-making. Treating the receipt as a taxable event will not cause an heir to work less, because the amount of money she receives has no relation to the amount she works. Similarly, she does not control when the decedent dies, so she cannot defer her receipt of income. Because the receipt of an inheritance is virtually entirely out of her control, taxing that receipt will not alter the heir's behavior at all. Treating the inheritance as taxable income is not only possible, but efficient.

Gross income generally includes all receipts of money and property, unless the tax law explicitly excludes that receipt.[124] While the tax law does currently exclude inheritances from gross income,[125] there is no compelling reason for it to do so. In fact, given the fact that taxpayers can use their inheritances in precisely the same manner they use other income, and that taxing inheritances does not create any economic distortions, Congress should eliminate the exclusion and include inheritances in gross income, in the same way it planned to in 1894.

C. Basis and Inheritance

Current tax law also provides for a step-up in basis on inherited property.[126] This means that an heir takes a basis in inherited property equal to the fair market value of the property on the date of the decedent's death. The step-up in basis allows an individual to keep appreciated property until her death. When she dies and leaves the property to her heirs, the gain is wiped out, and nobody pays taxes on that gain.[127]

The step-up in basis presents a stark contrast to the rules surrounding the basis of property received by gift. Like inheritances, current law does not treat gifts as gross income.[128] Unlike inheritances, though, the recipient of a gift takes a carryover basis in that gift.[129] That means that the donee's basis in property is the same as the donor's basis in that property was; while giving a gift is not a realization event under current law, it also does not eliminate any built-in appreciation. Instead, it shifts that appreciation to another taxpayer.

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hand, the individual gets to keep only a part of each additional dollar she earns, which will cause her to work less. This is the substitution effect.").

124. I.R.C. § 61(a).

125. *Id.* § 102(a).

126. *Id.* § 1014(a). Note that this basis rule does not apply to all gratuitous transfers; the recipient of an *inter vivos* gift takes a carry-over basis, meaning her basis in the property is the same as the donor's basis was. *Id.* § 1015(a).

127. As an example, imagine John bought one share of stock in Apple on December 10, 2004, when it was trading at $4.65 per share. John held onto the stock until September 1, 2017, when it was trading for $164.05. If he sold the stock on that day, he would pay taxes on a gain of $159.40. If, instead of selling the stock, he died on September 1, 2017, leaving the stock to his daughter Jane, she would take the stock with a basis of $164.05. If she sold it the next day for $165, she would have a taxable gain of just $0.95; the rest of the nearly $160 in gain would effectively disappear.

128. I.R.C. § 102(a).

129. *Id.* § 1015(a).

Tax policy commentators have generally assumed that if Congress eliminated the estate tax, it would also eliminate the step-up in basis.[130] In fact, in the 2001 Bush tax cuts, when Congress managed to temporarily eliminate the estate tax,[131] it concurrently eliminated the step-up in basis.[132] That elimination made sense: the step-up in basis is expensive. In its fiscal year 2018 list of tax expenditures, the Treasury Department estimated that the step-up in basis reduced federal revenue by $49.99 billion in 2016.[133]

Still, when an estate tax exists, the step-up in basis is defended on at least two grounds. The first is that not stepping up the basis would tax estates twice; first, the estate tax upon the decedent's death, and second, the income tax on built-in gain when heirs sold the property.[134] The second is that carryover basis would be impracticable. It can be hard enough for the original owner to keep track of her basis,[135] and it could be impossible for an heir to determine or reconstruct her now-dead benefactor's basis in property.[136]

Merely eliminating the step-up in basis without also eliminating the estate tax has proved virtually impossible. The 2001 tax reform was not Congress's only attempt at eliminating it; in 1976, Congress replaced the step-up in basis for inherited property with a carryover basis.[137] Four years later, in the face of widespread opposition and criticism, Congress repealed this replacement and returned the step-up in basis.[138]

Ultimately, the step-up in basis is an odd provision of tax law. Basis is generally intended as a "placeholder for previously taxed income" to avoid the risk of double taxation.[139] The step-up in basis, however, overcompensates, ensuring not only that appreciation doesn't face double taxation, but that it in fact faces no taxation. Stepped-up basis does virtually the opposite from what basis is generally designed to do. The best that can be said for the stepped-up basis rule is that it survived because

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130. *See* GRAETZ & SHAPIRO, *supra* note 9, at 23 ("It was widely agreed inside the beltway that estate tax repeal would involve getting rid of the so-called step-up-in-basis . . . ."). That assumption may be unfounded, though: in 2017, the House of Representatives passed a tax bill that eliminated the estate tax while maintaining the step-up in basis. Ashlea Ebeling, *Estate Tax Repeal, with Stepped-Up Basis, in House Tax Bill*, FORBES (Nov. 2, 2017, 5:48 PM), https://www.forbes.com/sites/ashleaebeling/2017/11/02/estate-tax-repeal-with-stepped-up-basis-in-house-tax-bill/#3a194ba15e7d [https://perma.cc/KQH8-ZT99].

131. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 501, 115 Stat. 38, 69.

132. *Id.* § 541, 115 Stat. at 76.

133. U.S. DEP'T OF THE TREASURY, TAX EXPENDITURES 23 (2016), https://www.treasury.gov/resource-center/tax-policy/Documents/Tax-Expenditures-FY2018.pdf [https://perma.cc/U65L-HUKA].

134. GRAETZ & SHAPIRO, *supra* note 9, at 23.

135. *See* Joseph M. Dodge & Jay A. Soled, *Debunking the Basis Myth Under the Income Tax*, 81 IND. L.J. 539, 544 (2006) ("Taxpayers are notoriously lax in keeping such records.").

136. *See* Howard J. Hoffman, *The Role of the Bar in the Tax Legislative Process*, 37 TAX L. REV. 411, 448–49 (1982).

137. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2005, 90 Stat. 1520, 1872.

138. Lawrence Zelenak, *Taxing Gains at Death*, 46 VAND. L. REV. 361, 365 (1993).

139. Samuel D. Brunson, *Mutual Funds, Fairness, and the Income Gap*, 65 ALA. L. REV. 139, 173 (2013).

using carryover basis proved politically infeasible and administratively difficult.[140] But these difficulties do not transform the step-up in basis into something justified or desirable.[141] Rather, they leave it in place because it is already there, even though changes have made the administrative justifications for stepped-up basis "largely obsolete."[142]

Replacing the estate tax with an inheritance tax would allow Congress to definitively eliminate the step-up in basis. Congress would not have to replace it with the carryover basis that proved so administratively difficult, though. Rather, taxpayers would take a fair market value in inherited property. Practically, then, there would be little difference to an heir between a stepped-up basis under the estate tax and a fair market value in an inheritance tax.

