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INTRODUCTION

One of the most dominant themes in American ideology is equality of opportunity. In our society, ability and willingness to work hard are supposed to make all things possible. But we know there are flaws in our ideology.[1] Differences in native ability unquestionably exist. Similarly, some people seem to have distinctly more than their fair share of good luck. Both types of differences are, however, beyond our control. So we try to convince ourselves that education evens out most differ-

1. *See, e.g.*, F. HAYEK, THE CONSTITUTION OF LIBERTY 87 (1960) ("[I]t just is not true that 'all men are born equal.' "); T. Roosevelt, *Seventh Annual Message* (Dec. 3, 1907), in 16 MESSAGES AND PAPERS OF THE PRESIDENTS 7070, 7085 (1917) ("[T]here are some respects in which men are obviously not equal . . . .").

ences.[2] Still, we know there are immense differences in the values various parents imbue in their children.[3] And we also know there are vast differences in the educations parents can afford for their children.[4] Here too, however, we feel there is little to be done.[5] We respect, if regret, cultural differences that lead some parents to value the education of their children less than others do. And we believe to the bottoms of our souls in the worthiness of the capitalistic game we ask ourselves and our children to play.[6] So we take pride in the fact that some parents can provide their children with the finest educational opportunities imaginable. We have no interest in discouraging excellence in education, even if it is disproportionately available to the children of the fortunate. Instead, we satisfy ourselves with providing an educational safety net for all our children: our taxes support public education and land grant universities, and our charity funds scholarships.

When forced to acknowledge these differences in ability, luck, and educational opportunity, we admit that we do not play on a completely level field. But because each of these differences seems beyond our control, we tend to believe the field is as level as we can make it. It is not. For no particularly good reason, we allow some players, typically those most culturally and educationally advantaged, to inherit huge amounts of wealth, unearned in any sense at all. So long as we continue to tolerate inheritance by healthy, adult children, what we as a nation actually proclaim is, "All men are created equal, except the children of the wealthy."[7]

Meanwhile, Gramm-Rudman-Hollings[8] is our only response to a frighteningly persistent $200 billion federal budget deficit.[9] The con-

2. *See, e.g.*, Friedrich, *The Economics of Inheritance*, in 1 SOCIAL MEANING OF LEGAL CONCEPTS 27, 33 (E. Cahn ed. 1948).

3. *See* F. HAYEK, *supra* note 1, at 89-91; A. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF 75 (1975); Blum & Kalven, *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 504 (1952).

4. *See* A. OKUN, *supra* note 3, at 75; Blum & Kalven, *supra* note 3, at 503.

5. *See* F. HAYEK, *supra* note 1, at 91-93.

6. See, for example, the words of Andrew Carnegie, *infra* note 95.

7. J. BRITTAIN, THE INHERITANCE OF ECONOMIC STATUS (1977), is an important account of the ways in which Americans achieve economic status. Also helpful is J. WEDGWOOD, THE ECONOMICS OF INHERITANCE (1929).

8. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985) (codified in scattered sections of 2, 31 & 42 U.S.C.). *See generally* Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CALIF. L. REV. 595 (1988).

9. The Bush administration recently projected the deficit for fiscal year 1991 at $294 billion. Rasky, *New Estimate Increases the Deficit for 1991 to $294 Billion*, N.Y. Times, Oct. 1, 1990, at A1, col. 6. Of course, all estimates of the deficit depend not only on their economic assumptions but also on what they count. *See generally* Rosenbaum, *The Rosy Path to Cutting the Deficit*, N.Y. Times, Jan. 30, 1990, at A20, col. 1. Many believe the real deficit is even larger than the

tinuing failure of the federal government seriously to address the deficit indicates to many (apparently even to one who has asked us to read his lips) that higher taxes are inevitable,[10] regardless of the fact that no one wants to pay them, or that they may cause adverse economic consequences. The only real issue is what type of tax could help reduce the deficit least painfully while achieving significant social objectives.[11]

About $150 billion pass at death each year.[12] Yet in 1988 the federal wealth transfer taxes raised less than $8 billion.[13] Obviously, these taxes could raise much more.[14] If, to take the extreme example, we allowed the government to confiscate all property at death, we could

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figure the government uses to judge its own compliance with Gramm-Rudman-Hollings. *See, e.g.*, H. AARON, B. BOSWORTH & G. BURTLESS, CAN AMERICA AFFORD TO GROW OLD? 1-2 (1989); Zuckerman, *Deja Voodoo All Over Again*, U.S. NEWS & WORLD REP., Oct. 9, 1989, at 84. In this regard, the views of Senator Hollings are particularly interesting. He predicted that "the true deficit for 1990 [would] be very close to . . . $300 billion." Hollings, *I Want a Divorce*, N.Y. Times, Oct. 25, 1989, at A31, col. 2. Referring to the 1990 budget as "a spectacular jambalaya of tricks and dodges," he noted that the government's much lower figure was the product of a "con game" in which numerous items of deficit spending were simply not counted. His conclusion is that "Gramm-Rudman-Hollings has failed." Even Senators Gramm and Rudman, still defending Gramm-Rudman-Hollings, have openly acknowledged "budget trickery" and "gimmicks." Gramm & Rudman, *We Made a Commitment*, N.Y. Times, Oct. 25, 1989, at A31, col. 4.

10. *E.g.*, Rosenthal, *Bush Now Concedes a Need for "Tax Revenue Increases" to Reduce Deficit in Budget*, N.Y. Times, June 27, 1990, at A1, col. 4; Apple, *Taxes and Political Peril*, N.Y. Times, May 8, 1990, at A1, col. 4 ("Most people in Washington now think some kind of tax increase is inevitable . . . ."); Dowd, *Bush Eases Stand, Saying New Taxes Can Be Discussed*, N.Y. Times, May 8, 1990, at A1, col. 6.

11. Some apparently are unconcerned by massive deficits. *See* Kilborn, *Is the Deficit Really a Threat?*, N.Y. Times, Jan. 23, 1989, at A1, col. 5. Clearly, however, we cannot continue indefinitely to accumulate national debt at the current rate. Already, 18 cents of every dollar the federal government spends is *interest* on the national debt. Wall St. J., Sept. 25, 1989, at B3, col. 4 (dividing monthly interest by monthly outlays). Even worse, interest payments currently consume 23 cents of every tax dollar. *Id.* (dividing monthly interest by monthly revenue).

12. R. MUSGRAVE & P. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 489-90 (4th ed. 1984) (offering "speculation" as to "order of magnitude"); *see also* E. CLARK, L. LUSKY & A. MURPHY, CASES AND MATERIALS ON GRATUITOUS TRANSFERS 2 (3d ed. 1985) ("well in excess of $100 billion"). In fact, the amount seems to be growing. One study estimates that the total worth of estates at death will increase from $924.1 billion between 1987 and 1991 to $2.1 trillion between 2007 and 2011. These estimates are in constant 1990 dollars. *See* Ravo, *A Windfall Nears in Inheritances from the Richest Generation*, N.Y. Times, July 22, 1990, at E4, col. 1.

13. The federal wealth transfer taxes raised $7.78 billion in 1988. B. BITTKER & E. CLARK, FEDERAL ESTATE AND GIFT TAXATION 1 (6th ed. 1990).

14. Many others have identified estate and gift taxes as prime candidates to generate additional governmental revenue. J. PECHMAN, FEDERAL TAX POLICY 255 (5th ed. 1987) ("[T]ax theorists almost unanimously agree that taxation of wealth should play a larger role in the revenue system."); *see* Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 269 (1983); Westfall, *Revitalizing the Federal Estate and Gift Taxes*, 83 HARV. L. REV. 986, 988 (1970) ("From both a social and economic viewpoint the federal estate and gift taxes are a highly desirable vehicle for increasing federal revenues."); Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223, 256 (1956) ("[I]t is hard to devise a better tax than a death tax."); Carnegie, *Wealth*, 148 N. AM. REV. 653, 659 (1889) ("Of all forms of taxation, [the death tax] seems the wisest."); 58 CONG. GLOBE, 37th Cong., 2d Sess. 1534 (1862) (statement of Mr. Hickman) ("[T]here is no property upon which a tax can better be laid than upon inheritances.").

almost eliminate the deficit with one stroke of a Presidential pen.[15] This nation, however, rarely has used taxes on the transfer of wealth to raise significant revenue.[16] Our historical hesitancy in this regard strongly suggests that we as a nation are unwilling to abolish inheritance in order to raise revenue. Nonetheless, thinking about using the federal wealth transfer taxes to abolish inheritance may not be entirely futile. It may permit an entirely new type of analysis. Conventional attempts to reform the federal wealth transfer taxes inevitably bog down in the Anglo-American tradition of freedom of testation. As begrudged intruders upon a general rule, these taxes necessarily end up playing an inconsequential role. One willing, for purposes of analysis, to discard freedom of testation could start from the proposition that property rights *should* end at death. Inheritance then would be tolerated only as an exception to that general rule. This article does just that. I invite the reader to join me in speculating whether it might not make sense to use the federal wealth transfer taxes to curtail inheritance, thereby increasing equality of opportunity while raising revenue.

My proposal views inheritance as something we should tolerate only when necessary — not something we should always protect. My major premise is that all property owned at death, after payment of debts and administration expenses, should be sold and the proceeds paid to the United States government. There would be six exceptions. A marital exemption, potentially unlimited, would accrue over the life of a marriage.[17] Thus, spouses could continue to provide for each other after death. Decedents would also be allowed to provide for dependent lineal descendants. The amount available to any given descendant would, however, depend on the descendant's age and would drop

15. I obviously do not share Michael Graetz's opinion that federal taxes on the transfer of wealth have no significant role to play in dealing with the deficit. *See* Graetz, *supra* note 14, at 269-70. Nor do I agree that, given the current levels of revenue consumed by the federal government, raising revenue no longer justifies imposition of such taxes. *See* Jantscher, *The Aims of Death Taxation*, in DEATH, TAXES AND FAMILY PROPERTY 40, 40-41 (E. Halbach ed. 1977). To paraphrase an old saying, "A billion here, a billion there — before long, you're talking serious money."

16. During the period 1945 to 1980, the portion of federal revenues generated by the federal wealth transfer taxes hovered rather consistently in the neighborhood of 1.5%. *See* S. SURREY, P. MCDANIEL & H. GUTMAN, FEDERAL WEALTH TRANSFER TAXATION: CASES AND MATERIALS 42 (successor ed. 1987) (adding cols. 4 and 6 from Table 1). Since then, these taxes have played an even smaller role in producing federal revenue. In 1985, for example, the federal wealth transfer taxes yielded substantially less than 1% of the federal government's revenue. *See id.*

On occasion we have, however, used the federal transfer taxes to raise a substantially larger portion of the government's revenue. In 1940, for example, these taxes generated more than 6.8% of federal revenue. In 1925 and 1935 the figures were 4.2% and 6.5%, respectively. *Id.*

17. *See infra* notes 289-99 and accompanying text.

to zero at an age of presumed independence.[18] A separate exemption would allow generous provision for disabled lineal descendants of any age.[19] Inheritance by lineal ascendants (parents, grandparents, etc.) would be unlimited.[20] A universal exemption would allow a moderate amount of property either to pass outside the exemptions or to augment amounts passing under them.[21] Thus, every decedent would be able to leave something to persons of his or her choice, regardless whether another exemption was available. Up to a fixed fraction of an estate could pass to charity.[22] In addition, to prevent circumvention by lifetime giving, the gift tax would increase substantially.[23]

My proposal strikes directly at inheritance by healthy, adult children. And for good reason. We cannot control differences in native ability. Even worse, so long as we believe in the family, we can achieve only the most rudimentary successes in evening out many types of opportunities.[24] And we certainly cannot control many types of luck. But we can — and ought to — curb one form of luck. Children lucky enough to have been raised, acculturated, and educated by wealthy parents need not be allowed the additional good fortune of inheriting their parents' property.[25] In this respect, we can do much better than we ever have before at equalizing opportunity. This proposal would leave "widows and orphans" essentially untouched. The disabled, grandparents, and charity would probably fare better than ever before.

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18. *See infra* notes 300-12 and accompanying text.

19. *See infra* notes 313-16 and accompanying text.

20. *See infra* notes 317-18 and accompanying text.

21. *See infra* notes 319-32 and accompanying text.

22. *See infra* notes 333-43 and accompanying text.

23. *See infra* notes 344-93 and accompanying text.

24. *See, e.g.*, Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 699 (1986) (noting the "wide range of implicit and explicit transfers that take place when children live in the family household").

25.

> The decision to tax wealth is based upon ethical grounds. In choosing inherited wealth we are saying that the distribution of such wealth is "unfair," and that society can order the distribution in a more "equitable," or "fairer" manner. This in turn means that it is judged that wealth derived from luck (in this case of parentage or friends), is unfair and should be corrected. To be consistent we should include wealth derived from all windfalls, betting, treasure trove, profits, etc. In discriminating between these we are making the ethical judgment that some forms of luck are socially more worthy than others; that it is more acceptable to allow people to keep their football winnings, than to retain their family plate.

Tait, *The Taxation of Wealth at Death: A New Proposal*, 9 SCOT. J. POL. ECON. 38, 38-39 (1962); *see also* J. BRITTAIN, INHERITANCE AND THE INEQUALITY OF MATERIAL WEALTH 13 (1978) ("The less the rewards of wealth are associated with one's own contribution, the better the case for taxing them. . . . Inheritance remains one of the purest forms of 'getting something for nothing.' "); L. THUROW, THE IMPACT OF TAXES ON THE AMERICAN ECONOMY 157 (1971) ("Americans seem to believe that an individual's position in the distribution of economic resources should depend upon his own efforts and not those of his ancestors . . . .").

But inheritance by healthy, adult children would cease immediately, except to the extent of the universal exemption.

This proposal sounds radical,[26] perhaps even communistic.[27] Inheritance does seem to occupy a special place in the hearts of many Americans, even those who cannot realistically expect to inherit anything of significance.[28] For example, in 1982, sixty-four percent of the voters in a California initiative voted to repeal that state's inheritance tax.[29] Michael Graetz, who, like me, finds this element of the American psyche puzzling, explains it as a product of "the optimism of the American people. In California, at least, sixty-four percent of the people must believe that they will be in the wealthiest five to ten percent when they die."[30] This fascination with inheritance perhaps explains the minimal public debate about using the federal transfer taxes to raise substantial amounts of revenue.[31] But curtailing inheritance is hardly radical. For years Americans have written seriously and thoughtfully on the subject.[32] My proposal builds on that tradition and reaches the conclusion that substantial limitations on inheritance would contribute meaningfully to the equality of opportunity we offer our children. It also concludes that such limitations are fully consistent with our notions of private property. Neither conclusion is new.

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26. *See* Cole, *Inheritance,* 8 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES (1932) 35, 41-43, *reprinted in* P. MECHEM & T. ATKINSON, CASES AND MATERIALS ON WILLS AND ADMINISTRATION 12, 14 (5th ed. 1961) ("Propaganda for the abolition of inheritance is in most cases in effect propaganda for socialism . . . .").

27. In 1918 the Bolsheviks abolished inheritance in the Soviet Union. *See infra* notes 243-44 and accompanying text.

28. *See* J. BRITTAIN, *supra* note 7, at 6-7, 29-30; Kornstein, *Inheritance: A Constitutional Right?,* 36 RUTGERS L. REV. 741, 741 (1984); Verbit, *Do Estate and Gift Taxes Affect Wealth Distribution?,* 117 TR. & EST. 598, 682 (1978).

29. L.A. Times, June 10, 1982, pt. 1, at 16, col. 3; *see* Fairbanks & Billiter, *Voters Put Crimp in Plans for Tax Increase,* L.A. Times, June 10, 1982, pt. 1, at 3, col. 3.

30. Graetz, *supra* note 14, at 285.

31. *See generally* R. CHESTER, INHERITANCE, WEALTH, AND SOCIETY (1982); Chester, *Inheritance and Wealth Taxation in a Just Society,* 30 RUTGERS L. REV. 62 (1976). J. Kenneth Galbraith has suggested a different reason for the lack of discussion: "Those who might themselves be subject to equalization have rarely been enthusiastic about equality as a subject of social comment." J. GALBRAITH, THE AFFLUENT SOCIETY 33 (4th ed. 1984). Lester Thurow makes the same point more bluntly: "[A]re zero inheritance taxes merely the best example of the political power that wealth can buy?" L. THUROW, GENERATING INEQUALITY 198 (1975).

In fact, during the Reagan years the move was toward abolition of inheritance taxes — not abolition of inheritance. *See, e.g.,* Dobris, *A Brief for the Abolition of All Transfer Taxes,* 35 SYRACUSE L. REV. 1215 (1984).

32. W. SHULTZ, THE TAXATION OF INHERITANCE 196-98 (1926) ("Opposition to the institution of inheritance by individual protestants is as old as the institution itself."); *see, e.g.,* G. MYERS, THE ENDING OF HEREDITARY AMERICAN FORTUNES (1939); H. READ, THE ABOLITION OF INHERITANCE (1918); M. WEST, THE INHERITANCE TAX 223 (2d ed. 1908) (proposing inheritance tax rates of up to 100%); Nathanson, *The Ethics of Inheritance,* in 1 SOCIAL MEANING OF LEGAL CONCEPTS, *supra* note 2, at 74; Haslett, *Is Inheritance Justified?,* 15 PHIL. & PUB. AFF. 122 (1986).

What is new is a $200 billion deficit. Now, as at few other times in this nation's history, our government needs new sources of revenue. Accordingly, I suggest changes in the federal wealth transfer taxes that would curtail inheritance and raise revenue. If we cannot, or will not, control the deficit, this generation's primary bequest to its children will be the obligation to pay their parents' debts.[33]

I. INHERITANCE IN PRINCIPLE

A. *Inheritance as a Natural Right*

John Locke, in his *Two Treatises of Government,* first published in 1690, argued that inheritance was the natural right of children.[34] He derived that right from the fact that children were "born weak, and unable to provide for themselves."[35] Their right to inheritance rested, in Locke's words, on their "Right to be nourish'd and maintained by their Parents."[36]

Despite Locke's powerful influence on those who founded this nation,[37] his conception of inheritance as a natural right never took firm root here.[38] *Nunnemacher v. State*[39] is essentially the only opinion by an American court embracing that conception. Justice Winslow, writing for the Supreme Court of Wisconsin, argued eloquently that inheritance was an "inherent right." He found protection for it not only in the Wisconsin constitution but also in the Declaration of Independence's guarantee of "life, liberty and the pursuit of happiness."

> So clear does it seem to us from the historical point of view that the right to take property by inheritance or will has existed in some form among civilized nations from the time when the memory of man runneth not to the contrary, and so conclusive seems the argument that these rights are a part of the inherent rights which governments . . . are established to conserve, that we feel entirely justified in rejecting the dictum so frequently asserted by such a vast array of courts that these rights are purely statutory and may be wholly taken away by the legislature.[40]

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33. Even Richard Epstein, arguing in favor of property rights that extend indefinitely beyond an owner's lifetime, suggests we "develop institutional arrangements that insure that all members of the next generation will be able to develop their own talents without having to pay (say, in the form of higher taxes) for the extravagances of the previous one." Epstein, *supra* note 24, at 699.

34. J. LOCKE, TWO TREATISES OF GOVERNMENT bk. 1, § 88, at 206-07 (P. Laslett ed. 1988).

35. *Id.* § 89, at 207.

36. *Id.*

37. The extent of Locke's influence on those who founded this nation is now a subject of debate among historians. *See, e.g.,* J. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 423-24 (1975).

38. Apparently Chancellor Kent also believed inheritance was a natural right. *See* 2 J. KENT, COMMENTARIES *326-28; 4 *id.* at *376.

39. 129 Wis. 190, 108 N.W. 627 (1906).

40. 129 Wis. at 200-01, 108 N.W. at 629-30 (emphasis omitted).

Nunnemacher nonetheless upheld the Wisconsin inheritance tax as a reasonable regulation within the legislature's prerogative. Thus, *Nunnemacher* is interesting for two reasons. It is unique in its insistence upon inheritance as a natural right. At the same time, it is characteristically American in its refusal to protect inheritance from legislative control.

B. *The Positivistic Conception of Inheritance*

It was Blackstone, in his *Commentaries,* first published in 1765, who most influenced the development of the American law of inheritance.[41] He argued that inheritance was "no *natural,* but merely a *civil,* right":

> For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion; else if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him; which would be highly absurd and inconvenient.[42]

According to Blackstone, inheritance was merely a custom turned into positive law: "A man's children or nearest relations are usually about him on his death-bed, and are the earliest witnesses of his decease. They became, therefore, generally the next immediate occupants, till at length, in process of time, this frequent usage ripened into general law."[43] Society converted the custom into law to avoid the "endless disturbances"[44] that would result without a clear rule designating who was entitled to a decedent's property.

Blackstone's positivistic theory, rather than Locke's natural rights theory, has always dominated this country's thinking on inheritance.[45]

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41. Pascal, writing more than one hundred years earlier, had already reached the conclusion that inheritance was not a natural right. B. PASCAL, DISCOURSES ON THE CONDITION OF THE GREAT (1648), *reprinted* in 48 THE HARVARD CLASSICS 382, 383 (C. Eliot ed. 1910). In America, James Otis, described by Stanley Katz as "no stranger to the siren song of natural rights," had already argued, in litigation occurring in 1763, that inheritance was not a natural right. *Baker v. Mattocks* (Super. Ct. 1763), in REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, at 69, 71 (J. Quincy, Jr. ed. 1865); *see* Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era,* 76 MICH. L. REV. 1, 7 (1977).

42. 2 W. BLACKSTONE, COMMENTARIES *10-11 (emphasis in the original); *see also* 2 *id.* at *2 ("[T]here is no foundation in nature or in natural law why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow-creatures from a determinate spot of ground, because his father had done so before him; or why the occupier of a particular field or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him.").

43. 2 *id.* at *11-12.

44. 2 *id.* at *10.

45. *See, e.g.,* E. SCOLES & E. HALBACH, PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 11 (4th ed. 1987); M. WEST, *supra* note 32, at 201; Chester, *supra* note 31, at

For example, in 1787 Judge Ellsworth, of Connecticut, emphatically rejected the natural rights conception of inheritance.[46] In the 1790s Thomas Paine advocated death taxes that must have seemed staggering.[47] At the same time, in England, Jeremy Bentham was advocating dramatic increases in death taxes.[48] In 1898 the Supreme Court of the United States bluntly stated, "The right to take property by devise or descent is the creature of the law, and not a natural right . . . ."[49] According to one author, the courts of every state except Wisconsin have reached the same conclusion.[50] Thus, when President Theodore Roosevelt addressed Congress in 1907, he was on solid political and theoretical ground in stating that "[t]he Government has the absolute right to decide as to the terms upon which a man shall receive a bequest or devise from another."[51] Even Justice Winslow noted that the positivistic theory had been accepted "by the great majority of the courts of this country" and referred to the "unanimity" of its acceptance.[52]

C. *Why the Positivistic Conception Prevailed*

One reason for the dominance of the positivistic conception of inheritance is that Blackstone's explanation of how inheritance developed makes intuitive sense. Any society that respects property rights during lifetime necessarily reallocates those rights at an owner's death.

86-92; Halbach, *Introduction to Chapters 1-4,* in DEATH, TAXES AND FAMILY PROPERTY, *supra* note 15, at 4; Katz, *supra* note 41, at 7-9; Montgomery, *The Inheritance Tax and the Constitution,* 10 ILL. L. REV. 633, 634-38 (1916); Shaffer, *Death, Property and Ideals,* in DEATH, TAXES AND FAMILY PROPERTY, *supra* note 15, at 26, 35 ("Quibbles over the 'natural right' to make wills are trivial — private property was not invented by God . . . .").

46. 1785-88 Kirby 438-39 (Judge Ellsworth's Notes to *Adams v. Kellogg*).

47. *See infra* note 134.

48. *See infra* note 123.

49. Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 283, 288 (1898). Nor was this an isolated statement. *See* Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942) ("Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance."); United States v. Perkins, 163 U.S. 625, 627 (1896) ("[T]he right to dispose of . . . property by will has always been considered purely a creature of statute and within legislative control."); United States v. Fox, 94 U.S. 315, 320 (1876).

50. Kornstein, *supra* note 28, at 766-67, 789-91. Sturgis v. Ewing, 18 Ill. 176 (1856), is typical:

> The power to devise is not an inherent, natural right, conferred upon us by the law of nature, as is the right to acquire and own. So long as we can not possess, control or enjoy anything we have, after we are dead, we can have no absolute right to say what shall be done with our acquisitions after that period. As mortals we then cease to be, and all connection with earth and our acquisitions terminates. . . . When we acquire property, we do not acquire with it, and as a part of it, the right to devise it in any particular mode, or even to devise it at all.

18 Ill. at 183-85; *see also* Minot v. Winthrop, 162 Mass. 113, 117, 38 N.E. 512, 513 (1894).

51. T. Roosevelt, *supra* note 1, at 7084.

52. Nunnemacher v. State, 129 Wis. 190, 198, 108 N.W. 627, 628 (1906).

In order to avoid the "endless disturbances" to which Blackstone referred, the rules relating to that reallocation must be simple and enforceable. Inheritance through the decedent's family or by the decedent's will has long met that test. Longevity does not make inheritance a natural right, however. Nor does it make inheritance a necessary stick in the bundle of rights we call property. Inheritance is merely the tool we currently use to reallocate the property rights of those no longer living. Other simple and enforceable rules for reallocating property at death might work equally well.[53]

Another reason for the dominance of the positivistic conception of inheritance is the badly flawed logic of the natural rights conception. In America, most states expressly require parents to support minor children.[54] But the fact that minor children have these special claims hardly requires the conclusion that healthy, adult children do, too. Even if minor children do have natural rights of inheritance, those rights surely do not, in every case, extend to a parent's entire estate. Natural law hardly requires that the minor child lucky enough to have had as a parent the owner of $50 million inherit the entire $50 million.[55]

Yet another reason for the failure of the natural rights conception is that it is flatly inconsistent with inheritance *as it exists* in the United States. In America today, children often do not inherit all — or even any — of their parents' property.[56] Their rights are therefore distinctly more contingent than natural. Under the Uniform Probate Code, the children of a parent who dies intestate may have no inheritance rights whatever if their other parent was still married to the decedent at the time of the decedent's death.[57] Congress' 1981 amendments to the estate tax and gift tax marital deductions suggest a strong national sentiment in favor of parental prerogative to disinherit children.[58] Even if

53. Reallocating a substantial portion of a decedent's property to the government has always been thought fully compatible not only with our notions of private property but also with our constitutional form of government. *See infra* notes 76-85 and accompanying text.

54. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2451 (West Supp. 1989); CAL. CIV. CODE §§ 196, 196.5 (West 1982 & Supp. 1990); N.Y. DOM. REL. LAW § 32 (McKinney 1988 & Supp. 1990); N.Y. FAM. CT. ACT §§ 413-416 (McKinney 1983 & Supp. 1990).

55. In fact, a credible argument can be made that inheritance is *contrary* to natural right, in that it denies equality of opportunity. *See* H. READ, *supra* note 32, at xxvii, 19.

56. *See generally* Haskell, *Restraints upon the Disinheritance of Family Members*, in DEATH, TAXES AND FAMILY PROPERTY, *supra* note 15, at 105.

57. UNIFORM PROBATE CODE § 2-102(3) (1982) (first $50,000, and one half of the balance, passes to surviving spouse). Some states give the entire estate, no matter how large, to the surviving spouse. *E.g.*, ARIZ. REV. STAT. ANN. § 14-2102(1) (1975).

58. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403, 95 Stat. 172, 301-04 (1981) (enacting quantitatively unlimited marital deductions for both estate and gift tax purposes) (codified at I.R.C. §§ 2056, 2523 (1988)).

there is no surviving spouse, children in America still generally have no right to inheritance. In most states a decedent can leave everything to collateral relatives, friends, or charity. Indeed, there is no quantitative limitation on either the estate tax or the gift tax charitable deduction.[59] Only if a child is pretermitted does he or she sometimes have rights of inheritance denied by a parent. Even then, the statutory trend is to create these rights as infrequently as possible.[60] And in those rare cases where pretermitted children do have rights, they normally extend to less than the entire estate.[61]

A final, but crucially important, reason for the dominance of the positivistic conception is that, in the United States, natural rights ideology is, to use Stanley Katz's words, "relevant but ambiguous"[62] to inheritance. A willingness to use the Constitution to protect "natural rights," coupled with a conclusion that inheritance was such a right, would lead to the sorts of constitutional protections Justice Winslow posited. Yet the primary focus of natural rights ideology is not property, but people. Egalitarianism is much closer than property to the core of the natural rights world view. Treating inheritance as a protected natural right would have erected a substantial barrier to the creation of an egalitarian society. Even prominent proponents of the natural rights world view have rarely asserted, much less advocated protecting, a natural right of inheritance. Thomas Jefferson, author of the Declaration of Independence, upon which Justice Winslow relied, denied that inheritance was a natural right. In a letter to James Madison dated September 6, 1789, Jefferson asserted that it was "self evident"

> *"that the earth belongs in usufruct to the living":* that the dead have neither powers nor rights over it. The portion occupied by an individual ceases to be his when himself ceases to be, and reverts to the society. . . . If [the society has] formed rules of appropriation, those rules may give it to the wife and children, or to some one of them, or to the legatee of the deceased. So they may give it to his creditor. But the child, the legatee, or creditor takes it, not by any natural right, but by a law of the society. . . . Then no man can, by *natural right,* oblige the lands he occupied, or the persons who succeed him in that occupation, to the pa[y]ment of debts contracted by him. For if he could, he might, during his own life, eat up the usufruct of the lands for several generations to come, and then the lands would belong to the dead, and not to the living, which would

59. *See* I.R.C. §§ 2055, 2522 (1988) (estate tax and gift tax).

60. *See* UNIFORM PROBATE CODE § 2-302 (1982).

61. *See* UNIFORM PROBATE CODE § 2-302 (1982) (protected child takes only his or her intestate share).

62. Katz, *supra* note 41, at 9.

be the reverse of our principle.[63]

Still, the natural rights conception may help to explain Americans' continuing fascination with inheritance. It is hardly surprising that a nation that has equal reverence for two such divergent documents as the Declaration of Independence and the Constitution would draw meaning simultaneously from two completely inconsistent conceptions of inheritance.[64]

D. *Inheritance — Property or Garbage?*

Locke found an owner's entitlement to property in the labor expended to acquire it:

> The *Labour* of his Body, and the *Work* of his Hands . . . are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property.* It being by him removed from the common state Nature placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other Men.[65]

Curtailing inheritance in the way I suggest is consistent with Locke's vision of property, because healthy, adult children generally do not participate in the acquisition of the property they inherit. Even Locke seems to have realized that his theory of property did not justify inheritance, for, as discussed above, he justified inheritance separately, as a natural right.[66]

According to John Stuart Mill, in his *Principles of Political Economy,* first published in 1848, property consisted "in the recognition, in each person, of a right to the exclusive disposal of what he or she have produced by their own exertions, or received either by gift or by fair agreement, without force or fraud, from those who produced it."[67] Mill's definition of property is obviously broad enough to include inherited wealth. Mill himself, however, was openly skeptical about whether inherited wealth *was* rightfully obtained from its creator.

In Mill's view, no presumptions in favor of the propriety of inheri-

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63. 15 T. JEFFERSON, THE PAPERS OF THOMAS JEFFERSON 392-93 (J. Boyd ed. 1958) (emphasis in original); *see also* T. PAINE, THE RIGHTS OF MAN (PT. I 1791), *reprinted in* 1 THE COMPLETE WRITINGS OF THOMAS PAINE 241, 251 (P. Foner ed. 1945) ("It is the living, and not the dead, that are to be accommodated. When man ceases to be, his power and his wants cease with him . . . .").

64. *Cf.* Michelman, *Takings, 1987,* 88 COLUM. L. REV. 1600, 1628 (1988) ("[C]laims of popular sovereignty and classical property cannot, in truth, be stably reconciled at a very high level of abstraction or generality.").

65. J. LOCKE, *supra* note 34, bk. 2, § 27, at 287-88 (emphasis in original).

66. *See supra* text accompanying notes 34-36.

67. J. MILL, PRINCIPLES OF POLITICAL ECONOMY bk. 2, ch. 2, § 1, at 218 (1909).

tance were to be drawn from its antiquity, because Mill believed the feudal family to be fundamentally different from our own.[68] In feudal times, the King dispensed land not to any particular individual, but to a family. The extended family, as a unit, worked on and defended that land. Each family member was in some sense responsible for the productivity of the land. Thus, each had a certain entitlement to the land, regardless of who "owned" it.[69] In addition, each depended on the land for his or her existence. That many came to view inheritance as an inherent characteristic of property is, therefore, hardly surprising.

We, however, no longer live in a feudal society:

> [T]he feudal family . . . has long perished, and the unit of society is not now the family or clan . . . but the individual; or at most a pair of individuals, with their unemancipated children. Property is now inherent in individuals, not in families: the children when grown up do not follow the occupations or fortunes of the parent: if they participate in the parent's pecuniary means it is at his or her pleasure, and not by a voice in the ownership and government of the whole . . . .[70]

In short, in a feudal society, it made sense to think of inheritance as a necessary component of property. But it does not make sense in an industrial society composed of individuals. Instead, according to Mill, inheritance amounts only to the passage of "unearned advantage" to those who "have in no way deserved" it.[71]

Each of Mill's observations about the increasing role of the individual and the decreasing role of the family remains true today. But there is another, even more significant, difference between life in feudal England and life in the United States today. We pride ourselves in never having had England's aristocracy. The Declaration of Independence proudly proclaims, "All men are created equal." Inheritance belies that proposition. We preach equality of opportunity and in the

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68. *Id.* bk. 2, ch. 2, § 3, at 221-23. *See generally* Friedman, *The Law of the Living, The Law of the Dead: Property, Succession, and Society,* 1966 WIS. L. REV. 340.

69. Locke, too, toyed with the idea that a decedent's heirs owned an interest in his or her property prior to death. J. LOCKE, *supra* note 34, bk. 1, § 88, at 207.

70. J. MILL, *supra* note 67, bk. 2, ch. 2, § 3, at 222.

71. *Id.* bk. 2, ch. 2, § 1, at 219. Following Bentham, *see infra* note 123, Mill proposed elimination of intestate succession by collaterals. J. MILL, *supra* note 67, bk. 2, ch. 2, § 3, at 223. In addition, Mill advocated limitations on the amount a decedent could bequeath to any one individual. *Id.* bk. 2, ch. 2, § 4, at 226-29. Mill did believe that children ought to be allowed to inherit property from their parents. But he openly scoffed at the idea that they ought to inherit all of it:

> The duties of parents to their children are those which are indissolubly attached to the fact of causing the existence of a human being. The parent owes to society to endeavour to make the child a good and valuable member of it, and owes to the children to provide, so far as depends on him, such education, and such appliances and means, as will enable them to start with a fair chance of achieving by their own exertions a successful life. To this every child has a claim; and I cannot admit that, as a child, he has a claim to more.

Id. bk. 2, ch. 2, § 3, at 224. Mill, then, assumed that inheritance by children would continue but favored restricting it to the extent necessary to equip them to lead their own lives.

same breath bless inheritance. Just how is it that the son of a janitor has an opportunity to succeed equal to that of the son of a billionaire? In a society that prides itself on equality of opportunity, inheritance is primarily explainable as a vestige of the aristocratic times and pretensions of the country from which we inherited our legal system.