The shift would represent a substantive legal difference, though, for two main reasons. First, it would no longer rest on the vague and unjustified foundations that currently underlie the step-up in basis. Instead of being justified because other options are administratively difficult, heirs would get fair market value basis because they paid taxes upon receipt of the property. Rather than determining basis by an artificial standard that only applies to one situation, heirs would determine basis through the standard income tax rule, and basis would again reflect value that had been taxed.[143]

In addition, the shift from stepped-up basis to fair market value basis would prevent income from going untaxed. Under the stepped-up basis rule, if a decedent holds appreciated property, the appreciation is never subject to income taxation, because stepped-up basis does not function as a placeholder for already-taxed income.[144] Instead, because the heir would pay taxes upon receipt of the property, basis would function in its ordinary sense as a placeholder of taxed value. Because the heir would pay taxes on the fair market value of the inherited property, she would get fair market value basis justifiably and fairly, to avoid double taxation on gain. Her basis would arise for precisely the same reason and in precisely the same manner as anybody else who includes property in gross income calculates basis.

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140. Richard Schmalbeck, Jay A. Soled & Kathleen DeLaney Thomas, *Advocating a Carryover Tax Basis Regime*, 93 NOTRE DAME L. REV. 109, 137 (2017).

141. Daniel Halperin, *A Charitable Contribution of Appreciated Property and the Realization of Built-In Gains*, 56 TAX L. REV. 1, 12 (2002) ("In my view, basis step-up at death is unjustified and should be eliminated.").

142. Schmalbeck, Soled & Thomas, *supra* note 140.

143. *See* I. Jay Katz, *Did* Zarin *Have a* Tufts *Day at a Casino Made Out of* Kirby Lumber*?*, 26 U.C. DAVIS L. REV. 261, 302 (1993) ("Thus, the court's holding in *Philadelphia Park* established that cost basis means the taxpayer's after-tax investment in property."). The idea that basis represents the portion of an asset's value on which the holder has paid taxes is underscored by the fact that a taxpayer must reduce her basis in property as she takes depreciation, while she increases her basis as she invests after-tax dollars into that property. I.R.C. § 1016(a) (2012).

144. Beckett G. Cantley, *Relearning the Lesson: IRS Judicial Doctrine Attacks on the Captive Insurance Company Pre-Planned Tax Deductible Life Insurance Tax Shelter*, 14 HOUS. BUS. & TAX L.J. 179, 186 (2014) ("The 'stepped-up' basis causes the accumulated capital appreciation in the property at the time of the deceased's death to go permanently untaxed under the income tax.").

III. DETAILS OF THE POST-ESTATE TAX

In spite of being an ineffective zombie tax, the estate tax has the momentum borne of a long history and inertia. As ineffective as it is, there are legal and administrative structures undergirding it, and taxpayers and tax planners have some degree of familiarity with it. Replacing it with the post-estate tax requires establishing new legal and practical scaffolding to address the different pressures likely to occur with the different tax. In the following Sections, I will address structures that need to be taken into account in designing and enacting the post-estate tax.

A. Liquidity to Pay the Tax

One significant problem that this proposal implicates is liquidity. How will the estate or the heir get cash to pay their tax obligations? This is not an issue, of course, where the estate has enough cash to pay the tax bill, or where it consists of liquid assets like publicly traded securities that can easily be sold to pay the taxes due. Where the estate has cash or liquid assets, it has the ability to pay its taxes. Likewise, where an heir receives cash or liquid assets from the decedent, paying taxes is not an issue.

Some estates are made up of property that cannot, or in some cases should not; be sold to provide liquidity to pay taxes. The quintessential examples of these kind of estates are small businesses and farms. There is a widespread popular belief that the estate tax forces small business owners and family farmers to break up their businesses and farms to pay the current estate tax (which has the same liquidity problem).[145]

These concerns are almost certainly overblown. The Center on Budget and Policy Priorities estimates that fewer than fifty small businesses and farms will owe estate tax for 2017, and those that do owe estate tax will owe an average of six percent of their value in estate tax.[146] In fact, it is likely that few, if any, farms have ever been sold to pay the estate tax.[147]

While the liquidity concerns may be overblown with respect to the current estate tax, they will have some grounding with respect to this proposal. The high exemption amount in the current estate tax protects most estates from estate tax liability and reduces the amount of liability on those estates that do face the estate tax. But this proposal does not include any exemption: decedents will owe taxes on all of the appreciation triggered by their deaths, and heirs will owe taxes on the full value of the estate they receive.

In cases where the inheritance is made up of both cash (or other liquid assets) and illiquid assets, liquidity remains relatively unimportant. But where the decedent left valuable illiquid assets—not just family farms and businesses, but art, jewelry, real

145. GRAETZ & SHAPIRO, *supra* note 9, at 126.

146. Chloe Cho, *No, the Estate Tax Isn't a Heavy Burden on Small Businesses*, CTR. ON BUDGET & POL'Y PRIORITIES: OFF THE CHARTS (Jan. 19, 2017, 3:45 PM), https://www.cbpp.org/blog/no-the-estate-tax-isnt-a-heavy-burden-on-small-businesses [https://perma.cc/HN7K-7SR6].

147. GRAETZ & SHAPIRO, *supra* note 9, at 126.

property, or other valuable assets—simply selling assets to pay the tax may be impracticable or may be undesirable.

Current law provides that certain estates can defer their estate tax for up to five years and can then spread that payment out for up to ten years.[148] To qualify under current law, an estate must contain a closely held business that makes up at least thirty-five percent of its value.[149] Deferral has costs to the government.[150] Among other things, allowing taxpayers to defer paying their tax liabilities "expose[s] the government to the risk of taxpayer default."[151] In cases where a significant portion of a decedent's estate comprises illiquid assets, though, the government has determined that the benefits to taxpayers of allowing deferral outweigh the costs to the government. Because the government is currently comfortable allowing deferral of the estate tax in certain circumstances, it stands to reason that it should allow deferral of the taxes proposed here in similar circumstances.

The deferral would apply differently to the decedent and to the heir, however. In the case of the decedent, I propose importing a modified version of the current estate tax version of deferral. Rather than applying solely to decedents whose estates were comprised largely of small businesses, however, it could potentially be triggered by any illiquid assets[152] held by the decedent's estate.

It would only *potentially* be triggered, though. The decedent's estate would calculate the tax on her gain realized upon leaving her assets to her heirs. The post-estate tax would require the estate to pay taxes on the built-in gains to the extent of the cash and liquid securities it held. If the estate's cash and liquid assets proved sufficient to pay all of its tax liabilities, it would not qualify for any deferral. To the extent that the tax due exceeded the cash and value of the liquid assets held by the estate, the estate could defer paying taxes on that excess. The design of the deferral itself could replicate the deferral that exists in the current estate tax.