Even today, however, many still claim that inheritance is a necessary component of property.[72] Given the nearly unlimited control we still accord the Dead Hand, such statements are accurate as descriptions of fact. But inheritance is not a necessary theoretical component of property. Instead, inheritance is part of what we commonly think of as property simply because we have tolerated it for centuries.[73] In fact, the essence of our notion of property lies in its usefulness to its current owner. Curtailing a parent's ability to leave property to healthy, adult children at death would have no effect on this aspect of property.[74] A property owner could continue to use property for his or her benefit in any way he or she saw fit during life.

Another of the important characteristics of our notion of property is that an owner can give it, during lifetime, to another. Curtailing inheritance would not itself disturb this aspect of property, either. However, if restrictions on inheritance are to be effective, there must also be an ambitious gift tax.[75] Thus, parents could continue to make gifts during their lifetimes to their healthy adult children or anyone else; it would simply become more expensive to do so.

Under current law, property owners also have the right to determine who will own their property after their deaths. Curtailing inheritance obviously would limit this aspect of our notion of property. But allowing those who once owned property to do after death what they were unwilling to do during lifetime has never made sense. When a parent makes a gift to a child, the parent necessarily feels a sentiment something like, "Johnny needs *x*." Or, "I want Suzy to have *y*." Curtailing inheritance would not alter parents' ability to satisfy either sentiment at any time during life, for any reason or for no reason at all.

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72. *E.g.*, R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 304 (1985) ("The conception of property includes the exclusive rights of possession, use, and disposition. The right of disposition includes dispositions during life, by gift or by sale, and it includes dispositions at death . . . .").

73. *Cf.* Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752, 1760 & n.46 (1988) (noting that "historical-descriptive" notions of property are sometimes confused with "conceptual-normative" notions).

74. "Not only are inheritance and bequest no necessary part of the institution of private property, but the reasons which justify private property have little application to them. Private property is a necessary and useful institution because it promotes industry. Can this be said of inheritance?" M. WEST, *supra* note 32, at 223.

75. *See infra* notes 344-93 and accompanying text.

What it would disallow is waiting until death to do it. Why? Transferring property at death requires of a decedent neither sentiment. Transferring property by intestate succession requires no sentiment whatever. And transferring property by will requires only a very different sentiment. What a testator says is, "Johnny needs *x* but can have it only if it is left after my death." Or, "I want Suzy to have *y*, but she cannot have it until I am completely finished using it." Both sentiments are distinctly less emphatic and less worthy of enforcement by society than those underlying lifetime gifts. They are undeniably secondary sentiments. The primary (and often exclusive) sentiment with respect to death-time transfers is always, "I want *x*." Or, "I need *y*." Children and everyone else come later (if at all). In many cases, the parent may really want the child to take the property, but not now. Now, it belongs to the parent. What this proposal eliminates is, therefore, garbage-can parental "giving" to healthy, adult children. A parent would not be allowed to use his or her property until it no longer had any usefulness (to the parent) and then expect the government to collect whatever was left over and deliver it, neatly recycled, to his or her healthy, adult children. Instead, when death placed a property owner's garbage at the curb, the government would simply pick it up.

E. *Constitutional Concerns*

As early as 1897, counsel involved in litigation before the Supreme Court of the United States seriously (but unnecessarily) debated whether a state could abolish inheritance.[76] Although the Supreme Court properly declined to express an opinion on that issue at that time,[77] other American courts have been less reticent. For example, in 1858, the Court of Appeals of Virginia wrote that the legislature might, "to-morrow, if it pleases, absolutely repeal the statute of wills and that of descents and distributions and declare that upon the death of a party, his property shall be applied to the payment of his debts, and the residue appropriated to public uses."[78] In 1942, the Supreme Court of the United States, in a more expansive mood, wrote, "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."[79] Since no state has ever at-

76. Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 283, 288 (1898).

77. 170 U.S. at 288.

78. Eyre v. Jacob, 55 Va. (14 Gratt.) 422, 430 (Ct. App. 1858); *see also* Pullen v. Commissioners, 66 N.C. 361, 364 (1872); Sturgis v. Ewing, 18 Ill. 176, 185 (1856).

79. Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942); *see also* Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 48 (1944).

tempted to abolish inheritance, all such statements are, of course, merely dicta. These statements are, nonetheless, overwhelmingly in favor of such legislative power.[80]

Concluding that a state legislature could abolish inheritance does not, however, also justify concluding that Congress could do so. Traditionally, regulation of inheritance has been the prerogative of the states. Nonetheless, to date, almost all congressional efforts to raise revenue through the federal estate and gift taxes have been upheld as constitutional. Despite constitutional bans on imposition of direct taxes without reference to the census,[81] progressive federal estate and gift taxes have been sustained uniformly as excise taxes on the transfer of wealth.[82] Thus, a congressional attempt to abolish inheritance might fall on the wrong side of the line.[83] No transfer would remain for Congress to tax. Moreover, no inheritance would remain for the states to regulate. But Congress' authority to raise revenue from property passing at death appears to extend to anything less than complete abolition of inheritance.[84] As long as Congress continues to allow every decedent the right to transmit a reasonable amount of property, almost any reform of the federal transfer taxes would appear to pass constitutional muster.[85]

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80. *See* Kornstein, *supra* note 28, at 742 (inheritance "could constitutionally be abolished").

81. U.S. CONST. art. I, §§ 2, 9.

82. New York Trust Co. v. Eisner, 256 U.S. 345 (1921) (estate tax); Bromley v. McCaughn, 280 U.S. 124 (1929) (gift tax); *see also* Knowlton v. Moore, 178 U.S. 41 (1900) (upholding the 1898 federal inheritance tax); Scholey v. Rew, 90 U.S. (23 Wall.) 331 (1874) (upholding the Civil War federal succession tax).

83. *Cf.* Brushaber v. Union Pac. R.R., 240 U.S. 1, 24 (1916) (congressional exercise of the taxing power not restricted by the fifth amendment unless "so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property").

84. In Hodel v. Irving, 481 U.S. 704 (1987), the Supreme Court declared unconstitutional a federal law providing for escheat (to the tribe) of decedents' interests in certain highly fractionated Indian lands. Determining the larger meaning of the case is difficult, because there were three separate concurrences, joined in by a total of eight Justices. The gist of the Court's opinion seems to be that "complete abolition of both the descent and devise of a particular class of property may be a taking." 481 U.S. at 717. Thus, if inheritance were not *completely* abolished, as would be true if all decedents were allowed to pass a fixed amount of property at death, *Hodel v. Irving* would be inapplicable. Indeed, citing Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942), the Court's opinion continues: "[W]e reaffirm the continuing vitality of the long line of cases recognizing the States', and where appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause." 481 U.S. at 717. Moreover, *Hodel v. Irving* is clearly inconsistent with Andrus v. Allard, 444 U.S. 51, 65-66 (1979), in which the Court wrote: "[D]enial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." Yet three of the concurring Justices specifically disclaimed any intention to limit *Andrus v. Allard* to its facts. 481 U.S. at 718.

85. *Cf.* R. EPSTEIN, *supra* note 72, at 283-84, 303-05 (suggesting that even a "confiscatory tax approaching 100 percent will be attacked in vain" under current caselaw); Kornstein, *supra* note 28, at 742 (concluding that Congress could constitutionally abolish inheritance).

II. INHERITANCE AS A MATTER OF POLICY

A. *Society's Stake in Accumulated Wealth*

Individuals never acquire property on their own. Society plays a crucial role in every individual's acquisitive activities. Society determines the rules by which individuals acquire property. Society also educates (to one extent or another) every individual. And society enacts and enforces laws that protect individuals' enjoyment of what they acquire.

Andrew Carnegie was one of the first and most outspoken advocates of society's interest in accumulated wealth. According to Carnegie, individualism and competition are responsible for all civilization's advances.[86] As the natural consequence of that competition, some individuals acquire more than others. Those who do owe a responsibility to the public, from whom their wealth comes. Thus, they hold their wealth in trust for the benefit of the public.[87] High death taxes are therefore appropriate. They encourage persons of great wealth to devote it to the public interest during life.[88]

One need not wholeheartedly accept Carnegie's optimistic vision of capitalism to agree with his conclusion that society has a major stake in the wealth it allows individuals to accumulate.[89] Those who succeed in accumulating large sums would, no doubt, do quite well for them-

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86.

> The price which society pays for the law of competition . . . is . . . great; but the advantages of this law are . . . greater still, for it is to this law that we owe our wonderful material development . . . . [A]nd while the law may be sometimes hard for the individual, it is best for the race, because it insures the survival of the fittest in every department. We accept and welcome, therefore, . . . great inequality of environment . . . as being not only beneficial, but essential for the future progress of the race.

Carnegie, *supra* note 14, at 655.

87. Accordingly, the wealthy should provide their dependents, after death, with only moderate amounts for legitimate needs. Carnegie, *supra* note 14, at 661-62; *see also* Carnegie, *The Best Fields for Philanthropy*, 149 N. AM. REV. 682 (1889).

88. Carnegie, *supra* note 14, at 659.

89. The argument works even better if one believes those who accumulate large sums are essentially robber-barons:

> [The estates of millionaires] have been accumulated out of the pockets of the citizens of the several States; in some instances, this has extended to the entire country and even to the entire world. Where profits are so enormous, they cease to be profits simply, but they are nothing other than a tax. The citizenship, that has paid them, is more entitled to the benefits from them than the heirs-at-law. . . .
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> . . . .
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> . . . It is just and fair that those who have accumulated large estates, be compelled to distribute them back to the citizenship of the State. An Inheritance Tax should not be imposed upon small estates because, by the very nature of things, such are not accumulations by profiteering, but by fair profits, honestly earned by unselfish dealings.

REPORT OF THE STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI FOR THE YEAR 1919, at 32-33 (1920).

selves, even if stranded on a desert isle.[90] But they have not been. Instead, they have been a part of society, where they have been allowed to attend public or privately endowed schools and then employ their gifts in dealing with rights, institutions, knowledge, and fashions created and maintained by society at large. Put another way, the wealth they accumulate is "largely the result of the recipient being favorably positioned vis-à-vis the structure of civilization."[91] Such wealth is, therefore, "in large part produced by society itself."[92] President Theodore Roosevelt put it this way: "The man of great wealth owes a peculiar obligation to the State, because he derives special advantages from the mere existence of government."[93] President Franklin D. Roosevelt commented:

> Wealth in the modern world does not come merely from individual effort; it results from a combination of individual effort and of the manifold uses to which the community puts that effort. The individual does not create the product of his industry with his own hands; he utilizes the many processes and forces of mass production to meet the demands of a national and international market.
>
> Therefore, in spite of the great importance in our national life of the efforts and ingenuity of unusual individuals, the people in the mass have inevitably helped to make large fortunes possible.[94]

The inescapable conclusion is that society has a major stake in all accumulated wealth. Given that stake, society need not continue to allow decedents nearly unlimited control over the disposition of their property after death.

B. *Arguments in Favor of Curtailing Inheritance*

1. *Leveling the Playing Field*

The inequality of accumulation that occurs as the by-product of capitalism is hardly to be despised, as Andrew Carnegie[95] and Theo-

90. Brannon, *Death Taxes in a Structure of Progressive Taxes,* 26 NATL. TAX J. 451, 451 (1973).

91. *Id.*

92. *Id.*

93. T. Roosevelt, *Sixth Annual Message* (Dec. 3, 1906), in 16 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 1, at 7023, 7042. Roosevelt proposed a "very heavily" graduated tax "on the inheritance of those swollen fortunes which it is certainly of no benefit to this country to perpetuate." *Id.* at 7043.

94. F.D. Roosevelt, Message to Congress (June 19, 1935), in H.R. REP. No. 1681, 74th Cong., 1st Sess. (1935), *reprinted in* 1939-1 C.B. (pt. 2) 642, 642-43.

95.

> The Socialist or Anarchist who seeks to overturn present conditions is to be regarded as attacking the foundation upon which civilization itself rests, for civilization took its start from the day that the capable, industrious workman said to his incompetent and lazy fellow, "If thou dost not sow, thou shalt not reap," and thus ended primitive Communism by separating the drones from the bees. . . . To those who propose to substitute Communism for this

dore Roosevelt[96] well realized.[97] Thus, absolute equality is a goal for which society ought not to strive[98] and that, in any event, society could never even approximate without eugenics and state socialism. Equality of opportunity, however, is at the very core of American values.[99] Philosophers tend to agree that equality of opportunity is a fundamental good.[100] It is hardly open to debate that inherited wealth contradicts equality of opportunity.[101] According to one authority, "inherited wealth account[s] for half or more of the net worth of every wealthy man and for most of the net worth of equally wealthy women."[102] How society reallocates accumulated wealth at death is, therefore, a critical determinant of the degree of equality of opportunity succeeding generations will enjoy.[103] Thus, Thomas Jefferson ad-

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intense Individualism the answer, therefore, is: The race has tried that. All progress from that barbarous day to the present time has resulted from its displacement.

Carnegie, *supra* note 14, at 656.

96. *See* T. Roosevelt, *supra* note 1, at 7084-85 ("We have not the slightest sympathy with that socialistic idea which would try to put laziness, thriftlessness and inefficiency on a par with industry, thrift and efficiency; which would strive to break up . . . private property . . . . Such a theory, if ever adopted, would mean the ruin of the entire country . . . .").

97. The reader may be tempted to sneer at reliance on such rough-and-ready turn-of-the-century defenders of American capitalism as Andrew Carnegie and Teddy Roosevelt. Arthur M. Okun's thoughtful lectures, delivered at the John F. Kennedy School of Government of Harvard University in April 1974, however, seem to reach the same ultimate conclusion: "[T]he market needs a place." A. OKUN, *supra* note 3, at 119. He, too, is very aware that inequality must occur.

98. *See* F. HAYEK, *supra* note 1, at 85-88; *id.* at 85 (quoting Holmes: "I have no respect for the passion for equality, which seems to me merely idealizing envy.").

99. *See, e.g.*, A. BERLE, THE AMERICAN ECONOMIC REPUBLIC 52 (1963); A. MELLON, TAXATION: THE PEOPLE'S BUSINESS 123 (1924) ("The theory upon which this country was founded is equality of opportunity."); A. OKUN, *supra* note 3, at 75-76; T. SMITH, THE AMERICAN PHILOSOPHY OF EQUALITY 148-52 (1927).

100. *See, e.g.*, B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 28, 221 (1980); J. RAWLS, A THEORY OF JUSTICE 83-90, 274-80 (1971); J. WILSON, EQUALITY 180-94 (1966).

One commentator has defined the issues this way:

> What, then, are the ethical criteria which we bring to bear on [the question of inheritance]? First, that every human being counts or ought to count as a person. Second, that in human relations, concern with eliciting the best possibilities in another is essential to the best development of oneself. Third, that this is as applicable in the relations of groups to groups as it is in individual relations. In this context, "best" is taken to mean that which forwards the life of others.

Nathanson, *supra* note 32, at 76.

101. J. BRITTAIN, *supra* note 25; S. MUNZER, A THEORY OF PROPERTY 383-95 (1990); J. WEDGWOOD, *supra* note 7; Haslett, *supra* note 32, at 125-26; Kotlikoff & Summers, *The Role of Intergenerational Transfers in Aggregate Capital Accumulation*, 89 J. POL. ECON. 706, 730 (1981) ("Intergenerational transfers appear to be the major element determining wealth accumulation in the United States."); *see also* C. SHAMMAS, M. SALMON & M. DAHLIN, INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT 3 (1987); Verbit, *supra* note 28, at 612 n.5; Friedrich, *supra* note 2, at 35-36.

102. R. MUSGRAVE & P. MUSGRAVE, *supra* note 12, at 483-84.

103. Blum and Kalven acknowledge that "lessening inequalities" in inheritance may have a role to play in the quest for equality of opportunity. Blum & Kalven, *supra* note 3, at 502-03.

Rawls argues that inheritance is "permissible provided that the resulting inequalities are to the advantage of the least fortunate and compatible with liberty and fair equality of opportunity." J. RAWLS, *supra* note 100, at 278. He assumes that "a number of inheritance and gift

vocated a steeply progressive death tax as a "means of silently lessening the inequality of property."[104] So did Thomas Paine.[105] President Theodore Roosevelt advocated the predecessor of the current federal estate tax largely on the basis that it would guarantee "at least an approximate equality in the conditions under which each man obtains the chance to show the stuff that is in him when compared to his fellows."[106]

Inheritance nonetheless continues to enjoy widespread support, even from eminent philosophers. F.A. Hayek, for example, writes:

> Egalitarians generally regard differently those differences in individual capacities which are inborn and those which are due to the influences of environment, or those which are the result of "nature" and those which are the result of "nurture. . . ." [N]o more credit belongs to him for having been born with desirable qualities than for having grown up under favorable circumstances. The distinction between the two is important only because the former advantages are due to circumstances clearly beyond human control, while the latter are due to factors which we might be able to alter. The important question is whether there is a case for so changing our institutions as to eliminate as much as possible those advantages due to environment. . . .
>
> The fact that certain advantages rest on human arrangements does not necessarily mean that we could provide the same advantages for all or that, if they are given to some, somebody else is thereby deprived of them. The most important factors to be considered in this connection are the family, inheritance, and education, and it is against the inequality which they produce that criticism is mainly directed. They are, however, not the only important factors of environment.[107]

However compelling Hayek's argument may be with respect to the inequalities generated by family and education,[108] I wonder whether it also justifies those generated by inheritance. Hayek admits that inheritance is one of those "human arrangements" that contributes to inequality of opportunity.[109] He also seems to assume that, unlike many other sources of inequality of opportunity, inheritance is one we could do something about.[110] Thus, he almost seems to conclude that inheritance is unobjectionable because it is not the only source of inequality,

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taxes" will be imposed. *Id.* at 277. He acknowledges that if inequalities of wealth exceed a certain point, equality of opportunity is threatened. *Id.* at 278.

104. 8 T. JEFFERSON, *supra* note 63, at 82.

105. *See infra* note 134.

106. T. Roosevelt, *supra* note 1, at 7085.

107. F. HAYEK, *supra* note 1, at 88-89.

108. Even in the Soviet Union, which historically rejected capitalism and all it stands for, the children of the elite have educational opportunities vastly superior to those of the masses. Smith, *How the Soviet Elite Lives,* ATLANTIC MONTHLY, Dec. 1975, at 39, 49-51.

109. F. HAYEK, *supra* note 1, at 91.

110. *See id.* at 90-91.

and, even were we to abolish it, inequality of opportunity would continue to exist.

Of course, Hayek does say more.[111] After justifying the inequality families and education produce, he continues:

> Once we agree that it is desirable to harness the natural instincts of parents to equip the new generation as well as they can, there seems no sensible ground for limiting this to non-material benefits. The family's function of passing on standards and traditions is closely tied up with the possibility of transmitting material goods.[112]

In my opinion, the benefits of the family Hayek dwells on, acculturation and education, are separable from the purely financial advantage inheritance represents.[113] Restrictions on inheritance need not affect adversely such benefits. We can devise a system that allows (or even encourages) parents to use their material advantages to benefit their children through acculturation and education yet prohibits transfers of purely financial advantage. The proposal outlined in this article attempts to make that distinction.[114] It is true that some varieties of acculturation and education may wither without ample financial irrigation. It is also true that denying the adult children of the wealthy access to their parents' fortunes would require those children to fund childhood "standards and traditions" from their own earnings. But I do not believe that would be bad.

In any event, my proposal does not attempt to prohibit all intergenerational transmission of financial advantage. In fact, it would allow parents to fund family "standards and traditions" long after their children were grown, through annual tax-free gifts[115] and other

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111. Nozick does not, however. After defending the types of inequality Hayek and I regard as inherent in the concept of a family upbringing, he continues:

> *Is* it unfair that a child be raised in a home with a swimming pool, using it daily even though he is no more *deserving* than another child whose home is without one? Should such a situation be prohibited? Why then should there be objection to the transfer of the swimming pool to an adult by bequest?

R. NOZICK, ANARCHY, STATE, AND UTOPIA 238 (1974) (emphasis in original). The simple answer is that we tolerate (perhaps even celebrate) the inequalities inherent in a family upbringing, because we put an extremely high value not only on capitalism but also on allowing parents to raise their own children. Not all inequalities stem from a family upbringing, however. Just because a child has grown up swimming in a family pool does not mean that he or she should, as a 50-year old who already owns another pool, inherit the one he or she swam in while a child. *See* Kornstein, *supra* note 28, at 772 ("Using the sanctity of the family as justification for inherited wealth is an attempt to do socially what cannot be done biologically."). Interestingly, a recent newspaper article describes Nozick as a supporter of "increased inheritance taxes." It quotes him as describing inheritance as a "special kind of unearned benefit that produces unequal opportunities." Ravo, *supra* note 12.

112. F. HAYEK, *supra* note 1, at 91.

113. In any event, Hayek himself seems to doubt whether his argument requires the conclusion that all inheritance is acceptable. *Id.*

114. *See infra* notes 361-67 and accompanying text.

115. *See infra* notes 368-70 and accompanying text.

lifetime giving, though limited by a gift tax.[116] And it would permit parents at death to leave even their healthy, adult children a moderate amount of financial advantage.[117] If particular varieties of acculturation and education must necessarily wither in the absence of greater unearned, lifelong financial advantage, I wonder whether they are hardy enough for cultivation in this nation's ideological climate. We as a nation pride ourselves on having no Chambords.[118]

In short, my proposal attempts to distinguish those types of inequalities that are inevitable in the family context from those that are distinctly less so. Like Hayek, I have little interest in equality as such. But I do believe our "human arrangements" ought to be tailored, wherever possible, to maximize equality of opportunity. The fact that inequality of ability, luck, and education would continue under a system that curtailed inheritance[119] is irrelevant. We must do what we can.

2. *Deficit Reduction in a Painless and Appropriate Fashion*

Another reason to curtail inheritance is the prospect of raising revenue. If $150 billion pass at death each year, curtailing inheritance has the potential to raise a substantial amount of revenue. Unfortunately, my proposal would raise nowhere near $150 billion. It contains so many generous exceptions that its very structure limits its promise. Taking those exceptions into account, my best guess is that it might raise $25-30 billion.[120] Even so, it would raise almost four times as

116. *See infra* notes 344-93 and accompanying text.

117. *See infra* notes 319-32 and accompanying text.

118. *See generally* L. HARTZ, THE LIBERAL TRADITION IN AMERICA (1955).

119. Hayek makes the "cynical" argument that, if inheritance were abolished, parents would merely find other ways to advance their children's interests, "such as placing them in positions which might bring them the income and the prestige that a fortune would have done." F. HAYEK, *supra* note 1, at 91. He cites in support of his prediction the example of the Soviets, who did, temporarily, abolish inheritance. *See infra* notes 243-52 and accompanying text. That such parental use of influence does, in fact, occur in the Soviet Union seems to be correct. *See* A. BERLE, *supra* note 99, at 52; Smith, *supra* note 108, at 49-51. Were Hayek only a bit more cynical, however, he would realize that, even in systems that celebrate inheritance, parents tend to look after their children's interests. Parental use and abuse of influence are simply part of the family. *See* A. BERLE, *supra* note 99, at 52.

120. Forty-five-thousand-eight-hundred estates of decedents dying in 1986 filed returns reporting at least $500,000. Combined, they reported assets of $66 billion. Johnson, *Estate Tax Returns, 1986-1988,* STATISTICS OF INCOME BULL., Spring 1990, at 27. If half of all decedents qualified for (and fully utilized) the unlimited marital exemption, *infra* notes 289-99 and accompanying text, the tax base would drop to $33 billion. Assuming all other decedents fully utilized the universal exemption, *infra* notes 319-32 and accompanying text, the tax base would drop an additional $6 billion (one half of 45,800 estates times $250,000). Thus, $27 billion would remain. The rough nature of this estimate should be obvious. It ignores four of the exceptions my proposal would allow. Three, however, would be relatively inexpensive: the exemption for dependent lineal descendants, *infra* notes 300-12 and accompanying text, because few parents die with children under age 25; the exemption for disabled lineal descendants, *infra* notes 313-16 and accom-

much as the federal wealth transfer taxes currently raise.[121] But the exceptions are not the only limitations on the proposal's promise. Its economic effects are unknown. If it decreased incentives to work or save, its revenue yield might be lower still.[122] All these uncertainties suggest that raising revenue is not the most important reason to implement this proposal. On the other hand, a country with a government that insists on consistently spending substantially more than it takes in ought to consider seriously any proposal with reasonable prospects for raising any significant amount of revenue.

Denying healthy, adult children the property that once belonged to their parents is about as painless a tax as one could imagine. Jeremy Bentham, arguing in favor of severe restrictions on inheritance,[123] laid great emphasis on this point. He argued that restricting inheritance was "absolutely the *best*" form of tax.[124] The title he chose for his pamphlet, *Supply Without Burthen,* suggests why. A tax on inheritance imposes no restriction on the enjoyment of the current property owner. It is true that those who currently stand to inherit may, as an initial matter, be disappointed. But change the rules, and people's expectations change. As a result, in the long run, after potential heirs

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panying text, because few beneficiaries are totally and permanently disabled; and the exemption for lineal ascendants, *infra* notes 317-18 and accompanying text, because few parents survive their children. The charitable exemption would be more costly, but I see no way to predict its cost. Each omission suggests the $27 billion figure is too high. Other factors, however, suggest the $27 billion figure is too low. First, the 1986 figures used above reflect only estates exceeding $500,000. This proposal would apply to estates above $250,000. Second, fewer than half of all decedents could and would utilize an unlimited marital exemption. (Only 45% of 1986 decedents whose estates filed estate tax returns passed *anything* to a surviving spouse, despite the fact that all who were married at death automatically qualified for an unlimited marital deduction. *See* Johnson, *supra,* at 48-50 (Table 2).) Third, an invigorated gift tax, *infra* notes 344-93 and accompanying text, would yield additional revenue. Fourth, if the amount of wealth passing at death increases as much as some expect, *see supra* note 12, the prospects for future growth in revenue are substantial.

121. *See supra* note 13.

122. I discuss these risks *infra* notes 169-225 and accompanying text. I conclude, however, that the risks involved are small.

123. In 1795, in a pamphlet entitled *Supply Without Burthen,* Bentham proposed that property passing by intestate succession be allowed to pass only to *"near relations."* All other property would escheat. J. BENTHAM, SUPPLY WITHOUT BURTHEN OR ESCHEAT VICE TAXATION (1795), *reprinted in* 1 JEREMY BENTHAM'S ECONOMIC WRITINGS 283 (W. Stark ed. 1952) (emphasis in original). He also proposed that freedom of testation be limited to one half one's property. Even as to property passing by intestate succession to "near relations," he argued that "the public [should] come in for a share in the succession, (suppose an *equal* share)." *Id.* at 283-84 (emphasis in original). Bentham thus proposed changes that would have pushed inheritance in two of the same directions I suggest here. Inheritance would be more rigidly defined in terms of the relationship of the beneficiary to the decedent, and freedom of testation would be curtailed.

Unlike Jefferson and Paine, for whom inheritance posed a threat to elective representative government, *see infra* notes 134-36 and accompanying text, Bentham offered his proposal to raise revenue. In fact, he recommended that the revenue be used to retire the national debt. J. BENTHAM, *supra,* at 298-99, 319.

124. *Id.* at 283 (emphasis in original).

have taken the change in the law into account, they will not be disappointed.[125]

Depriving rich parents of the right to decide who will own their property after death is a similarly painless and appropriate way to raise revenue.[126] Recent evidence suggests that the elderly are among the deficit's primary beneficiaries.[127] Such evidence also suggests that the elderly are becoming rich (at least on a relative basis) at the expense of the young.[128] If the welfare state is allowing the elderly to save money they otherwise would have spent on medical or living expenses, what could be more appropriate than denying them the right to dictate how those savings are disposed of after death?

A tax on inheritance by healthy, adult children falls squarely on those whose only claim is by accident of birth. To them, inheritance is little more than a windfall.[129] They, more than anyone else, truly have the ability to pay. And the extent to which a tax is based on ability to pay is widely accepted as a primary measure of a tax's fairness.[130]

3. *Protecting Elective Representative Government*

In America, our covenant that "all men are created equal" secures much more than the legitimacy of the capitalistic game we ask ourselves and our children to play. It also secures the form of elective representative government we cherish.[131] We believe all our citizens

125. *Id.* at 279, 289-94. Bentham's argument seems strained. An analogy, however, bears him out. In the United States, the children of presidents and senators rarely seem disappointed that they cannot succeed to their parents' positions. *See* H. READ, *supra* note 32, at 178. Had they been born a few centuries earlier, or in a different country, where the laws permitted the children of Kings and aristocrats to inherit their parents' power, they would have had quite different expectations. But the rules are clear in the United States: though a child may inherit a parent's money, a child generally cannot inherit a parent's political power. In short, Bentham may be correct. If we change the laws of inheritance, we may also change potential heirs' expectations.

126. *See supra* note 14.

127. Chakravarty & Weisman, *Consuming Our Children?,* FORBES, Nov. 14, 1988, at 228-30; Reeves, *Elderly May Prove You Can Take It with You,* Tucson Citizen, Dec. 20, 1988, at 8A, col. 2.

128. Dentzer, *A Health-Care Debacle,* U.S. NEWS & WORLD REP., Oct. 9, 1989, at 16, 17 (poverty rate among the elderly declined from 35% in 1959 to 12% in 1987); Chakravarty & Weisman, *supra* note 127, at 222-23, 228; Reeves, *supra* note 127.

129. *See supra* notes 25, 95-119 and accompanying text.

130. *See, e.g.,* J. DODGE, THE LOGIC OF TAX: FEDERAL INCOME TAX THEORY AND POLICY 91-94 (1989); A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS bk. 5, ch. 2, pt. 2 (1776), *reprinted in* 39 GREAT BOOKS OF THE WESTERN WORLD 1, 361 (R. Hutchins ed. 1952) ("The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities . . . . In the observation or neglect of this maxim consists what is called the equality or inequality of taxation.").

131. In 1787, Noah Webster put it this way:

An equality of property, with a necessity of alienation, constantly operating to destroy com-

should have an equal voice in selecting their governmental representatives. We also believe all our citizens should have an equal opportunity to serve in elective office. Inheritance is inconsistent with these beliefs.[132] Money clearly influences politicians.[133] Similarly, because political campaigns are expensive, the wealthy have a tremendous advantage when seeking election.

Thomas Paine knew inheritance was inconsistent with elective representative government. His proposals for staggering death taxes were motivated primarily by his fear of the corrupting influence dramatic inequalities of wealth would have in a representative democracy.[134] Thomas Jefferson, too, seems to have sensed that the very concept of inheritance was incompatible with the American form of government.[135] If "the earth belongs . . . to the living,"[136] the dead ought not decide who owns portions of it; neither ought they influence the process by which the living decide how to use it.

Nonetheless, inheritance reform at the time of the American Revolution was tame in comparison with that then advocated by

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binations of powerful families, is the very *soul of a republic* — While this continues, the people will inevitably possess both *power* and *freedom;* when this is lost, power departs, liberty expires, and a commonwealth will inevitably assume some other form.

N. WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION PROPOSED BY THE LATE CONVENTION HELD AT PHILADELPHIA (1787), *reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 25, 59 (P. Ford ed. 1888) (emphasis in original).

132. *See, e.g.,* J. RAWLS, *supra* note 100, at 278 (if inequalities of wealth exceed a certain point, political liberty "tends to lose its value, and representative government [tends] to become such in appearance only"); H. READ, *supra* note 32, at 3 ("[I]nherited wealth is the foe of freedom.").

133. *See, e.g.,* L. THUROW, *supra* note 25, at 135-52.

134. In the second part of *The Rights of Man,* first published in 1792, Paine openly worried about the corrupting influence inheritance could have on an elective representative government. He therefore proposed a sharply progressive tax, based on the amount inherited by each individual. The marginal tax rates rose to "the point of prohibition" (100%) on the largest "estates." T. PAINE, *supra* note 63, at 434-39.

In *Agrarian Justice,* published in 1796, Paine returned to the problem of inheritance and offered a second proposal. He argued that, in a state of nature, all people had a natural right to occupy the land. Private property arose, depriving some of their right to use the land, when others improved it, thereby entitling themselves to possess it. This "cultivation" of the land, according to Paine, permitted the rise of civilization. He therefore argued that private property must be preserved. But he also argued that those "thrown out of their natural inheritance by the introduction of the system of landed property" must be compensated. Everyone, therefore, upon attaining age 21, should receive a one-time payment of £15. In addition, everyone over the age of 50, as well as the "lame and blind," should receive £10 annually. T. PAINE, AGRARIAN JUSTICE (1796), *reprinted in* 1 THE COMPLETE WRITINGS OF THOMAS PAINE, *supra* note 63, at 605, 611-13. Here, then, is a scheme surprisingly similar to Social Security. Instead of requiring "contributions" from the system's beneficiaries, through payroll taxes on wages, however, Paine argued that the necessary revenue should come from property passing at death. *Id.* at 613-17.

135. *See* Katz, *supra* note 41, at 18. *See generally* Katz, *Thomas Jefferson and the Right to Property in Revolutionary America,* 19 J.L. & ECON. 467 (1976).

136. 15 T. JEFFERSON, *supra* note 63, at 392 (emphasis omitted).

Paine[137] and Bentham.[138] It consisted mainly in elimination of primogeniture and entail.[139] Still, its primary purpose was to prevent the disparities in hereditary wealth that had occurred in Europe and thus to protect elective representative government.[140] Jefferson, author of the Virginia legislation, considered an "aristocracy of wealth" to be "of more harm and danger, than benefit, to society."[141] He aimed, instead, "to make an opening for the aristocracy of virtue and talent," which he regarded as "essential to a well ordered republic."[142] Because eliminating primogeniture and entail "would prevent the accumulation and perpetuation of wealth in select families," he viewed it as part of "a system by which every fibre would be eradicated of antient or future aristocracy; and a foundation laid for a government truly republican."[143] In 1784 the preamble to legislation overhauling North Carolina's inheritance laws echoed Jefferson.[144] In 1787, writing in favor of the Constitution, Noah Webster used the same argument.[145] And in 1794, when the Delaware legislature eliminated the eldest son's double share from its law of intestate succession, the preamble read: "WHEREAS it is the duty and policy of every republican government to preserve equality amongst its citizens, by maintaining the balance of property as far as is consistent with the right of individuals . . . ."[146] Clearly, those who founded this nation understood the

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137. *See supra* note 134.

138. *See supra* note 123.

139. *See* Katz, *supra* note 41, at 11-14.

140. *See id.* at 14-29; G. Alexander, Time and Property in the American Civic Republican Legal Culture (Sept. 8, 1989) (unpublished manuscript on file with the *Michigan Law Review*).

141. T. JEFFERSON, AUTOBIOGRAPHY (1829), *reprinted in* 1 THE WORKS OF THOMAS JEFFERSON 1, 58 (P. Ford ed. 1904).

142. *Id.*

143. *Id.* at 77; *see id.* at 77-78.

144.

> WHEREAS it will tend to promote that Equality of Property which is of the Spirit and Principle of a genuine Republic . . . .
>
> . . . .
>
> AND whereas Entails of Estates tend only to raise the Wealth and Importance of particular Families and Individuals, giving them an unequal and undue influence in a Republic, and prove in manifold Instances the Source of great Contention and Injustice . . . .

LAWS OF THE STATE OF NORTH-CAROLINA 488-89 (J. Iredell ed. 1791) (Act of Apr. 1784, ch. 22).

145.