The treatment of heirs would necessarily be different. Under the inheritance tax regime I have proposed, heirs would include inheritances in their gross income and pay taxes at ordinary rates on the amounts inherited. In some cases, though, their receipt of valuable illiquid assets could make it difficult or impossible to pay taxes.

Rather than paying the tax immediately, then, heirs would have a deferral option. Under that option, they could defer paying taxes on any illiquid assets that they inherited. However, heirs would take a zero dollar basis in any assets for which they made the election. Upon the sale or other disposition of those assets, they would pay taxes at ordinary rates, irrespective of whether the assets would otherwise have been capital assets in their hands. And they would pay interest on the gain at the Code's

148. I.R.C. § 6166(a).

149. *Id.* § 6166(a)(1).

150. *See* Steven Shavell, *Sharing Risks of Deferred Payments*, 84 J. POL. ECON. 161, 161 (1976) ("Uncertainty often enters into an economic transaction when payment is deferred.").

151. Ari Glogower, *Taxing Capital Appreciation*, 70 TAX L. REV. 111, 170 (2016).

152. The law would have to define "illiquid assets," of course. In general, though, they would be assets for which no efficient market exists. So, publicly traded securities would not qualify as illiquid. Shares of a closely held corporation would qualify, unless the organizational documents provided for repurchase by the corporation at a determinable price. A wholly owned business would generally qualify as illiquid.

underpayment rate, running from the date on which taxes on the receipt of the inheritance would have been due without the election.[153]

The election I propose is moderately punitive, but that is both by necessity and design. By necessity because the receipt of an inheritance is ordinary income; if an heir could transform that ordinary income into capital gain merely by making an election—one which provided the benefits of deferral, no less—every heir would elect to defer the recognition of income. Moreover, the interest also functions to eliminate the time-value-of-money benefits of deferral.

To fully equalize the heir who pays the tax immediately and the heir who makes the election, though, the provision would only tax gain on capital assets at ordinary rates up to the fair market value at the time the assets were inherited; moreover, only that amount would be subject to interest. However, determining the value of an illiquid asset can be daunting, and bifurcating the gain into ordinary and capital gain (as well as imposing an interest charge on only part of the gain) would add significant complexity. Moreover, notwithstanding the interest charge, it is in the government's interest to receive its tax revenue earlier rather than later. As a result, the additional costs of deferral ensure that taxpayers have an incentive to pay their taxes upfront rather than electing the deferral option.

It is worth noting that, while the question of what to do with large and illiquid estates is tremendously salient, it is also significantly overstated.[154] Researchers have never found an instance of heirs who had to sell a family business or family farm to pay the estate tax.[155] In part, that is because few estates are composed of such a high percentage of illiquid assets that they lack the cash to pay the estate tax.[156] It may also be because there are ways to plan around the problem of illiquid estates, including the use of life insurance to provide liquidity for an otherwise-illiquid estate.[157] While certain details would change if Congress eliminated the estate tax, replaced it with an inheritance tax, and treated death as a realization event, decedents and heirs would have the same tools available to offset the illiquidity. Allowing them to take advantage of those tools and to elect deferral in certain circumstances, would continue to allow small businesses and farms to stay together where that was in the decedent's and heirs' best interests.

B. Excludable Life Insurance

Under current law, beneficiaries of a life insurance contract generally do not need to include the insurance proceeds in their gross income.[158] This exclusion for life insurance proceeds has been part of the modern federal income tax since its 1913 enactment.[159] Although the exclusion of life insurance proceeds from gross income

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153. *See* I.R.C. § 6601(a).

154. Batchelder, *supra* note 107, at 89 ("The problems the estate tax creates for family businesses have been greatly exaggerated in the public debate.").

155. *Id.*

156. *Id.* at 89–90.

157. *See* Robert B. Smith, *Reconsidering the Taxation of Life Insurance Proceeds Through the Lens of Current Estate Planning*, 15 VA. TAX REV. 283, 286 (1995).

158. I.R.C. § 101(a).

159. Revenue Act of 1913, ch. 16, § II(B), 38 Stat. 114, 167.

has a long history, Congress never explained why it decided to exclude insurance proceeds.[160] Many commentators believe, however, that Congress enacted the exclusions because it had doubts about whether life insurance proceeds met the constitutional definition of "income."[161]

On one occasion, the Supreme Court declined to rule on the constitutionality of including life insurance proceeds in gross income.[162] Still, it is unlikely that a constitutional bar exists to treating life insurance as income. Although the Supreme Court has not weighed in on whether life insurance proceeds specifically qualify as gross income under the Constitution,[163] it has held that the constitutional definition of gross income "extends broadly to all economic gains not otherwise exempted."[164] This suggests that, if Congress were to decide to end the exclusion of life insurance proceeds from gross income, it would face no constitutional impediment.

And Congress should end the exclusion. Under current law, which excludes inheritances from heirs' gross income, it makes sense to exclude life insurance proceeds, too. After all, life insurance represents an alternative way for a decedent to pass wealth to her heirs. In fact, while the income tax excludes life insurance from beneficiaries' gross income, the estate tax treats some life insurance proceeds as part of the estate.[165] If the estate tax goes away, to be replaced by an income tax, it makes sense for the exclusion of life insurance proceeds to similarly go away.

If the exclusion for life insurance proceeds remained, moreover, wealthy individuals would have an economic incentive to shift their assets from their estate to insurance, because life insurance would incur no income tax, while inherited assets would. Absent a tax difference, heirs would be indifferent between receiving cash from a decedent's estate and insurance proceeds from her insurance company. Eliminating the exemption of life insurance proceeds from gross income would prevent this type of tax avoidance and ensure the fair and equal treatment of heirs.

C. Skipping Generations

Absent some sort of impediment in the tax law, wealthy families could reduce their collective estate tax liability by skipping their children and instead leaving inheritances to grandchildren. To prevent this type of estate tax avoidance, Congress enacted the generation-skipping tax.[166] Without the generation-skipping tax, assets would be taxed to the estate of the original decedent, then taxed again in the estates

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160. Thomas J. Gallagher, Jr., *A Primer on Section 101–Federal Income Taxation of Life Insurance Proceeds*, 49 TEMP. L.Q. 831, 831 n.2 (1976).

161. Wayne M. Gazur, *Death and Taxes: The Taxation of Accelerated Death Benefits for the Terminally Ill*, 11 VA. TAX REV. 263, 303–04 (1991).

162. United States v. Supplee-Biddle Hardware Co., 265 U.S. 189, 194–95 (1924) ("It is earnestly pressed upon us that proceeds of life insurance paid on the death of the insured are in fact capital and can not be taxed as income under the Sixteenth Amendment. . . . We are not required to meet this question." (citation omitted)).

163. Indeed, it has had no real opportunity to do so, inasmuch as the Code has excluded them from gross income since 1913.