> Make laws . . . destroying and barring entailments; leave real estates to revolve from hand to hand, as time and accident may direct; and no family influence can be acquired and established for a series of generations — no man can obtain dominion over a large territory — the laborious and saving, who are generally the best citizens, will possess each his share of property and power, and thus the balance of wealth and power will continue where it is, in the *body of the people.*

N. WEBSTER, *supra* note 131, at 59 (emphasis in original).

146. Act of Jan. 29, 1794, ch. 53, 2 DEL. LAWS 1172 (1797).

inconsistency between great hereditary wealth and elective representative government.

And despite the fact that Americans have always tolerated inheritance, we have never completely forgotten our duty to "maintain the balance of property as far as is consistent with the right of individuals."[147] This duty, in fact, seems to underlie President Franklin D. Roosevelt's 1935 Message to Congress:

> The transmission from generation to generation of vast fortunes by will, inheritance, or gift is not consistent with the ideals and sentiments of the American people.
>
> . . . Great accumulations of wealth can not be justified on the basis of personal and family security. In the last analysis such accumulations amount to the perpetuation of great and undesirable concentration of control in a relatively few individuals over the employment and welfare of many, many others.
>
> Such inherited economic power is as inconsistent with the ideals of this generation as inherited political power was inconsistent with the ideals of the generation which established our Government.[148]

The existence of billionaires in our country today poses the same dangers the framers sought to avoid by eliminating primogeniture and entail two centuries ago. If we were willing to curtail inheritance, we could simultaneously eliminate one of the most blatant sources of inequality[149] and improve the prospects for another two centuries of elective representative government in America.[150]

4. *Increasing Privatization in the Care of the Disabled and the Elderly*

As the extended family vanishes, it leaves behind many victims. Elderly parents and grandparents, as well as the disabled, are often, in effect, homeless.[151] Increasingly, the cost of supporting these individuals has fallen to the government. The government, however, often provides care for such individuals in a poor and insensitive fashion. Moreover, the cost of providing such care is an expense we as a nation seem unable to afford.[152] A system that encourages family members to provide for the care of the elderly and disabled is, therefore, desirable.

147. 2 DEL. LAWS 1172. Our antitrust laws demonstrate our continuing acceptance of that duty.

148. F.D. Roosevelt, *supra* note 94, at 643.

149. *See supra* notes 101-02 and accompanying text.

150. *See* Jantscher, *supra* note 15, at 53 (speculating that campaign contribution restrictions might not be necessary if wealth were more equally distributed).

151. *See generally* C. SHAMMAS, M. SALMON & M. DAHLIN, *supra* note 101, at 154-61.

152. *See generally* Tolchin, *How the New Medicare Law Fell on Hard Times in a Hurry*, N.Y. Times, Oct. 9, 1989, at A1, col. 1.

Increased privatization would ensure not only better and more sensitive care, but also reduction of the costs borne by the government.

My proposal would encourage private expenditure for the care of the elderly and disabled. It would allow a generous exemption for disabled lineal descendants.[153] In addition, it would allow an unlimited exemption for lineal ascendants,[154] most of whom would be elderly. Given the prospect of reallocation to the government at death, these exemptions generally would be utilized when available. The prospect of reallocation at death might also encourage people still alive to pay for the care of their disabled and elderly relatives more frequently than they do now. Given the appropriateness of such expenditures, the current gift tax exclusions for transfers in discharge of a donor's legal obligation and for gifts of medical care would continue.[155] The latter might even be expanded to include gifts of nursing-home care.[156] Finally, there would be an unlimited exclusion, for gift tax purposes, for transfers to or for the benefit of any lineal ascendant.[157]

No doubt the truly wealthy already take care of their elderly and disabled. Thus, curtailing inheritance might produce little privatization at that level. Those at lower wealth levels, however, do not always take care of their own. "Divestment planning," a new type of estate planning, caters to clients desiring to shift the costs of caring for elderly and disabled relatives to the government.[158] By making it much more expensive during lifetime to give large amounts to one's children,[159] and by limiting the amount healthy children could inherit,[160] this proposal would achieve much greater privatization at the "near-rich" level.

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153. *See infra* notes 313-16 and accompanying text.

154. *See infra* notes 317-18 and accompanying text.

155. *See infra* notes 361-67 and accompanying text.

156. *See infra* note 367.

157. *See infra* notes 371-72 and accompanying text.

158. The practice is described in Dobris, *Medicaid Asset Planning by the Elderly: A Policy View of Expectations, Entitlement and Inheritance,* 24 REAL PROP., PROB. & TR. J. 1, 14-17 (1989). Something is surely very wrong with a system that ostensibly provides certain types of care only for the poor but welcomes into its fold those who have deliberately made themselves poor by enriching their adult children. *See* Quinn, *Do Only the Suckers Pay?,* NEWSWEEK, Dec. 18, 1989, at 52 ("Your first reaction might be to say, 'Of course a child should inherit.' But think about it. Are you willing to pay taxes, to support *my* mother in a nursing home, solely to help *me* acquire her money?") (emphasis in original).

159. *See infra* notes 344-93 and accompanying text.

160. *See infra* notes 300-12, 319-32 and accompanying text.

5. *Expanding Public Ownership of National and International Treasures*

Capitalism generally assumes that everything has a price and that all property is appropriate for private ownership. Yet, even in America, capitalism has its limits. Yellowstone National Park, for example, does not belong in private hands. It should, and does, belong to all Americans. Yellowstone and the other National Parks, Forests, and Monuments need not be the only examples of property we find inappropriate for private ownership. The paintings of van Gogh, Gauguin, or Picasso arguably fall into the same category. By curtailing inheritance, we could force more treasures of this type onto the market each generation. Some would remain within a given family longer, as the result of lifetime transfers, but raising funds to pay an increased gift tax might cause others to surface.

Forcing works of art onto the market more frequently would not alone assure their acquisition by the public. In the current art market many museums find it difficult to compete effectively.[161] But even that might change. In general, works of art do not generate income. Nor are they regularly used as collateral.[162] And their utility and ability to confer prestige on an owner are of an unusual variety. Major components in their value, therefore, include their potential for appreciation and the fact that an owner can transmit that potential at death. Depriving works of art of that transmissibility might make a major difference in their value to private individuals. To museums, however, it would not matter.

6. *Increasing Lifetime Charitable Giving*

The income, estate, and gift taxes all currently provide incentives for gifts to charity.[163] We as a nation seem committed to allowing individuals to do for society through the charitable sector some things the government cannot or will not do. We therefore apparently believe that charitable giving is desirable. In order to continue to encourage gifts to charity, the gift tax would necessarily allow a deduction for transfers to charity.[164] Given the incentives for lifetime giving that reallocation at death would create, the allowance of a gift tax charitable

161. *See, e.g., In re* Bayley Trust, 127 Vt. 380, 250 A.2d 516 (1969); Passell, *Vincent Van Gogh, Meet Adam Smith,* N.Y. Times, Feb. 4, 1990, at H1, col. 2; Kimmelman, *How the Modern Got the van Gogh,* N.Y. Times, Oct. 9, 1989, at C13, col. 1.

162. *See* Passell, *supra* note 161.

163. I.R.C. §§ 170, 2055, 2522 (1988) (income tax, estate tax, and gift tax).

164. *See infra* notes 378-83 and accompanying text.

deduction would surely result in a marked increase in lifetime charitable giving.[165]

7. *Neutralizing the Corrosive Effects of Wealth*

According to many, great wealth is a curse. Carnegie, for example, wrote:

> Why should men leave great fortunes to their children? If this is done from affection, is it not misguided affection? Observation teaches that, generally speaking, it is not well for the children that they should be so burdened. Neither is it well for the state. . . . [I]t is no longer questionable that great sums bequeathed oftener work more for the injury than for the good of the recipients. Wise men will soon conclude that, for the best interests of the members of their families and of the state, such bequests are an improper use of their means.
>
> . . . [L]ooking at the usual result of enormous sums conferred upon legatees, the thoughtful man must shortly say, "I would as soon leave to my son a curse as the almighty dollar" . . . .[166]

Many others have agreed.[167] The reasons are obvious. Great wealth confers tremendous disincentives to work, extraordinary incentives to consume frivolously, and unbelievable power. Curtailing inheritance in the way I suggest would not eliminate great wealth. It would pose no direct obstacle to the acquisition of wealth. Moreover, selected individuals, such as surviving spouses and lineal ascendants, could still *inherit* great wealth. And large amounts would still occasionally run the gauntlet of the gift tax. But much less would get through than currently does.[168]

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165. There would also be an exemption for charitable transfers at death. *See infra* notes 333-43 and accompanying text. A powerful incentive for lifetime giving would nonetheless exist, because the gift tax charitable deduction would permit larger tax-free gifts. *See infra* notes 378-83 and accompanying text. Yet other incentives could be created. For example, the rate of gift tax imposed on taxable charitable transfers (those in excess of the deduction) could be set lower than the applicable gift tax rate for other gifts.

166. Carnegie, *supra* note 14, at 658. Mill's thoughts were almost identical. *See* J. MILL, *supra* note 67, bk. 2, ch. 2, § 3, at 221-26.

167. *E.g.*, G. MYERS, *supra* note 32, at 372 ("Wealth is [the heir's] passport to arrogance and snobbishness . . . ."); J. WEDGWOOD, *supra* note 7, at 194-95 (large inheritances breed "a class of 'idle rich' "); M. WEST, *supra* note 32, at 10 (quoting Nobel: "Experience has taught me that great fortunes acquired by inheritance never bring happiness, they only dull the faculties."); W. LECKY, DEMOCRACY AND LIBERTY (1896), *quoted in* M. WEST, *supra* note 32, at 10 ("Wealth which brings with it no ties and is obtained and enjoyed with no effort is to most men a temptation and a snare."); U.S. NEWS & WORLD REP., May 7, 1990, at 30 (quoting Vanderbilt: "Inherited wealth is a big handicap to happiness. It is as certain death to ambition as cocaine is to morality.").

Even those who spend their entire careers catering to the needs of the wealthy sometimes reach similar conclusions. A very senior and successful estate planner once told me he had only dealt with one "truly wealthy" family whose children had not been "ruined" by it.

168. Sussman, Cates, and Smith have questioned whether

> inheritance functions as either a damper or a spur to achievement. Most beneficiaries in this study inherited too late in life for the windfall to affect their life style. . . . Anticipation of an

C. *Arguments Against Curtailing Inheritance*

1. *The Effect on the Economy*

Several lines of argument suggest that curtailing inheritance might adversely affect the economy. The adverse economic effects most frequently mentioned fall into three categories: decreased incentives to work, increased consumption leading to decreased savings, and decreased privately held capital.

a. Incentive to work. One of the first retorts to any proposal to curtail inheritance is the assertion that such a proposal would eliminate incentives to work. According to this line of reasoning, one works in large part for the opportunity to pass something to one's children at death.[169] People, however, work for many other reasons.[170] First are the power and prestige that work and accumulation provide. Money makes the world go round. We work primarily to earn it. Money allows us to feed, clothe, and house ourselves. It also provides us with luxuries and amusement for our leisure. Money provides us with security. If we accumulate enough money, we can stop working. Instead, our money works for us. Put only a little differently, money promises to care for us in old age. Even complete abolition of inheritance would have no effect on any of these truisms. Money would continue to make both the world go round and Americans go to work.

Another reason many people work is that they like to. Some fortunate people love doing what they do. Others do not exactly love their work but strongly prefer it to idleness. Still others work primarily for the joy of achievement.[171] Finally, there are workaholics. Individuals

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inheritance is clouded by unknown variables: the age at death of the holder, the amount in the will to be received, the testator's perception of need of potential legatees, the beneficiary's position in the reciprocity system, changes in interaction patterns, and emergent but unpredictable situations requiring emergency and long-term care of the aged family member.

M. SUSSMAN, J. CATES & D. SMITH, THE FAMILY AND INHERITANCE 313 (1970). The point is well taken. I myself regard elimination of the corrosive effects of wealth as perhaps the weakest argument in favor of this proposal. I do, however, wish to make two points in defense of the argument. First, not all potential heirs are as rational as Sussman, Cates, and Smith imply. Inheritance may, therefore, play a larger disincentive role than they suggest. Second, they studied only inheritance. This proposal addresses not only inheritance but also lifetime giving. By imposing an aggressive gift tax, this proposal would also reduce the amount of wealth transmitted during life to potential heirs. The disincentive effect of large lifetime gifts is surely more difficult to explain away than that of inheritance.

169. *See* Friedrich, *supra* note 2, at 33. One group of people this theory fails to explain are those who never have children yet work hard all their lives. *See* H. READ, *supra* note 32, at 175-76, 282-83. "TINKs" are another. Two-income-no-kids couples almost by definition work harder than most.

170. *See* R. BARLOW, H. BRAZER & J. MORGAN, ECONOMIC BEHAVIOR OF THE AFFLUENT 7 (1966); H. READ, *supra* note 32, at 173-76; J. MILL, *supra* note 67, bk. 2, ch. 2, at 228-29; J. BENTHAM, *supra* note 123, at 301, 343-44; Nathanson, *supra* note 32, at 85-86, 89-90.

171. *See generally* D. MCCLELLAND, THE ACHIEVING SOCIETY 234-37 (1961); Van Doren,

of each of these types, and surely many others, work for reasons not dependent on whether they can pass property to healthy, adult children.

In our society those who manage to accumulate an unusual amount of money are generally branded as "successes" for that reason alone.[172] Curtailing inheritance takes nothing away from the person who earns it. The incentives of status and social power inherent in commanding a large fortune suggest that restricting the ability to pass one's fortune at death would have little effect on the work ethic. Indeed, Andrew Carnegie flatly rejected the idea that heavy death taxes would "sap the root of enterprise."[173]

Another of the most important reasons we work and accumulate is to "provide" for others, particularly our children. Parents usually want to support their children at least as well as they were supported. Many parents also want their children to receive the best education and medical care money can buy. And all parents want to provide their children with little "extras" that constitute neither support, education, nor medical care — for any reason or no reason at all. Curtailing inheritance would have *no effect* on parents' ability to satisfy these desires.

Undoubtedly it is important to ask how curtailing inheritance would affect incentives for work. But with so many other, more important incentives, it is hard to believe curtailing inheritance by healthy, adult children would have any measurable impact.[174] President Theodore Roosevelt, for example, believed that "the desire on the part of the breadwinner to leave his children well off" was "a potent source of thrift and ambition."[175] He nonetheless concluded that allowing people to provide their children with "moderate amounts of property"

Redistributing Wealth by Curtailing Inheritance: The Community Interest in the Rule Against Perpetuities and the Estate Tax, 3 FLA. ST. U. L. REV. 33, 56 (1975). Perhaps Andrew Carnegie was referring to this type of individual when he argued that high death taxes would spur some to even higher achievement: "[F]or to the class whose ambition it is to leave great fortunes and be talked about after their death, it will attract even more attention, and, indeed, be a somewhat nobler ambition to have enormous sums paid over to the state from their fortunes." Carnegie, *supra* note 14, at 660.

172. *See, e.g.*, A. OKUN, *supra* note 3, at 48.

173. Carnegie, *supra* note 14, at 660; *see also* Hoover, *The Economic Effects of Inheritance Taxes*, 17 AM. ECON. REV. 38, 44-45 (1927).

174. *See, e.g.*, W. SHULTZ, *supra* note 32, at 206-08 ("[I]nheritance tax prospects react upon the average individual's business initiative very little one way or another."); Boehm, *Cause and Effect: Federal Estate Tax Revision Tied by Law to Social Consequences*, 43 TEXAS L. REV. 479, 486 n.28, 490 (1965) ("People of energy do not close up segments of producing plants because succession taxes become due . . . .").

175. T. Roosevelt, *Sixth Annual Message*, *supra* note 93, at 7043.

would satisfy that desire.[176] Similarly, President Franklin D. Roosevelt believed the desire to provide for one's children would be "adequately served by a reasonable inheritance."[177] Nor have presidents been alone in reaching this conclusion. Economist Gerald R. Jantscher has concluded that "no one need be deterred from supporting" death taxes on the basis of their economic effects, including their impact on incentives to work.[178] Similarly, Michael Graetz, while still a law professor, offered the "educated guess[ ]" that the "disincentive effects" of various taxes, including the estate tax, have a relatively small effect on economic activity.[179]

The failure of the federal government to address the deficit suggests that new or higher taxes are inevitable. The only issue is what type of tax could reduce the deficit with the least adverse economic consequences. Whatever the disincentive effects of an increase in taxes at death, the authorities are all but unanimous that such effects are smaller than those of an increase in the income tax,[180] Congress' traditional tax of choice.

b. Increased consumption and decreased savings. The second economic argument against curtailing inheritance focuses on its supposed tendency to encourage consumption.[181] For years, estate planners

176. *Id.*

177. F.D. Roosevelt, *supra* note 94, at 643. A "moderate amount" of property and a "reasonable inheritance" are obviously highly subjective terms. My own suggestion is $250,000. *See infra* notes 319-32 and accompanying text.

178. Jantscher, *supra* note 15, at 46; *see id.* at 41-46.

179. Graetz, *supra* note 14, at 280-81. If curtailing inheritance did adversely affect incentives to work, surely its greatest impact would be on the oldest among us. Most such individuals have, however, already retired.