164. Comm'r v. Banks, 543 U.S. 426, 433 (2005).

165. I.R.C. § 2042 (2012).

166. Herzig, *supra* note 5, at 1159.

of the grandchildren when they died, but, because the assets never passed through the original decedent's children's estates, it would not be taxed at that generation.[167]

The generation-skipping tax prevents this reduction of a family's collective estate tax. Where a decedent leaves property to her grandchildren, skipping her children, her estate must pay an additional amount of tax, as if the inheritance had been received by her children and then they had left it to her grandchildren.[168] If the estate tax were replaced by income tax provisions that treated death as a realization event and that required heirs to include inheritances in gross income, the idea of a generation-skipping tax would be unwieldy and would be largely unnecessary in any event.

It would be unwieldy because an inheritance that skips a generation does not feel like that generation's income. True, the income tax does, under certain circumstances, treat a person who does not actually receive income as if she had received that income. As far back as 1930, the Supreme Court held that Congress could "tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it."[169]

Over time, this doctrine that income is taxed to the person who earns it has shifted slightly. Today, rather than focusing solely on who earned the money, courts look to who has the "ultimate direction and control" of the income.[170] In certain cases, then, it would be possible for the child of a decedent to be required to include an inheritance in her gross income even though the inheritance skipped her and went, instead, to her children. But for that to be the case, the Internal Revenue Service would need to demonstrate that she had some control over who received the inheritance. In most cases, though, without receiving the inheritance, she would not include it in gross income.

While the generation-skipping tax makes sense in the estate tax regime, then, it generally makes less sense in the income tax regime. In certain circumstances, a skipped heir could potentially exercise control. For instance, if the skipped potential heir had significantly influenced the decedent's decision of where to leave her assets, that skipped individual may have exercised control. But generally, as long as the skipped potential heir did not control the decedent's decision of where to leave her assets, the skipped potential heir would not have income.

And if the would-be heir disclaims her inheritance? Under ordinary income tax principles, the recipient of a prize can refuse to accept that prize, and she does not have to include its value in her gross income.[171] But disclaiming an inheritance is different. The individual who declines a prize exercises no control over who, if anybody, receives that prize. If she could require that the prize be awarded instead to a particular person, she would have exercised sufficient control that she would have

167. *Id.*

168. I.R.C. § 2601.

169. Lucas v. Earl, 281 U.S. 111, 114–15 (1930).

170. Vnuk v. Comm'r, 621 F.2d 1318, 1320 (8th Cir. 1980).

171. Rev. Rul. 57-374, 1957-2 C.B. 69. Taxpayers must, as a general rule, include the fair market value of prizes they receive in their gross income. I.R.C. § 74(a).

to include the prize in her gross income.[172] Under the common law and most state laws, if an heir disclaims her inheritance, she is treated as dying before the decedent for inheritance purposes, and her heirs receive the inheritance instead, unless the decedent's will provides otherwise.[173] Effectively, then, in at least some circumstances, by disclaiming an inheritance, the would-be heir has also determined who receives it.[174] In those cases, like cases where the disclaiming heir expressly directs where the inheritance goes, the skipped heir *should* include the inheritance in her gross income.

D. Bequests to Surviving Spouses

The estate tax does not reach all bequests. Notably, there is no estate tax on bequests made to a surviving spouse.[175] The tax law arrives at this by deducting from the decedent's estate any money or property left to the spouse.[176] Effectively, then, the estate tax ignores any part of an estate that the decedent leaves to her surviving spouse. Substituting the income tax for the estate tax allows an opportunity to revisit this dynamic. Should a bequest to a surviving spouse be treated as a realization event? Should the bequest be income to the surviving spouse?

In many cases, it should not. Where a couple files a joint return, the tax law recognizes them as a single taxpaying unit.[177] As a result, transactions between the couple have no tax consequences. Effectively, for tax purposes, a transfer from one joint filing spouse to the other is the equivalent of moving money from one pocket to another. As such, there is no realization event, and there is no income.

Whether or not the tax law *should* treat a married couple as a single taxable unit,[178] as long as it does, it makes sense to ignore bequests to surviving spouses for tax purposes. If the spouses make up a single taxable unit, transferring money and assets between each other has no tax relevance, even if it represents different ownership or control.[179] The receipt of a bequest by a surviving spouse who filed a joint return

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172. *See supra* note 170 and accompanying text.

173. Adam J. Hirsch, *Revisions in Need of Revising: The Uniform Disclaimer of Property Interests Act*, 29 FLA. ST. U. L. REV. 109, 163 (2001).

174. Situations where the decedent's will determines who will receive an inheritance if the heir disclaims it raise the question of whether the skipped heir controlled the money. As a general rule, if the heir knew where the money would go when she chose to disclaim her inheritance, she should be treated as exercising sufficient control to include it in her gross income. Whether she knew, of course, is a question of fact.

175. I.R.C. § 2056(a).

176. *Id.*

177. Samuel D. Brunson, *Taxing Polygamy*, 91 WASH. U. L. REV. 113, 118 (2013).

178. Joint filing creates some significant problems, most notably by discouraging secondary earners—often women—from working. *See id.* at 126. Still, in spite of academics' and tax theorists' issues with joint filing, there has been no political move away from it, and there is no reason to believe that the United States will move to an individual filing system in the foreseeable future. Therefore, it is necessary in discussing the post-estate tax to fit it within a regime that includes joint filing.

179. Perhaps an illustrative example would be the distribution of an asset from a single-member limited liability company (LLC) to its owner. For legal purposes, an LLC—even a single-member LLC—is "an entity distinct from its member." UNIF. LTD. LIAB. CO. ACT

should not constitute the receipt of income, and that bequest should not be treated as a realization event.[180]

The answer is different, however, where spouses file separate returns. Where spouses file separate returns, the tax law does not recognize them as a joint tax unit. Rather, each spouse pays income tax on the income he or she earns.[181] Although they could have been treated as a single taxable unit, spouses who file separate returns have instead elected to be two different tax units.

The current estate tax elides (or ignores) this distinction. It conditions its spousal exemption on marriage, not on the makeup of the tax unit.[182] And perhaps this makes sense; after all, the estate tax is not an income tax, and there are no joint estate tax returns. But in the income tax context, treating joint and separate filers the same is far less defensible.

As a result, where spouses file separate returns, a bequest to a surviving spouse should be a realization event for the decedent and should be income in the hands of the surviving spouse. The exemption granted to couples who file joint returns is not based on their affection or their familial closeness. It is based on the fact that they are a tax unit.[183] As discussed above, as long as a married couple filing a joint return is treated as a single tax unit, ignoring transactions between the couple makes sense from an income tax perspective. But where they file separate returns—and thus are treated as separate taxpaying units—it does not make sense. The tax law does not generally ignore transactions between them,[184] and the surviving spouse has not been

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§ 108(a) (UNIF. LAW COMM'N 2006) (amended 2013). Notwithstanding its legal existence, though, by default, the tax law disregards a single-member LLC, effectively treating it as a nonentity. Treas. Reg. § 301.7701-3(b)(2)(C) (as amended in 2006). Because the member and the LLC make up a single taxable unit, the member pays taxes on the LLC's income when that income is earned. There are, however, no tax consequences when the LLC distributes the income to the member. Similarly, a married couple filing jointly pays taxes jointly when income is earned. Thus, when the couple transfers assets between each other—even at death—their tax unity should be respected.

180. To get the benefit of these two exclusions, though, the surviving spouse must file a final joint return. *See* I.R.C. § 6013(a)(3).

181. *See* Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 382 (1994) ("Taxing earned income to the earner is at the core of the justification for separate returns . . . .").

182. Specifically, the estate tax allows the estate to deduct from "the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse." I.R.C. § 2056(a).

183. After all, a bequest to a decedent's children would face estate tax under the current regime and income tax under the proposed regime, notwithstanding that parents and their children likely have affection for one another and clearly have a familial relationship. But parents and children do not make up a single taxable unit for U.S. tax purposes.

184. While the tax law *generally* treats spouses who file separate returns as separate taxpayers, certain antiabuse rules disregard transactions between them, anyway. For instance, the tax law prevents individuals from deducting losses on the sale of property to family members. I.R.C. § 267(a), (b)(1). That disallowance includes spouses, whether or not they filed a joint return. *Id.* § 267(c)(4). But it also includes ancestors, siblings, and children, none of whom have the ability to make up a single tax unit with the selling individual. *Id.* The purpose of this antiabuse provision is not to appropriately tax a tax unit, then; rather, it is to

taxed on the decedent's income. Therefore, where a married couple files separate returns, the decedent's death should trigger realization in her appreciated assets, and the surviving spouse should include any bequest he receives in gross income.[185]

Differentiating between joint and separate filers seems arbitrary in certain ways, and perhaps it is. Nonetheless, the tax law treats couples differently depending on whether they file joint returns or not, and bifurcating the income tax consequences of inheritances makes sense within a regime that already bifurcates for other purposes.

IV. FAIRNESS IN THE POST-ESTATE TAX

Implementing the post-estate tax will raise several questions of fairness. In particular, it will reach taxpayers who, because they had insufficient assets or income, never had to deal with the estate tax. In spite of its falling on people who did not pay the estate tax, though, it is both possible and likely that the post-estate tax can ultimately be a progressive change. In the following Sections, I will explain how it can maintain its progressivity and otherwise be designed with fairness in mind.

A. Declining Progressivity

Although the estate tax reaches less wealth with every increase in the exemption amount, many commenters see wealth taxation as playing "a critically important role in the preservation of progressivity in our nation's tax system."[186] In its current iteration, no estate pays taxes on its first $11.18 million of assets in 2018.[187] That means it only reaches the very wealthiest decedents. As such, the current estate tax is steeply progressive.

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prevent individuals from recognizing artificial losses by constructing an artificial transaction with individuals who have noneconomic ties that allow them to cooperate. *See, e.g.*, Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529, 1553–54 (2008).

185. The question of how to treat married decedents who filed separate returns is more complicated in community property states. Community property law provides each spouse with "an undivided one-half interest in the community property." Free v. Bland, 369 U.S. 663, 664 (1962). As a practical matter, though, that one-half interest means little until the marriage ends, either through death or divorce. Susan Kalinka, *Taxation of Community Income: It Is Time for Congress to Override* Poe v. Seaborn, 58 LA. L. REV. 73, 80–81 (1997). For purposes of this discussion, I intend to bracket the question of how this proposal would apply to community property states, however. Only nine states have community property laws, Boggs v. Boggs, 520 U.S. 833, 840 (1997), and only about five percent of married taxpayers file separate returns, Ray Martin, *When It's Better for Couples to File Separate Tax Returns*, CBS NEWS: MONEYWATCH (Feb. 29, 2016, 5:30 AM), https://www.cbsnews.com/news/when-its-better-for-couples-to-file-separate-tax-returns [https://perma.cc/J42S-X94R]. While the question of how to treat couples who live in community property states and file separate returns may be complicated, it affects a small minority of taxpayers and should not drive the overall question of how to best structure taxes at death.

186. Jennifer Bird-Pollan, *Why Tax Wealth Transfers?: A Philosophical Analysis*, 57 B.C. L. REV. 859, 880 (2016).

187. Rev. Proc. 2018-18 § 3.35, 2018-10 I.R.B. 392.

My proposed post-estate tax regime would be less obviously progressive, a necessary result of reaching a far larger swath of the public. In fact, anybody who died with appreciated assets or received an inheritance would owe taxes on that amount. The point of progressive taxation is not simply progressivity, though. Rather, it is fairly distributing the burdens of government in a manner that "maintain[s] some of the conditions of freedom and liberty basic to the thinking of most Americans."[188] In fact, a progressive tax with relatively low rates on a broad income base will maintain those conditions without encouraging expensive and complicated tax avoidance and evasion.[189]

That is not to say that my proposal would eliminate progressivity. A progressive tax schedule is, after all, a hallmark of fairness when evaluating a tax regime.[190] And my proposed tax regime would continue to be progressive. In fact, the result would be as progressive as the income tax rates provided. If the taxpaying public decided that the resultant tax distribution was insufficiently progressive, it could adjust the current rate structure.

In some ways, including inheritances in heirs' gross income would be fairer, both from a horizontal and a vertical equity perspective. After all, an individual who receives a $1 million inheritance has a $1 million benefit. Because she currently does not have to include inherited money in her gross income, though, she is in a different situation from another taxpayer who earns $1 million in labor income or even from a taxpayer who realizes $1 million of gain on the sale of capital assets. She can spend her inheritance in precisely the same manner that the other two can spend their money, but, in spite of being similarly situated economically, she does not pay any taxes on her inheritance. (It is true that the source of the heir's receipts differs from the source of the workers, so the horizontal equity analysis is not completely on point. Nonetheless, because both have similar consumption potential, there is no compelling reason for one to pay taxes at a thirty-seven percent marginal rate and the other to pay nothing.[191])

Moreover, the current system violates vertical equity norms. An heir who receives $1 million is in a better financial situation than an individual who earns $50,000. In 2018, though, an unmarried individual with $50,000 in taxable income will owe $6939.50 in federal income taxes.[192] Meanwhile, the heir owes no taxes on her inheritance.

Requiring heirs to include inheritances in gross income would shift this fairness determination. Heirs would owe taxes on their receipts at the same rate as workers who earned the same amount of money and enjoyed the same consumption potential. Moreover, taxing heirs on their inheritances would eliminate the current regressive treatment of earners in comparison with heirs. While the absolute level of

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188. Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465, 520 (1987).