180. *See, e.g.*, J. PECHMAN, *supra* note 14, at 234 ("[E]ven [critics] would concede that death taxes have less adverse effects on incentives than do income taxes of equal yield."); C. SHOUP, FEDERAL ESTATE AND GIFT TAXES 104 (1966) ("[Transfer taxes] tend less than other taxes to check entrepreneurial drive. They have little tendency to push investors either toward or away from risk taking."); M. WEST, *supra* note 32, at 212 ("The inheritance tax is less a discouragement to industry than an income tax . . . ."); Harriss, *Economic Effects of Estate and Gift Taxation (1955),* in READINGS IN DEATH AND GIFT TAX REFORM 41, 43 (G. Goldstein ed. 1971); Gutman, *A Practitioner's Perspective in Perspective: A Reply to Mr. Aucutt,* 42 TAX LAW. 351, 352 (1989); Graetz, *supra* note 14, at 284 ("[T]axes on bequests are preferable to high tax rates on income."); Brannon, *supra* note 90, at 451-52; Westfall, *supra* note 14, at 989 ("[E]state and gift taxes, unlike the income tax, have a minimal impact on risk-taking, entrepreneurial drive, and resource allocation."); Groves, *Retention of Estate and Gift Taxes by the Federal Government,* 38 CALIF. L. REV. 28, 30 (1950) ("Death taxes reduce savings more than income taxes and impede production and investment incentives less."). *But see* Boskin, *An Economist's Perspective on Estate Taxation,* in DEATH, TAXES AND FAMILY PROPERTY, *supra* note 15, at 56, 62 ("[O]verall, a substantial decrease in 'expenditures' (saving) for bequests can be expected from increasing transfer taxes relative to income taxes."); B. BITTKER & E. CLARK, *supra* note 13, at 3 ("The personal income tax . . . can accomplish infinitely more in the way of checking inflation than even a confiscatory estate tax."). Of course, none of these authors advocated a death tax with a flat rate of 100%.

181. *See, e.g.*, Stiglitz, *Notes on Estate Taxes, Redistribution, and the Concept of Balanced Growth Path Incidence,* 86 J. POL. ECON. S137 (1978).

have teasingly told their clients that the best estate planning was spending. If inheritance were curtailed, that advice would be truer than ever before. Anyone worried about what would happen to his or her wealth after death could consume it prior to death. If property owners generally followed such advice, curtailing inheritance would raise little revenue. More important, consumption would increase, and savings would decrease.

The primary reason most inheritance is not transferred during the lifetime of the decedent is that the decedent wants to keep the property more than he or she wants to give it away.[182] Greed is an undeniable human characteristic. Greed to the side, people with money have many reasons for wanting to keep it.[183] In particular, money is continuing power over (and attention from) one's children (and others). The parent who gives children what they expect eventually to receive gives up a substantial source of control over (and attention from) them.[184] Moreover, adult children rarely need a parent's money in any compelling sense. So, even under the current system, which itself provides strong incentives to transfer wealth during life,[185] parents almost always keep their money.[186] In short, the incentives to retain property dwarf the incentives to give it away.[187]

Would this parental tendency to retain property change if inheritance were curtailed? Economists admit that some types of demand are relatively inelastic, unresponsive to changes in price. Anyone who has ever counselled elderly parents to make substantial (or even insubstantial) gifts to their children knows something of the survival instinct such individuals have. Many are almost maniacal in their insistence on retention of property. And they are completely correct.

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182. *See* C. SHOUP, *supra* note 180, at 21-25; *supra* text following note 75.

183. *See* Ireland, *Inheritance Justified: A Comment,* 16 J.L. & ECON. 421, 421 (1973) ("My own argument would be that the primary functions of wealth accumulation are not in fact leaving wealthy heirs, but rather the status and social power inherent in holding a variety of wealth forms.").

184. *See* C. SHOUP, *supra* note 180, at 22; Ireland, *supra* note 183, at 421.

185. *See generally infra* notes 345-53 and accompanying text.

186. *See, e.g.,* J. PECHMAN, *supra* note 14, at 243; C. SHOUP, *supra* note 180, at 17-21; W. VICKREY, AGENDA FOR PROGRESSIVE TAXATION 205 (1947) (noting "a fairly strong desire on the part of the wealthy to hang on to their wealth to the very end, even under the pressure of a fairly strong tax penalty"); Fiekowsky, *The Effect on Saving of the United States Estate and Gift Tax,* in C. SHOUP, *supra* note 180, at 228, 229; Harriss, *Gifts During Life,* in C. SHOUP, *supra* note 180, at 174, 183; Osgood, *Carryover Basis Repeal and Reform of the Transfer Tax System,* 66 CORNELL L. REV. 297, 334 (1981) ("Although . . . tax benefits do play a role in [estate] planning decisions, it is fairly clear that taxpayers resist lifetime giving."); Brannon, *supra* note 90, at 452.

187. *See* Fiekowsky, *The Effect on Saving of the United States Estate and Gift Tax,* in C. SHOUP, *supra* note 180, at 231; Hochman & Lindsay, *Taxation, Interest and the Timing of Intergeneration Wealth Transfers,* 20 NATL. TAX J. 219 (1967); Tait, *supra* note 25, at 41-42.

Though it may appear to an "objective" estate planner that they could not possibly exhaust their wealth, they know their children do not need it. They also know they must face the unknown before they can face the beyond. Long-term or catastrophic illness or injury can exhaust almost any fortune. Old-age care is increasingly costly. Their children are in the primes of their lives. But elderly parents are often entirely dependent on their assets. So they normally make the right choice: they keep most of their property.[188] Thus, the demand for the power, prestige, flexibility, and security money provides seems relatively inelastic — even in persons old enough to be worrying about what happens to their property after death.[189] In short, the instinct for self-preservation would continue to limit spending, even if inheritance were curtailed. Curtailing inheritance might, therefore, increase consumption only slightly.[190] Indeed, Arthur M. Okun has opined that "the specter of depressed saving is not only empirically implausible but logically fake."[191]

Many economists disagree.[192] They focus on "demand for bequests" and seem to assume it is elastic. They argue that if an increase in death taxation increases the "cost" of bequests, people will spend more and leave fewer bequests.[193] They thus seem to assume that the only (or a very important) reason people refrain from spending is the possibility of leaving property when they die. I cannot believe that is true. On the contrary, I suspect the possibility of transmitting wealth at death is one of the *least* important reasons many people retain property. The results of an extensive survey support my suspicion. For persons with 1963 incomes of $45,000 or less (approximately $170,000 in

188. The greatness of *King Lear* is that Lear did what people generally do not do: he gave his wealth to his children without regard to his own security. And he suffered mightily for it.

189. *See* Fiekowsky, *The Effect on Saving of the United States Estate and Gift Tax,* in C. SHOUP, *supra* note 180, at 231. Ireland, too, seems to suspect this is true. *See* Ireland, *supra* note 183, at 421.

190. *See* J. WEDGWOOD, *supra* note 7, at 225-27; Jantscher, *supra* note 15, at 41-46 (concluding that "no one need be deterred from supporting" death taxes on the basis of their economic effects, including their impact on savings, and noting that replacement of a death tax with an equivalent income tax increase might in fact decrease savings); Fiekowsky, *The Effect on Saving of the United States Estate and Gift Tax,* in C. SHOUP, *supra* note 180; Hoover, *supra* note 173, at 45-47.

191. A. OKUN, *supra* note 3, at 98.

192. *See, e.g.,* R. WAGNER, INHERITANCE AND THE STATE: TAX PRINCIPLES FOR A FREE AND PROSPEROUS COMMONWEALTH 16-19 (1977); Boskin, *An Economist's Perspective on Estate Taxation,* in DEATH, TAXES AND FAMILY PROPERTY, *supra* note 15, at 61.

193. *But see* Starrett, *Effects of Taxes on Saving,* in UNEASY COMPROMISE 237, 237 (H. Aaron, H. Galper & J. Pechman eds. 1988) ("[I]t is not possible on the basis of theory to predict how taxes will affect saving."); Blinder, *Intergenerational Transfers and Life Cycle Consumption,* 66 AM. ECON. REV. 87, 92 (1976) ("[W]e know relatively little about the wealth elasticity of bequests.").

1988 dollars), the least important of the four most frequently articulated reasons for saving was "for bequests."[194] Only for persons with 1963 incomes in excess of approximately $120,000 (approximately $450,000 in 1988) was saving "for bequests" the most important of *those four alternatives.* Even for those individuals, there is reason to believe saving for bequests was not the most important of *all* reasons. Of the four reasons most frequently articulated, two, saving for children's educations and saving for retirement, understandably drop off almost to the vanishing point as wealth increases. The third, saving for emergencies, also decreases, though less dramatically, with increasing wealth. Thus, none of the other of the top four alternatives had much appeal for the truly wealthy. That saving for bequests was first in that group is therefore hardly surprising. The most important reasons for saving by the truly wealthy are probably distinctly less complimentary. Such reasons might include "love of the game," habit, a desire for prestige, the quest for economic power, control over other people, and greed.[195] One would hardly expect to glean these reasons from the self-generated responses of the wealthy to a survey about themselves. In contrast, a number of interviewees did mention saving for future consumption, but that reason was not even among the eight most frequent responses.[196] For the wealthy, then, it appears that additional consumption may be less attractive than for those at lower wealth levels. The truly wealthy already may consume at or near the point of satiation.

Seymour Fiekowsky's analysis is more persuasive. He focuses, not on the demand for bequests, as though it were dependent only on the estate tax rate, but on "the elasticity of substitution between personal consumption and bequests."[197] Thus, Fiekowsky acknowledges that the demand for bequests is dependent on other factors as well. For persons whose primary economic motivation is to own and control wealth during their lifetimes, for example, loss of the ability to bequeath that wealth is basically irrelevant. Or, to persons who already consume at or near the point of satiation, an increase in the cost of making bequests relative to that of further consumption is of little import:

> On the whole, then, although it may not be an overstatement to say

194. R. BARLOW, H. BRAZER & J. MORGAN, *supra* note 170, at 33 (Chart 4.1).

195. *See* O.W. HOLMES, *Law and the Court,* in COLLECTED LEGAL PAPERS 291, 293 (1920) ("[T]he only prize much cared for by the powerful is power. The prize of the general is not a bigger tent, but command.").

196. R. BARLOW, H. BRAZER & J. MORGAN, *supra* note 170, at 198.

197. Fiekowsky, *The Effect on Saving of the United States Estate and Gift Tax,* in C. SHOUP, *supra* note 180, at 233.

> that consumption of market goods and services looms large in the welfare functions of 90 percent of the citizens of the United States, the 10 percent in whose welfare functions asset ownership is the major variable (deflated only by some index of status and power value of wealth dollars) have been deterred [in the accumulation process] neither by the income tax nor by the estate tax . . . because these individuals know that they could not take their wealth with them even if estates were not taxed.[198]

Curtailing inheritance as suggested in this article would affect less than 10% of the population.[199] Its impact would thus be limited to that group of individuals least likely to engage in additional consumption.

Even if curtailing inheritance did have some adverse impact on savings, the forgoing analysis considers only the behavior of the decedent. It ignores those who, under current law, stand to inherit property. If imposition of a more burdensome tax at death is thought an incentive to consumption on the part of those for whom death is near, ought it not also be seen as an incentive to save on the part of those whose inheritances would be adversely affected? Carl S. Shoup has speculated, "Many fairly well-off adults in their thirties and forties would surely begin to retrench, and those with little capital and modest incomes might even strive to get more income, as the prospect of inheritance disappeared."[200] The knowledge that they could not rely on inheriting their parents' wealth would discourage consumption of their own earnings. Thus, if curtailing inheritance did increase consumption at the decedent level, it might also decrease consumption at the beneficiary level. On a net basis, therefore, this proposal might have no or little impact on savings.[201]

Looking at the issue from a completely different angle, one is tempted to ask whether an increase in spending would necessarily be bad. The answer would surely depend on what form the additional spending took. The usual argument is that the wealthy would exchange their assets for annuities.[202] From the perspective of the economy as a whole, such exchanges are of little consequence. The wealth remains in the economy — part invested by sellers of annuities and part accumulating again in the hands of annuitants. Wealth does not

198. *Id.* at 235.

199. In fact, this proposal would affect less than two percent of the population. *See infra* note 320.

200. C. SHOUP, *supra* note 180, at 89.

201. *See id.* (concluding that restricting inheritance might actually increase savings); Glastris, *The New Way to Get Rich,* U.S. NEWS & WORLD REP., May 7, 1990, at 27, 34, 36.

202. *E.g.,* R. WAGNER, DEATH AND TAXES 24 (1973); Boskin, *An Economist's Perspective on Estate Taxation,* in DEATH, TAXES AND FAMILY PROPERTY, *supra* note 15, at 60; Epstein, *supra* note 24, at 697; Tullock, *Inheritance Justified,* 14 J.L. & ECON. 465, 471 (1971).

disappear. Wealth would disappear only if *additional* consumption occurred. So those who make the annuity argument must also assume that the annuitant will spend the annuity payments. But are the wealthy really going to dine nightly at Lutèce? Or each purchase 2000 pairs of shoes? The truly wealthy, who are the only individuals this proposal would affect, may already consume at or near the point of satiation.[203] If so, major increases in the usual types of consumption seem unlikely.[204] Thus, epicureanism would not consume capitalism simply because we curtailed inheritance.[205]

John Langbein has written about the "annuitization" of wealth,[206] which he defines as the ever-growing layers of pensions and retirement plans designed to insulate us from old age. Others have described "life care contracts," under which the elderly exchange all their property for lifelong care in a nursing home.[207] Curtailing inheritance might push spending habits in this direction. Were I worried about the government appropriating my wealth at death, I would consider insuring myself and my family against all sorts of risks. First, I would want unlimited, lifelong medical coverage, and only the Mayo Clinic or a close equivalent would do. Second, I would want a super "life care contract" that would guarantee nursing-home care in a degree of privacy and quality rarely, if at all, currently available. And only a reputable, thoroughly financially backed institution would do. Third, I would want lifelong access for my descendants to the finest private education available. Each would be expensive, and together they would amount to a significant portion of my wealth, especially if I also tried to provide such protection to collateral relatives or friends. This spending, however, is hardly bad. To the extent I provide, by private means, for medical, nursing-home, and educational needs, I relieve society of the burden of doing so. The current difficulties with providing catastrophic health care coverage for even a portion of this society[208] suggest that government is not always the answer, and that, in any

203. *See supra* notes 194-202 and accompanying text.

204. *See supra* notes 182-96 and accompanying text.

205. Bentham concluded that his proposal for curtailing inheritance had no tendency to "*promote dissipation of the national wealth,* by leading men to live upon their capitals, or sell them for annuities for their own lives," because "a still stronger and more universal [motive than benefiting others after death] is the faculty of increasing a man's fund of personal enjoyment during life: a faculty which would be at a stand, if he parted with his capital for an annuity." J. BENTHAM, *supra* note 123, at 300-01 (emphasis in original); *see also id.* at 342-44.

206. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission,* 86 MICH. L. REV. 722, 744-46 (1988).

207. C. SHAMMAS, M. SALMON & M. DAHLIN, *supra* note 101, at 158-59; Fairbanks, *Lifetime Care Contracts,* PROB. & PROP., Mar./Apr. 1990, at 5.

208. *See generally* Tolchin, *supra* note 152.

event, government desperately needs all the help it can get. This type of spending might also be beneficial in less direct ways. To the extent doctors, hospitals, nursing homes, private schools, and universities profited from these arrangements, perhaps they could afford (or be required) to provide expanded services to those unable to pay for them. Or maybe the increased financial stability accompanying such funding would enable them to provide new or superior services.

A more current variation of the annuity argument maintains that curtailing inheritance would impair savings by "shortening the horizon" in which investors operate.[209] Instead of investing for the "long haul," which presumably is good for both the investor and the economy, the investor would settle for a quick fix. One way to reach the conclusion that death taxes do not have this effect is to assert that either the "life-cycle model" or the "short-horizon model," rather than the "multigeneration model," more accurately explains current economic behavior.[210] Each depends on a different primary assumption about economic behavior: how far economic decisionmakers plan ahead. Under the "multigeneration model," economic decisionmakers gain utility from the consumption of heirs and act accordingly. Under the "life-cycle model" or the "short-horizon model," however, economic decisionmakers pay no attention, or no attention until late in life, to providing for their heirs. Each hypothesis apparently has its adherents. Whichever is correct, impressive authority supports the proposition that a tax imposed at death poses less of a threat to accumulation than almost any other tax.[211] The reasons are obvious. Income and property taxes generally are imposed on an annual basis, and are payable by the investor directly. A death tax occurs only once, at a time most individuals like to think is far in the future, and can never be paid by the investor.

To the extent this proposal did negatively affect savings, it would be objectionable from an economist's perspective because it would be "inefficient." Yet it might increase efficiency by decreasing "rent-seeking activity."[212] When potential donees and legatees compete for the favor of a donor or testator, they engage in activity that creates no new wealth. They expend resources over the allocation of wealth already in existence. From each competitor's point of view, this may be rational

209. *See, e.g.*, Epstein, *supra* note 24, at 695 (discussing effect of time horizon on investment choices).

210. *See* Graetz, *supra* note 14, at 281 (citing H. AARON, ECONOMIC EFFECTS OF SOCIAL SECURITY 10-28 (1982)).

211. *See supra* note 180.

212. *See* Buchanan, *Rent Seeking, Noncompensated Transfers, and Laws of Succession*, 26 J.L. & ECON. 71 (1983).

behavior. But it is hardly efficient. By curtailing inheritance, this proposal would decrease rent-seeking activity and thereby increase efficiency, offsetting, at least in part, any decrease in efficiency attributable to increased consumption.[213]

We certainly should gauge the economic effects of curtailing inheritance as closely as possible. But even if curtailing inheritance in exactly the way I propose did seem likely to increase spending, one need not conclude that it is a bad idea.[214] There are many ways to tone my proposal down, without reverting to the current system of essentially voluntary taxes. One of the easiest would be to lower the death tax rate to 90%, 80%, or even 70%. Even at the latter rate, substantially larger amounts of revenue would be raised than under the current system. Yet, by allowing larger amounts of property to pass by inheritance, there would be less consumption. In fact, the best system might fix the death tax rate not at 100%, but at an "optimal" rate, *i.e.*, the rate that produced the highest revenue yield. In any event, the powers of economic prediction obviously are limited. Only a few years ago, one could have dreamed up few things more inflationary than a long-term $200 billion budget deficit. Yet the lowest inflation in recent memory has occurred in the shadow of the deficit. Similarly, in the period following the tax cuts of 1981, this nation's savings rate *fell*.[215] Simply put, many economic predictions, especially those involving the kinds of incentives discussed here, seem difficult, if not impossible, to verify.[216]

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213. *See id.* at 81. Buchanan goes on to describe, in general terms, a system of inheritance similar to mine:

> The norm of economic efficiency and the norm for intergenerational equity might be appropriately combined or balanced by a set of arrangements that would allow potential donors to retain powers of transfer in a quantitatively limited sense. The amount of value transferred might be restricted, in total and/or per person terms. Such institutional arrangements would distort to some extent the donor's choices concerning capital accumulation (decumulation), but often less so than in the case of specifically directed transfers. The arrangements suggested would also stimulate investment in rent seeking by potential donors, but again less investment than would be forthcoming under quantitatively and directionally restricted powers of transfer.