189. *Id.* at 519.

190. Brunson, *supra* note 177, at 118 ("A fair tax system should include marriage neutrality, income pooling, and progressive tax rates.").

191. I.R.C. § 1(j)(2)(A) (Supp. V 2018).

192. *See* Rev. Proc. 2018-18 § 3.01, 2018-10 I.R.B. 392.

progressivity may decline, as individuals who before did not owe any taxes would now owe them, it also may increase, for precisely the same reason.[193]

In addition, if treating death as a realization event and inheritances as income makes the tax system significantly less progressive, the problem is easy to fix. Marginal tax rates and tax brackets are not fixed in stone. They are amenable to legislative change.[194] To the extent that the burden of this change fell on low-income taxpayers, Congress could lower marginal rates at the bottom of the income scale and raise them at the top. In any event, though, as long as the income tax is progressive, the post-estate tax will correspond to the overall progressivity of the tax regime.[195]

B. Reducing the Net Tax Paid

Replacing the estate tax with an income tax permits decedents significantly more control over the net amount of tax paid. The amount of estate tax a decedent's estate owes currently depends, in the first instance, on the size of the estate. The larger the

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193. Whether progressivity declined or increased would depend on whether heirs were more likely to be high-income individuals or low-income individuals.

194. As recently as 2017, Congress changed both the marginal tax rates and the tax brackets, lowering every rate while increasing the size of many of the tax brackets. H.R. 1, 115th Cong. § 11001(a) (2017). If the changes in the treatment of inheritances proved too regressive, Congress could do precisely the opposite, increasing (some) tax rates while narrowing (some) tax brackets.

195. In the discussion of progressivity, it is important to note a potential wrinkle in heirs including inheritances in their gross income. A number of social safety net provisions use adjusted gross income to determine eligibility. For example, the government uses a modified adjusted gross income in determining Medicaid eligibility. Nicole Huberfeld, Elizabeth Weeks Leonard & Kevin Outterson, *Plunging into Endless Difficulties: Medicaid and Coercion in* National Federation of Independent Business v. Sebelius, 93 B.U. L. REV. 1, 25 (2013). The government also uses modified adjusted gross income to determine eligibility for other social safety net programs, including certain insurance subsidies and tax credits, Thomas D. Begley, Jr. & Andrew H. Hook, *Post-*Windsor *Planning: A New World of Celebration and Domicile*, 41 EST. PLAN. 44, 45 (2014), as well as the Supplemental Nutrition Assistance Program, *A Quick Guide to SNAP Eligibility and Benefits*, CTR. ON BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/sites/default/files/atoms/files/11-18-08fa.pdf (last updated Oct. 16, 2018) [https://perma.cc/QD8B-RW6Y]. While a large windfall inheritance may obviate the need for the social safety net programs, even a small inheritance could disqualify an heir from a necessary program. In Illinois, for example, children qualify for the state's Children's Health Insurance Program if they live in a household with income that does not exceed 200% of the federal poverty level. 215 ILL. COMP. STAT. ANN. 106/20(a)(2) (West 2018). Losing health insurance for that year could potentially be devastating. While dealing definitively with the question of social safety net eligibility is beyond the scope of this Article, there are potential fixes. For instance, an inheritance would not affect an heir's eligibility for the earned income tax credit (EITC) because EITC qualification is based on "earned income," and an inheritance would not be included in earned income. I.R.C. § 32(c)(2) (2012). On the other hand, in some cases, we may want an inheritance to figure into an individual's qualification for social safety net programs. An individual who inherited $1 million, for example, likely does not need Medicaid. Perhaps, then, policymakers could decide that an inheritance up to a certain size should not count toward eligibility, but above a floor would count.

estate, the more the decedent owes.[196] True, wealthy decedents have a number of ways to reduce their estate tax liabilities by, among other things, making charitable contributions and manipulating the perceived value of assets in their estate.[197] Even after taking various structuring transactions into account, though, in the end, the amount of estate tax paid depends on the size of the estate.

If we shift to my proposed income tax, decedents suddenly have significantly more control over the net amount of taxes paid. Decedents would have little ability to affect their own income tax on their assets' unrealized appreciation, but the net amount of tax paid would depend on how many heirs received inheritances, on the amount of income those heirs had for the year, and on the amount they received as an inheritance.

Why is that? Because heirs would pay income taxes on their inheritances at their own marginal rates. If a decedent had an estate worth $1 million, and, in 2018, left that $1 million to a single heir, that heir would have gross income of $1 million (plus whatever other income she had for the year). She would pay taxes at the top marginal rate of thirty-seven percent.[198] How much she would actually pay in taxes would depend on a number of different factors, but assuming she was married, filed a joint return, and had no other income or deductions, she would owe $300,499 in taxes.[199] If the decedent left the $1 million evenly to four married heirs, the marginal rate on each heir would drop to twenty-four percent.[200] Again, assuming that this was the heirs' only income and that they had no dependents and no other deductions, each heir would pay $42,819 in taxes. Collectively, the four heirs would pay $171,276, a little more than half of the taxes paid by the single heir who received the full $1 million bequest.[201] By spreading her bequest among several heirs, the decedent would ensure that a higher net amount of her estate went to her heirs rather than to the government.

And this is the way things should be. True, it reduces the federal government's income. But, while the estate tax was initially intended primarily to raise revenue,[202] today, proponents point to it as a way to reduce the concentration of wealth. The current estate tax can only do that by taking and redistributing money, however. Because a decedent's estate pays the same rate of tax whether the decedent leaves her money to one person or many, it does nothing to encourage wealthy individuals

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196. For example, if an individual died in 2018 with an estate of $10 million, she would pay no estate taxes, whether she left the full $10 million to a single heir or spread it out among fifty different heirs because the estate tax provided for a unified credit against estate tax liability of $11.18 million. Rev. Proc. 2018-18 § 3.35, 2018-10 I.R.B. 392. If, on the other hand, she died with an estate of $16.18 million, she would owe $2 million in estate tax, again whether she left her estate to one heir or to fifty. *See* I.R.C. §§ 2001(a), (c), 2010(a), (c) (2012).

197. *See, e.g.*, Wendy C. Gerzog, *Toward a Reality-Based Estate Tax*, 57 B.C. L. REV. 1037, 1037 (2016).

198. Rev. Proc. 2018-18 § 3.01, 2018-10 I.R.B. 392.

199. That is because, in 2018, a married couple filing a joint return can take a $24,000 standard deduction. *Id.* § 3.14.

200. *Id.* § 3.01.

201. The difference is partly because of the different marginal rates paid. But it is also less because four taxpayers get to take advantage of the lower marginal rates, not just one.

202. *See supra* note 13 and accompanying text.

to spread their money out. By imposing an income tax on heirs, on the other hand, wealthy individuals can reduce the amount of taxes they pay precisely by leaving smaller portions of their estates to more heirs. An income tax would, then, be more effective at reducing the concentration of wealth.

Of course, even spreading money between heirs does not fully eliminate the concentration of wealth. Presumably, a majority of heirs would still be descendants of the decedent. Still, generation after generation, the money would spread out, and family members can fall out of sorts with each other. Moreover, without an exemption of more than $5 million, and given that the decedent would pay taxes on any unrealized appreciation at death, it is possible that moving estate taxation into the income tax could raise a similar amount of revenue as the current estate tax.

C. Fiscal System Progressivity

While tax scholars generally focus on the progressivity of the tax rate structure, Professor Edward D. Kleinbard points out that such a focus gives, at best, an incomplete view of progressivity. Rather than looking only at the progressive structure of tax rates, we should look at progressivity "with respect to our fiscal system taken as a whole."[203]

Professor Daniel Hemel and Kyle Rozema provide a simplified example of how an increase in taxes across the board can still lead to an inequality-decreasing result.[204] They posit the elimination of a deduction that increases taxes on both a rich and a poor taxpayer.[205] Under their hypothetical, the rich taxpayer's taxes increase by $4.80, while the poor taxpayer's taxes increase by $1.80.[206] As a result of eliminating the deduction, the government has an additional $6.60 in revenue. If the government simply splits that amount and gives half to the poor taxpayer and half to the rich taxpayer (whether in cash or through services), the net result is that the poor taxpayer's after-tax income increases by $1.50, while the rich taxpayer's after-tax income goes down by $1.50.[207]

That is not to say that policymakers should entirely ignore tax rates and brackets. Those are integral to the overall progressivity of the U.S. fiscal system. But they alone are not the hallmark of progressivity. "A 'flat tax' with a relatively high single tax rate, a large personal exemption, and cash subsidies to the lowest-income

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203. EDWARD D. KLEINBARD, WE ARE BETTER THAN THIS: HOW GOVERNMENT SHOULD SPEND OUR MONEY 337 (2015).

204. Their particular topic is the repeal of the mortgage interest deduction, not the replacement of the estate tax. Nonetheless, their analysis is salient to the discussion of the estate tax. They explain that, although the "dollar benefits [of the mortgage interest deduction] flow disproportionately to the rich," the existence of the mortgage interest deduction causes the top decile and the top one percent "to bear a larger share of federal tax liabilities than they would bear" without the deduction. Daniel Hemel & Kyle Rozema, *Inequality and the Mortgage Interest Deduction*, 70 TAX L. REV. 667, 680 (2017).

205. *Id.* at 677.

206. *Id.*

207. *Id.* at 677–78.

households in fact can be more progressive in practice than a tax system that relies on increasing marginal rates alone."[208]

Almost irrespective of the rate structure, the two changes I propose in this Article should raise more revenue than the current exemption for inherited money and estate tax raise. In 2014, the estate tax only provided federal revenue of $19.3 billion, which represented far less than one percent of federal revenue.[209] In large part, the amount of revenue was this low because of the unified credit, which allows decedents to exclude $5 million (adjusted for inflation) from their estates.[210] In 2017, decedents could apply a unified credit of $5.49 million against their estate tax liability.[211]

As of 2018, the amount of revenue raised by the estate tax should plummet. The tax bill signed by President Donald Trump *doubled* the unified credit.[212] Under current law, then, no decedent with assets worth less than $11.18 million who dies in 2018 will pay the estate tax.[213]

Under my proposed post-estate tax, virtually all estates—and virtually all heirs—will pay taxes as the result of inheritances. Without any exclusion, federal revenues should increase substantially. To determine how progressive this proposal is, it is necessary to take into account not only how much people pay, but how the government will use its additional revenue. To the extent it deploys the additional revenue in ways that help the rich and injure—or, at least, do not help—the poor, the change will be regressive. But to the extent the government uses the additional revenue to fund programs and services that redound to the benefit of the poor, the overall fiscal system may be more progressive after the change than it was before, even if the imposition of taxes were less progressive than it is under current law.[214]

D. Charitable Giving and the Post-Estate Tax

Wealthy decedents have the ability, through proper planning, to reduce their estate tax liability. One of the important ways in which they reduce their estate tax is by making charitable bequests.[215] Individuals who make charitable donations during their lifetimes can deduct those donations, provided they itemize.[216] Similarly, a

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208. KLEINBARD, *supra* note 203, at 338.

209. Andrew Lundeen, *The Estate Tax Provides Less than One Percent of Federal Revenue*, TAX FOUND. (Apr. 7, 2015), https://taxfoundation.org/estate-tax-provides-less-one-percent-federal-revenue [https://perma.cc/55L4-8RSV].

210. I.R.C. § 2010(c)(3) (2012) (as in effect in 2017). In 2014, the inflation-adjusted amount was $5.34 million. Rev. Proc. 2013-35 § 3.32, 2013-47 I.R.B. 537.

211. Rev. Proc. 2016-55 § 3.35, 2016-45 I.R.B. 707.

212. H.R. 1, 115th Cong. § 11061(a) (2017).

213. Rev. Proc. 2018-18 § 3.35, 2018-10 I.R.B. 392.

214. I want to emphasize that, on the tax side, it almost unquestionably will be less progressive. The current estate tax is remarkably progressive—only the very wealthy pay any estate tax. Moreover, under current law, the top marginal income tax rate is lower than the rate of the estate tax. To the extent we only look at the revenue side of the proposal, then, it will necessarily be less progressive, even if it is objectively better in many ways.

215. James Poterba, *Estate and Gift Taxes and Incentives for Inter Vivos Giving in the US*, 79 J. PUB. ECON. 237, 242–43 (2001).

216. I.R.C. § 170(a) (2012).

decedent's estate can deduct charitable bequests, reducing the net estate and thus reducing the estate tax it owes.[217]

This estate tax charitable deduction is important to tax-exempt organizations: charitable giving is elastic, and, because the deduction reduces the cost of charitable bequests when compared with bequests to other heirs, lowering or eliminating the estate tax may dampen charitable bequests.[218] Various studies have calculated that the absence of an estate tax could reduce charitable bequests by somewhere between twelve and thirty-seven percent.[219] (It is hard to determine definitively the amount, if any, by which charitable bequests would go down because there is a competing consideration: with lower estate taxes, wealth would increase, allowing wealthy decedents to leave more to charity.[220] Still, empirical evidence clearly demonstrates that increasing the after-tax cost of charitable giving reduces charitable giving.[221])

And the estate tax does not only impact charitable bequests: it also encourages individuals to make lifetime charitable contributions.[222] In addition to being deductible against a donor's income, such lifetime gifts also act "as an accelerated charitable bequest as the donated property is removed from the estate."[223]

Repealing the estate tax would not eliminate the benefit of charitable contributions; in many ways, in fact, it could increase their salience and importance. A decedent who made a testamentary charitable donation could deduct that amount against income she earned in her final year of life, including her previously unrealized income.[224] While death would become a realization event, charitable donations would reduce that realization.