Id.

214. If curtailing inheritance did, in fact, serve as such a stimulant to consumption as to cause economic problems worth solving, a ready antidote exists. Imposition of a tax on consumption (possibly in lieu of the income tax) should fully counteract any incentive to consume. *See* L. THUROW, *supra* note 25, at 132-33; Chester, *supra* note 31, at 69; Brannon, *supra* note 90, at 453, 457. In fact, there is strong independent support for a consumption tax. *See, e.g.*, U.S. TREAS. DEPT., BLUEPRINTS FOR BASIC TAX REFORM (1977); N. KALDOR, AN EXPENDITURE TAX (1955); Andrews, *A Consumption-Type or Cash Flow Personal Income Tax*, 87 HARV. L. REV. 1113 (1974); J. RAWLS, *supra* note 100, at 278 ("a proportional expenditure tax may be part of the best tax scheme"); J. MILL, *supra* note 67, bk. 5, ch. 2, § 4, at 813 ("[T]he proper mode of assessing an income tax would be to tax only the part of income devoted to expenditure . . . .").

215. Graetz, *supra* note 14, at 280-81; Pechman, *Why We Should Stick with the Income Tax*, THE BROOKINGS REV., Spring 1990, at 9, 13.

216. *See* Graetz, *supra* note 14, at 280-83 (concluding that the "evidence concerning the

On the other hand, certain economic *facts* suggest we *could* raise much larger amounts of revenue from wealth without endangering the economy at all. In the United States the yield from wealth taxes amounted to only 0.2% of gross domestic product in 1984.[217] Of fifteen industrialized nations, only Australia and Italy relied less heavily on that tax base. Japan relied on wealth taxes to the extent of 0.3% of gross domestic product. Norway taxed wealth to the tune of 0.5% of gross domestic product. Germany and Austria imposed wealth taxes equal to 0.6% of gross domestic product. Switzerland taxed wealth to the extent of 1.5% of gross domestic product.[218] Thus, if we decided to derive substantially greater revenue from the taxation of wealth, we would be following the lead of other nations, some of which are not only democratic and capitalistic but also more successful economically than we are.

c. Decrease in capital privately held. By reallocating to the government a larger portion of what is owned at death, and by subjecting lifetime transfers to higher gift taxes, this proposal would remove from the private economy a large amount of capital.[219] This concern is, however, irrelevant to a tax providing deficit financing.[220] In incurring the debt implicit in the deficit, the federal government has already appropriated far more of this nation's capital than curtailing inheritance can ever hope to redeem. Because the deficit exceeds all wealth passing at death each year, curtailing inheritance to finance the deficit cannot deplete capital.

Bentham seems to have reached the same conclusion. He, too, recommended that the revenue from his proposal for curtailing inheritance be used to retire the national debt.[221] Mill agreed: "[T]he argument cannot apply to any country which has a national debt, and devotes any portion of revenue to paying it off; since the produce of

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alleged adverse economic effects of the estate tax is . . . inconclusive"); B. BITTKER & E. CLARK, *supra* note 13, at 8 ("No conclusion as to the effects of estate and gift taxation on incentives can be more than a guess.").

217. J. PECHMAN, *supra* note 14, at 371 (Table D-5).

218. *Id.*

219. All death taxes are subject to this objection. Adam Smith, in *The Wealth of Nations,* published in 1776, argued: "All taxes upon the transference of property of every kind, so far as they diminish the capital value of that property, tend to diminish the funds destined for the maintenance of productive labour." A. SMITH, *supra* note 130, bk. 5, ch. 2, pt. 2, appendix to arts. 1 & 2, at 380; *see also* D. RICARDO, *The Principles of Political Economy and Taxation,* in 1 WORKS AND CORRESPONDENCE OF DAVID RICARDO 152 (P. Sraffra ed. 1951). Bentham, too, was troubled by this argument. *See* Stark, *Introduction* to 1 JEREMY BENTHAM, *supra* note 123, at 68-70; 3 *id.* at 516-17.

220. *See* W. SHULTZ, *supra* note 32, at 201-06; M. WEST, *supra* note 32, at 209-10; Graetz, *supra* note 14, at 282-83.

221. 1 J. BENTHAM, *supra* note 123, at 288-89, 319.

the tax, thus applied, still remains capital, and is merely transferred from the tax-payer to the fundholder."[222] Thus, President Franklin D. Roosevelt, in advocating increased federal wealth transfer taxes, urged that the resulting revenue be used to balance the federal budget.[223] However daunting this country's need for capital, the federal government's voracious spending is much more likely than this proposal to upset the economic apple cart.[224] On the contrary, to the extent implementation of this proposal reduced the federal deficit, it might well have *positive* economic effects. Lawrence H. Summers has recently written: "The most potent and reliable way to increase national savings is to reduce government deficits. Any adverse effect that tax increases have on private savings is almost surely dwarfed by their favorable effect on national saving."[225] In short, the economic effects of curtailing inherited wealth actually may constitute another argument *in favor* of this proposal.

2. *Destabilization of the Family*

One of the arguments most frequently articulated in favor of inheritance is that it promotes family values and stability.[226] According to this line of reasoning, family ties are closer, richer, and more enduring because parents can provide for their children after death.[227] One way inheritance is said to accomplish this is by "meeting the maintenance needs of family members."[228] But unlimited inheritance is hardly necessary to allow individuals to fulfill their families' "maintenance needs." A proposal that allowed inheritance by surviving spouses, dependent lineal descendants, disabled lineal descendants, and lineal as-

222. J. MILL, *supra* note 67, bk. 5, ch. 2, § 7, at 822.

223. F.D. Roosevelt, *supra* note 94, at 643.

224. *See* Harriss, *Economic Effects of Estate and Gift Taxation,* in READINGS IN DEATH AND GIFT TAX REFORM, *supra* note 180, at 49 ("Productive capacity depends upon things of vastly greater importance than death taxes. . . . Prices, financial structure, wages, location, competition, and other aspects of business are not influenced by estate and gift taxes . . . .").

My biggest concern about the proposal in this article arises from my lack of confidence that Congress actually would use the revenue generated to decrease the deficit. If curtailing inheritance merely allowed the government to spend more, there would appear to be no escape from the conclusion that the government was consuming a larger share of the nation's savings. Any congressionally imposed prohibition against increased spending would be just as unenforceable as Gramm-Rudman-Hollings. Perhaps the funds generated by this proposal should, nonetheless, be set aside in a separate trust account publicly designated for deficit reduction. This ruse would at least require politicians set on spending the funds to endure the embarrassment they currently endure for spending funds supposedly devoted to Social Security.

225. Summers, *Comments,* in UNEASY COMPROMISE, *supra* note 193, at 259, 265; *see also* Bosworth, *Comments,* in UNEASY COMPROMISE, *supra* note 193, at 265, 267-68.

226. *See, e.g.,* HEGEL'S PHILOSOPHY OF RIGHT §§ 170-80 (T. Knox trans. 1965).

227. *See generally* Nathanson, *supra* note 32, at 86.

228. M. SUSSMAN, J. CATES & D. SMITH, *supra* note 168, at 312.

cendants would countenance satisfaction of almost all such needs.[229]

Another way inheritance is said to stabilize the family is through intergenerational "symbolic identification." The "transfer of mementos and other items cherished by the testator, such as a favorite chair or art object, and feelings expressed by beneficiaries about these items" are said to help "perpetuate the family through time."[230] Again, unlimited inheritance is hardly necessary to accommodate the intergenerational transfer of most mementos and accompanying sentiments. A proposal that allowed each decedent to transmit at death a moderate amount of property would suffice.[231]

There are also reasons to question the soundness of describing inheritance as the glue that holds families together. Any estate planner or probate judge knows the values inheritance promotes are often much less savory than those generally thought of in the homey term "family values." Children all too often make their parents' lives miserable trying to ensure places for themselves in their parents' wills or, worse yet, trying to part their parents from their money while still alive.[232] And parents all too often use their wealth as a club to ensure the continued attention — or even the obedience — of their children.[233] To be sure, in many families inheritance does not cause these sorts of stress. But the argument that inheritance holds such families together ignores the healthy personal relationships almost always present in families in which inheritance is assumed and not fought over. Surely the ties that bind in ways we wish to encourage are kinder, gentler, more loving, and much less mercenary than those inheritance offers.

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229. My proposal allows inheritance in all four situations. *See infra* notes 289-318 and accompanying text.

230. M. SUSSMAN, J. CATES & D. SMITH, *supra* note 168, at 311-12.

231. My proposal would allow every decedent to transfer $250,000 to anyone he or she chose. *See infra* notes 319-32 and accompanying text.

232. *See, e.g.*, Haynes v. First Natl. State Bank of New Jersey, 87 N.J. 163, 432 A.2d 890 (1981).

233. *See, e.g.*, Barnes v. Marshall, 467 S.W.2d 70 (Mo. 1971). *See generally* Halpern, *Parent-Child Relationships That Affect the Will*, in YOU MAY BE LOSING YOUR INHERITANCE 50-67 (M. Levin ed. 1979); C. SHOUP, *supra* note 180, at 22; Nathanson, *supra* note 32, at 87-88. Bentham, on this occasion defending inheritance, described the process:

> [Through making a will] the power of the present generation is extended over a portion of the future .... By means of an order not payable till after his death, he procures for himself an infinity of advantages beyond what his actual means would furnish. By continuing the submission of children beyond the term of minority, the indemnity for paternal cares is increased .... In the rapid descent of life, every support on which man can lean should be left untouched, and it is well that interest serve as a monitor to duty.

J. BENTHAM, THE THEORY OF LEGISLATION 184-85 (C. Ogden ed. 1931).

3. *Nationalization of the Means of Production*

To some, curtailing inheritance implies nationalization of the means of production. One author has put it this way, "[T]his society is clearly not willing for the state to take over the means of production as the result of an escheat of inherited wealth, even if only those assets over [a certain dollar value] were taken."[234] My proposal would do nothing of the kind.[235] Its primary purposes are to increase equality of opportunity and to raise revenue. Nor is it in any way frustrated by allowing the means of production to remain in private hands.[236]

Currently, payment of both the federal estate tax and the federal gift tax is in cash, and nothing in the concept of curtailing inheritance requires a change in that procedure.[237] Thus, curtailing inheritance would result not in nationalization of the means of production, but in a larger number of estate sales.[238] Normal fiduciary duties,[239] penalties for negligence and fraud,[240] fee structures based on the value of property administered, and the possibility, in every estate, of exempted bequests would ensure that executors would seek the highest value for estate assets, even if the bulk of the proceeds were destined for the

234. Chester, *supra* note 31, at 70; *see also* Nathanson, *supra* note 32, at 77-78 (abolition of inheritance leads ineluctably to disappearance of private property); Cole, *supra* note 26 (state inheritance means state control of capital); Epstein, *supra* note 24, at 696 (worrying about "political disputes over whether government sale is preferable to government management of retained property").

235. Of course, a given proposal might have nationalization as an independent goal. Eugenio Rignano, an Italian socialist writing shortly after the end of World War I, grew tired of waiting for the cataclysm of capitalism that would inexorably lead to nationalization of the means of production. He also worried about how the nations of Europe would pay their war debts. So he conceived an ingenious plan that, he argued, would gradually result in nationalization of the means of production through changes in the legal system, rather than through violent revolution. What he advocated was a progressive inheritance tax that reached 100% under certain circumstances. What was unique about Rignano's proposal was that its progressivity related not to amounts owned at death or bequeathed to individual beneficiaries, but to the method by which property had been acquired. He proposed no additional death taxes on property acquired by one's own efforts. But he did propose a 50% tax on anything the decedent had acquired by inheritance or gift from the person who earned it. And he proposed a 100% tax on anything the decedent had acquired from one who had not earned it. Given his political goals, he naturally proposed that the government take its share in kind, rather than in cash. *See generally* E. RIGNANO, THE SOCIAL SIGNIFICANCE OF THE INHERITANCE TAX (W. Shultz trans. 1924).

236. Chester might argue that cash, too, is a means of production. Obviously, it is. But the government, through the deficit, has already nationalized American's means of production, thus defined. My proposal merely advocates paying the resulting debt, not additional confiscation.

237. Bentham's proposal for curtailing inheritance expressly required that the government's share be reduced to cash. J. BENTHAM, *supra* note 123, at 285.

238. Requiring that the tax be paid in cash would also avoid much of the "intrigue and abuse" Epstein worries about. Epstein, *supra* note 24, at 696.

239. *E.g.*, RESTATEMENT (SECOND) OF TRUSTS §§ 170(1), 174, 176, 183 (1959) (duties to be loyal, to use reasonable care and skill, to preserve assets, and to be impartial). If an executor breached any of these duties, the government would have rights of recovery against the fiduciary in his, her, or its personal capacity.

240. *See, e.g.*, I.R.C. §§ 6651(f), 6662, 6663 (West Supp. 1990).

government. Some executors would, no doubt, find the temptation for profit, sloth, or sloppiness too great. Still others might even refuse to serve. To address these concerns, a proposal might allow the government the option of either serving as (co)executor or designating a private individual or bank to serve as (co)executor of any estate in which it had or was likely to have more than a 50% interest.[241] Noncash assets might thereby find their way into the hands of the government or its designee. To ensure continued private ownership of the means of production, however, a proposal need only require the government or its designee to dispose of these assets, perhaps by public sale, within a short, statutorily-fixed period of time.[242]

4. *The Failure of the Soviet Experiment*

Few have proposed to abolish inheritance completely. Yet, almost immediately after the Soviets came to power, they apparently attempted to do so. On April 27, 1918, the Soviets, following the teachings of Marx and Engels,[243] decreed: "Testate and intestate succession are abolished. Property of an owner (movable as well as immovable) becomes after his death the domain of the Russian Socialist Federated Soviet Republic."[244] They failed miserably. Over the next several decades, through a series of interpretations and outright amendments, the Soviets gradually transformed their experiment in abolition into a system for the recognition of inheritance similar to that in any of the United States.[245] Their failure suggests that curtailing inheritance may be easier said than done.

Several reasons suggest that the failure of the Soviet experiment has little relevance to proposals for inheritance reform in the United States. First, the Soviets, at least nominally, attempted to abolish inheritance. I suggest nothing of the kind.[246] What I propose is much

241. Bentham suggested that the government serve, in essence, as executor of those estates in which it had an interest. J. BENTHAM, *supra* note 123, at 285.

242. Bentham also suggested that all sales of estate assets be at public auction. *Id.*; *see also* Haslett, *supra* note 32, at 137-38.

243. Marx & Engels, *Manifesto of the Communist Party*, in BASIC WRITINGS ON POLITICS AND PHILOSOPHY 1, 28 (Feuer ed. 1959).

244. 1 V. GSOVSKI, SOVIET CIVIL LAW 623-24 (1948).

245. *See id.* at 624-29; *id.* at 657-58 ("[N]o restriction upon the accumulation of private wealth flows from the soviet law of inheritance. This does not mean that no such restrictions exist under the soviet law. There are strong and rigid restrictions, but these are to be found outside of the law of inheritance .... They are fully expressed ... in the soviet law of property."); *see also* 2 V. GSOVSKI & K. GRZYBOWSKI, GOVERNMENT, LAW AND COURTS IN THE SOVIET UNION AND EASTERN EUROPE 1163-74 (1959); Griffin, *The About Turn: Soviet Law of Inheritance*, 10 AM. J. COMP. L. 431 (1961).

246. *See infra* notes 289-343 and accompanying text (detailing the exemptions I propose).

less an experiment in abolition than an evolution of the regulation and taxation of inheritance this country has employed since its founding.

Second, the Soviet experiment failed in large part because the Soviet government had "no adequate apparatus to check upon all the estates in Russia."[247] Thirty years later, the Soviets continued to permit inheritance on an essentially informal basis; they still had neither executors nor probate.[248] In this country, we have a long tradition of requiring executors, lawyers, and probate for the testamentary disposition of wealth. Most states have special court systems, whose primary, if not exclusive, jurisdiction is the transmission of wealth at death. Thousands of estate planners' careers depend on the wealth transmission process. As a nation, we have decades of experience with the federal estate and gift taxes. Most states have been in the business of collecting death taxes even longer. In short, we have a grand tradition of intricate and intrusive regulation of decedents' estates, and we have created and paid for a large, dedicated, and professional bureaucracy to do it.[249] It is inconceivable that a federal attempt to curtail inheritance in the United States would go essentially unnoticed.

Finally, the most important reason the Soviet experiment is irrelevant is that, until very recently, the Soviets allowed their citizens to own only certain types of property.[250] As a result, the amounts passing by inheritance were inevitably small.[251] Thus, abolishing inheritance turned out to be unnecessary to state socialism. Moreover, denying inheritance, even as to the types of property permitted, affected not only the (formerly) wealthy, but also those able to accumulate modest amounts through their own efforts. The impact on incentives, when combined with that resulting from the abolition of private property, must have been devastating. In fact, it appears the Soviets abandoned their experiment in a deliberate effort to restimulate the worker productivity that abolition of private property had crushed.[252]

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247. 1 V. GSOVSKI, *supra* note 244, at 624-25.