A decedent could use charitable contributions to entirely avoid realizing the income. Under current law, a taxpayer who donates appreciated assets to charity does not have to include the unrealized appreciation into her income[225] and can deduct the fair market value of the appreciated assets.[226] To the extent that a decedent donates assets with unrealized appreciation to charity, her estate should similarly get a charitable deduction for the fair market value of the assets and be permitted to exclude the gain from her gross income.

And the tax-reducing benefits of testamentary charitable donations would not be limited to decedents. It would also reduce the amount of taxes her heirs would otherwise pay. It would do so not by virtue of deductions but by reducing the amount of taxable inheritance that she received. Moreover, even if the decedent chose *not* to make testamentary donations to charity, and instead chose to pay taxes on unrealized

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217. *Id.* § 2055(a).

218. David Joulfaian, *On Estate Tax Repeal and Charitable Bequests*, 123 TAX NOTES 1221, 1221 (2009).

219. Joulfaian, *supra* note 47, at 855.

220. Joulfaian, *supra* note 218, at 1221.

221. James P. Angelini & Nancy Chun Feng, *The Effect of Deduction Phaseout on Charitable Giving*, 158 TAX NOTES 631, 631 (2018).

222. Joulfaian, *supra* note 47, at 855.

223. *Id.* at 855–56.

224. I.R.C. § 170(a) (2012).

225. Withers v. Comm'r, 69 T.C. 900, 904–05 (1978).

226. Treas. Reg. § 1.170A-1(c)(1) (as amended in 2018).

appreciation, if any, in the estate, an heir could still choose to reduce her taxes by donating all or part of her inheritance to charity and deducting that donation.

Permitting decedents and heirs to avoid paying income taxes through charitable contributions would have two significant benefits. The first is that, by reducing the cost of charitable contributions, it would increase the amount of charitable contributions. The Tax Policy Center estimated that, as a result of the decrease in itemizers attributable to the tax bill of 2017, charitable giving would drop by about five percent.[227] That estimate does not take into account the increased estate tax exemptions, which will likely reduce testamentary charitable giving.[228] By providing a new benefit to charitable giving, eliminating the estate tax and replacing it with realization upon death and upon the receipt of an inheritance will make up at least some of the lost giving.

Charitable giving is not, however, one of the goals underlying the estate tax. The second significant benefit works toward one of the current estate tax goals. Inheritance is, after all, a zero-sum game. Any money left to one recipient is no longer available to other recipients. As such, an incentive to give to charity is an incentive *not* to give to heirs. Allowing decedents to avoid paying taxes on unrealized gains (and allowing heirs to offset inheritance income) through charitable deductions also reduces the hereditary concentration of wealth.

Allowing charitable deductions to offset taxes at death does reduce the amount of revenue these replacements for the estate tax would raise, as do all charitable deductions. Congress decided, though, that encouraging taxpayers to support a wide range of charitable endeavors that the government would not or could not directly fund was in society's best interest and willingly gave up that revenue.[229] Allowing decedents and heirs to offset their income through charitable contributions fits within this regime that Congress chose. At the same time, it advances a significant modern goal of estate taxation, and this advancement militates in favor of permitting the deductions.

CONCLUSION

The modern estate tax has been with us for more than a century. In that century, it has borne the burden of both raising revenue and reducing the concentration of wealth. Whether it ever accomplished its goals to a measurable degree, it does not currently do so. In fact, it has been so crippled by congressional action that it is effectively a zombie tax—not truly living, but not yet dead.

Since 1913, the federal income tax has provided that taxpayers do not have to include inheritances in their gross income.[230] While Congress did not explain in 1913 why it chose to exclude these gratuitous transfers from recipients' gross income,[231] it also did not limit its beneficence to excluding inheritances from gross income.

227. Fred Stokeld, *Fewer Taxpayers Expected to Claim Charitable Deduction*, 158 TAX NOTES 608, 608 (2018).

228. *Id.*

229. Kristin Balding Gutting, *Relighting the Charitable Deduction: A Proposed Public Benefit Exception*, 12 FLA. TAX REV. 453, 462 (2012).

230. Revenue Act of 1913, ch. 16, 38 Stat. 114, 167.

231. *See generally* Joseph M. Dodge, *Further Thoughts on Realizing Gains and Losses at*

While it is true that Congress's initial purpose in enacting the estate tax was to raise revenue, as a result of the high exemption amount and the low estate tax rate, the estate tax no longer raises a significant percentage of federal revenue. On the other hand, rhetorically, at least, it serves as a backstop against extreme inequality. The fact that combating income equality was not its original purpose (and, for that matter, the fact that it is only minimally successful in doing so) does not mean that, in designing a replacement for the estate tax, policymakers must focus primarily on raising revenue. Today, a century after its original enactment, the government's revenue sources have changed significantly, not least because the income tax changed from a class to a mass tax. Instead of focusing primarily on raising revenue, we could replace the estate tax with something that will more effectively combat the accumulation of income among a small number of Americans.

In short, Congress has largely neutered the estate tax, allowing it to live on in a zombie state. The taxpaying populace fears the estate tax, notwithstanding the low chance that they will actually encounter it, and, in spite of the rarity with which it reaches actual estates, politicians are able to capitalize on its mere existence to further their own political wins.[232]

It is time, then, to eliminate the last vestiges of the estate tax. It raises little revenue, does very little to prevent the accumulation of wealth, but provokes costly and wasteful behavior. To avoid it, wealthy individuals engage in expensive tax planning, planning that reduces their net wealth without benefiting society at large.

The purposes of the estate tax—raising revenue and preventing the accumulation and concentration of wealth among a small group of individuals and families—would be better served by replacing the tax on estates with an income tax. Treating death as a realization event would prevent appreciation in wealth from going untaxed. Treating inheritances as income in the hands of heirs would raise revenue and encourage decedents to spread their estates to many people. These two things would also diminish incentives for tax planning and would spread the progressive tax burden more fairly. Finally, shifting from an estate tax to an income tax would allow the special stepped-up basis rule to go away, instead utilizing ordinary basis rules. With these three changes, we could put to rest the zombie estate tax that haunts Americans' nightmares.

Death, 47 VAND. L. REV. 1827, 1831–34 (1994).

232. *See, e.g.*, Bernie Becker, *Both Parties Fired Up over Estate Tax*, HILL (Apr. 15, 2015, 6:00 AM), http://thehill.com/policy/finance/238862-both-parties-fired-up-over-vote-on-estate-tax-repeal [https://perma.cc/E25M-LGQU].