248. *Id.* at 639, 647; *see also* Griffin, *supra* note 245, at 440.

249. *See generally* Friedman, *The Law of Succession in Social Perspective,* in DEATH, TAXES AND FAMILY PROPERTY, *supra* note 15, at 9, 18-19 (describing America's probate system).

250. *See* 2 V. GSOVSKI & K. GRZYBOWSKI, *supra* note 245, 1130-37; Griffin, *supra* note 245, at 443; Holman, *The Law of Succession in Soviet Jurisprudence,* 21 IOWA L. REV. 487, 489-91 (1936). *But see* N.Y. Times, Feb. 18, 1990, at E18, col. 2 ("The Communist Party of the Soviet Union believes that the existence of individual property, including ownership of the means of production, does not contradict the modern stage in the country's economic development.") (from the Communist Party Central Committee's platform, adopted Feb. 7, 1990).

251. *But cf.* Smith, *supra* note 108, at 50 (suggesting that "high-ranking fathers" in the Soviet Union sometimes "do succeed in passing on private wealth and property" to their children).

252. *See* K. GRZYBOWSKI, SOVIET LEGAL INSTITUTIONS 155 (1962) ("The inheritance of items acquired by the workers . . . through their own labor promotes thrift and constitutes an added incentive toward raising productivity of labor."); 2 V. GSOVSKI & K. GRZYBOWSKI, *supra*

5. *Tax Evasion and Fraud*

Curtailing inheritance might encourage tax evasion and fraud. But consider the fact that the marginal federal estate tax rate was as high as 77% as recently as 1976.[253] I am not aware that the problems of tax evasion and fraud under that tax were out of line with those of other federal taxes before or since. Nor am I aware that there is any less tax evasion or fraud under the much lower current rates.[254] On the contrary, probably because in this country the transfer of any significant amount of wealth at death is next to impossible without the involvement of both lawyers and the court system, the estate tax traditionally has been one of the easiest taxes to enforce.

During an individual's lifetime, greater opportunities for fraud and evasion exist. Thus, under my proposal, assets, such as gold and diamonds, that are not registerable might become fertile sources of gift tax evasion. But surely we could develop effective antidotes. For example, if too many unreported gifts of gold and diamonds occurred, we could impose on jewelers and dealers in precious stones and metals the same reporting requirements banks currently abide by in handling large amounts of cash.

6. *Emigration — of Capital and Citizens*

Curtailing inheritance may also encourage emigration of both capital and citizens. Much wealth consists, however, of interests in business enterprises or real property.[255] Such wealth generally is not

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note 245, at 1171-74; 1 V. GSOVSKI, *supra* note 244, at 618-21; Griffin, *supra* note 245, at 435 ("The re-institution of inheritance rights was seen . . . as of assistance in developing thrift and an incentive to work."); Holman, *supra* note 250, at 498. For an account of the disastrous consequences of the Soviets' abolition of private property, see 2 V. GSOVSKI & K. GRZYBOWSKI, *supra* note 245, at 1131.

253. Internal Revenue Code of 1954, ch. 736, § 2001, 68A Stat. 3, 373 (1954) (amended 1976).

254. Currently the maximum federal estate tax rate is 55% and is scheduled to drop to 50% in 1993. I.R.C. § 2001(c)(1), (2)(D) (1988). For amounts between $10 million and $21,040,000 ($18,340,000 after 1992), however, there is also a 5% surtax designed to recover the benefits of the graduated rate structure and the unified credit. I.R.C. § 2001(c)(3) (1988).

The federal income tax has been the victim of even more drastic rate decreases. As recently as 1963, the highest marginal federal income tax rate applicable to individual taxpayers was 91%. Internal Revenue Code of 1954, ch. 736, § 1(a), 68A Stat. 3, 5 (1954) (amended 1964). Currently the maximum nominal federal income tax rate is 28%, though the maximum actual rate is 33%. *Compare* I.R.C. § 1(a)-(d) (West Supp. 1990) *with* I.R.C. § 1(g) (West Supp. 1990). I am unaware that tax evasion and fraud have taken a holiday as a result of that change, either. In fact, though the data is fragmentary, there seems to have been steady, and perhaps even accelerating, growth in the rate of noncompliance since 1969. *See* Henry, *Noncompliance with U.S. Tax Law — Evidence on Size, Growth, and Composition,* in REPORT OF THE ABA SECTION OF TAXATION INVITATIONAL CONF. ON INCOME TAX COMPLIANCE, INCOME TAX COMPLIANCE 15, 63 (1983).

255. Based on 1986 federal estate tax returns, 39% of the assets of estates in excess of $5

moveable. Thus, the amount of capital relocated is likely to be small.[256] In any event, efforts to relocate capital would, in theory at least, be ineffective, because, subject to various tax treaties, the federal estate tax is already universal,[257] and any proposal for curtailing inheritance would surely also be.[258]

As to the movement of citizens, there should be fewer limitations. Nonetheless, to escape the current federal estate tax one must not only cease residing in the United States but also renounce American citizenship.[259] These are drastic measures few would undertake, even under a system that curtailed inheritance.[260]

7. *Decreased State Revenues*

The federal government and every state currently impose death taxes. Combined, they yielded $9.1 billion in 1985.[261] Assuming that $150 billion passed at death that year,[262] only 6% went for taxes. At present, then, there is no conflict between the federal estate tax and the death taxes of the states.

Under my proposal, however, there would be less room in which to maneuver two tax systems. If the rate of tax imposed on nonexempt property were, in fact, 100%, states would have no source of revenue at death other than the property designated as exempt from the federal tax. Currently, some states do tax property exempt from the federal estate tax.[263] But allowing the states to tax amounts my proposal designates as appropriate for specific beneficiaries would defeat much

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million consisted of corporate stock. Johnson, *supra* note 120, at 36 (Table 1). Another 14% consisted of real property. *Id.*

256. *See* W. SHULTZ, *supra* note 32, at 320-21; M. WEST, *supra* note 32, at 212 ("no tax which can be levied on movable wealth will have less effect in driving away capital").

257. *See* I.R.C. § 2031(a) (1988) (gross estate includes all property "wherever situated"); *cf.* I.R.C. § 2014 (1988) (credit for foreign death taxes).

258. Mitigation of any practical benefits of relocating capital (such as creation of jurisdictional clogs on collection efforts) could be had at the expense of imposition of a combination of "toll taxes," prohibitions on international transfers of capital, and/or renegotiated tax treaties.

259. *See* I.R.C. § 2001(a) (1988) (imposing the estate tax on every "citizen or resident of the United States").

260. Even under current law, those willing to take these measures generally must survive renunciation by 10 years to avoid taxation on property situated in the United States. *See* I.R.C. §§ 2107(a), 2103 (1988). If additional deterrence proved necessary, the period of survival could be lengthened. Alternatively, the definition of property situated in the United States could be expanded.

261. J. PECHMAN, *supra* note 14, at 2 (Table 1-1).

262. *See supra* text accompanying note 12.

263. For example, a state may impose a quantitative limitation on the marital deduction for purposes of its own death tax. If so, the state's death tax may fall on property exempted by the federal estate tax, which has a quantitatively unlimited marital deduction. *See* I.R.C. § 2056 (1988).

of its theory. Moreover, allowing the states to add to the tax burdens of death would aggravate whatever adverse economic effects my proposal might have. The necessary conclusion, then, seems to be that curtailing inheritance at the federal level would preempt the death taxes of the states.[264]

During fiscal year 1987 state wealth transfer taxes raised about $3 billion, slightly more than one percent of all state revenues.[265] A decision by the federal government to claim the transfer of wealth at death as its own exclusive tax base would thus not threaten the states with economic disaster; nonetheless, such a decision would have serious implications that ought to be addressed, if possible. For example, the federal government could remit, to the state of domicile, a fixed portion of the death tax from each decedent's estate.[266] Admittedly, this would not be a complete solution. First, it would deny the states flexibility to increase the revenues derived from the transfer of wealth. Yet at least it would assure them a constant source of revenue. And Congress could, at any time, vary the sharing ratio. Second, all states would share in their own domiciliaries' wealth at the same rate. Thus, depending on the sharing ratio, states that currently impose high death taxes likely would receive less; states that currently impose low death taxes likely would receive more. Third, states would no longer be able to tax property located within their jurisdiction that belonged to nonresident decedents. On the other hand, they would no longer lose revenue to other states in which their own decedents owned property.

Nevertheless, elimination of fifty separate transfer tax systems creates attractive independent benefits. First, reduced bureaucracy and duplication of effort would allow death tax revenue to be obtained

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264. Vickrey reached the same conclusion. W. VICKREY, *supra* note 186, at 309.

Another call for exclusive federal taxation of the transfer of wealth at death came from an intriguing source, the State Tax Commission of the State of Mississippi:

> The Federal Government would be justified in confiscating all property in excess of $5,000,000 of large estates, upon the death of the owner. The revenue should be used to pay off the bonded debt incurred in the prosecution of the world war. . . . There are many arguments in favor of the Government's having all of the inheritance tax. The tax-payer can change his residence or can shift his property from one State to others so as to evade the payment of the tax. Some states consider the residence of the decedent as the situs for taxation; others, the location of the property. These differences in statutes impose double taxation in some cases.

REPORT OF THE STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI FOR THE YEAR 1919, at 33 (1920).

265. B. BITTKER & E. CLARK, *supra* note 13, at 2.

266. This amount might, for example, bear the same ratio to the federal death tax imposed on the estate as the total revenue all states raised from death taxes in the year immediately prior to implementation bore to total federal death tax revenues in the first year of implementation.

more efficiently.[267] Second, executors would no longer be required to file multiple death tax returns. Third, retirement states, such as Florida and Arizona, would be forced to compete for retirees on the basis of overall attractiveness, rather than as tax havens. Retirees could die where they chose, rather than where they thought they should. Fourth, multiple domiciliary state death taxation, which is theoretically impossible but supposedly constitutionally permissible,[268] would cease to exist. If two or more states, each purporting to be the decedent's domicile, claimed the domiciliary state's share, the Commissioner of Internal Revenue would interplead them, raising a clear federal question the Supreme Court could not lightly shirk.

8. *"Wiping Out the Dream"*

In the 1972 Presidential campaign, Senator George McGovern advocated a $500,000 limitation on the total any one individual could receive by gift or inherit during his or her lifetime.[269] John A. Brittain has described the public reaction as a "national cry of outrage."[270] Arthur M. Okun has noted that "a storm of protest from blue-collar workers greeted Senator McGovern's proposal for confiscatory estate taxes."[271] McGovern's own press spokesman, Richard Dougherty, explained the public reaction: "[I]t would wipe out the dream factor — every slob in the street thinks that if he hits the lottery big, he may be able to leave half a million to his family; it wipes out dreams."[272] McGovern thus stumbled over what appears to be the only real reason this country continues to tolerate unlimited inheritance. Recall the 1982 California initiative in which 64% of the voters favored repeal of the California inheritance tax.[273] Americans seem attached not only to buying tickets in state lotteries and watching television game shows, but also to dreaming about "rich uncles" whose imminent death will make them instant millionaires.[274]

Curtailing inheritance in the fashion I suggest is in many ways less radical than McGovern's proposal. Spousal inheritance would be po-

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267. *Cf.* Groves, *supra* note 180, at 41 (advocating that the federal government administer the state death taxes).

268. Cory v. White, 457 U.S. 85 (1982); Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937). *See generally* Groves, *supra* note 180, at 35, 37.

269. T. WHITE, THE MAKING OF THE PRESIDENT 1972, at 118-19 (1973).

270. J. BRITTAIN, *supra* note 7, at 30.

271. A. OKUN, *supra* note 3, at 49.

272. T. WHITE, *supra* note 269, at 119.

273. *See supra* text accompanying note 29.

274. *See* R. CHESTER, *supra* note 31, at 51, 74-76; J. BRITTAIN, *supra* note 25, at 13 n.31; A. OKUN, *supra* note 3, at 49.

tentially unlimited.[275] Parental inheritance would be unlimited.[276] And inheritance by dependents, the disabled, and charity would be generous.[277] But inheritance by healthy, adult children, collateral relatives, and unrelated individuals would be limited. Like McGovern's proposal, this proposal would, therefore, "wipe out" many "dreams" of instant wealth, as well as many "dreams" of passing great wealth at death. A crucial distinction is that this proposal would continue to permit lifetime giving, though subject to a more ambitious gift tax.[278] Thus, those who really did dream about sharing their wealth with others could do so — if they ever had any to share.

A second distinction relies on the pendulum theory of transfer taxation. In the late 1970s, the federal wealth transfer taxes affected a larger share of the American population than at any time in our history.[279] In that, they erred. Substantial changes occurred in 1976, but it was only with the Reagan Revolution in 1981 that the federal wealth transfer taxes began to go the way of the dodo. That the public chafed at such taxes in 1972, and continued to do so in 1982, is hardly surprising. But I wonder how a proposal for deriving additional revenue from the federal estate and gift taxes would fare today if the public realized that, under the changes made in 1981, less than one percent of the population pays any estate tax. And I also wonder how the public would react if the alternative to such a proposal were the decrease in take-home pay that an increase in the income tax would cause.

Of course, more than nonexistent rich uncles is involved. For some, leaving bequests appears to be means of achieving immortality. It is also a way to continue demonstrating love for others,[280] influencing (controlling?) their lives,[281] and enjoying property, after death. These are psychological concerns of potential importance. Whether they are important enough to offset the egalitarian benefits and revenue promised by curtailing inheritance is, however, doubtful. In other times, and in other places, the psychological or theological concerns of

275. *See infra* notes 289-99 and accompanying text.

276. *See infra* notes 317-18 and accompanying text.

277. *See infra* notes 300-16, 333-43 and accompanying text.

278. *See infra* notes 344-93 and accompanying text.

279. *See* C. SHAMMAS, M. SALMON & M. DAHLIN, *supra* note 101, at 128-29 (Table 6.1) (in 1977, 7.8% of all estates of decedents over age 25 paid federal estate tax); Gutman, *Federal Wealth Transfer Taxes After the Economic Recovery Tax Act of 1981*, 35 NATL. TAX J. 253, 266 n.36 (1982); Bentz, *Estate Tax Returns, 1983*, STATISTICS OF INCOME BULL., Fall 1984, at 4 (in 1977, 10.5% of all estates were required to file federal estate tax returns).

280. M. SUSSMAN, J. CATES & D. SMITH, *supra* note 168, at 10 ("[I]nheritance symbolizes what were at one time the love links and bonds between family members, most often those between marital partners, and between parents and children.").

281. *See supra* text at note 233.

the wealthy required that their possessions, servants, and even wives be buried or immolated with them. Today, we frown on such conduct. In other times, the psychological, theological, and political concerns of the wealthy required that political power descend through their children. We fought and won a war to end that form of inheritance.

In any event, I suggest *curtailing* inheritance, not abolishing it. A universal exemption would allow *every* decedent to bequeath a substantial amount of property.[282] If set at $250,000, this exemption would exempt approximately 98% of the population.[283] Thus, for the vast bulk of society, all my proposal would do is "wipe out the dream" of inheriting a purely imaginary fortune or passing a purely imaginary fortune to healthy, adult children. For the few truly wealthy, my proposal would, of course, represent a major change in the wealth transmission process. But even the truly wealthy could still pass, in addition to lifetime gifts, and in addition to other exempted amounts, $250,000 to whomever they wished. The psychological needs of 2% of the population to control more than that amount of wealth after death ought not prevail over the benefits my proposal promises.

III. A Proposal for Using the Federal Wealth Transfer Taxes To Curtail Inheritance

There is no natural right to inheritance. Nor is inheritance a necessary stick in the bundle of rights we refer to as property. Society's role in all acquisitive activities gives it an important stake in how property is reallocated after an owner's death. Numerous policy arguments support curtailing inheritance. Increasing equality of opportunity is something each of us ought to support. So is raising revenue in a relatively painless and appropriate fashion for a government that seems unable to raise the revenue it insists on spending. Protecting our elective representative government, increasing privatization in the care of the elderly and disabled, expanding public ownership of national and international treasures, increasing lifetime charitable giving, and neutralizing the corrosive effects of wealth are yet other policy benefits that curtailing inheritance would confer. Other policy concerns seem to argue against curtailing inheritance. Fears of adverse economic consequences, destabilization of the family, and loss of the psychological benefits of unlimited inheritance are among those most often mentioned.

Over the years, numerous thoughtful individuals, finding the argu-

282. *See infra* notes 319-32 and accompanying text.

283. *See infra* note 320.

ments in favor of curtailing inheritance convincing, have advanced schemes to limit inheritance. The need to reduce the deficit seems to justify a contemporary proposal, one specifically tailored to this country's probate and wealth transfer tax systems. The primary assumption underlying my proposal is that inheritance should be allowed only where public policy justifies it. Thus, my main premise is that, except for property described in one of six exceptions, all property owned by a decedent, after payment of debts and administration expenses, would be sold and the proceeds paid to the U.S. government.

The current tests for determining includibility in "gross estate" for federal estate tax purposes would determine the extent of property "owned" at death. For example, if section 2040 would include an amount attributable to jointly owned property,[284] this proposal would, absent an exemption, result in a tax equal to that amount.[285] Similarly, since section 2038 would include the entire value of the typical revocable *inter vivos* trust,[286] this proposal would, absent an exemption, result in a tax equal to the value of the trust at the death of its grantor.[287]

I have three reasons for adhering to the current tests. First, the current tests, despite their problems (and there are some big ones), amount to a reasonable estimation of property "passing" at death. Second, any system of death taxation must face the issues of inclusion and exclusion that the current system has already resolved. Using those tests would greatly reduce the switch-over costs of adopting my proposal. Third, although I know "gross estate" is an imperfect tax base, I prefer to tilt at windmills one at a time.[288]

Four of the six exceptions rest on relatively indisputable grounds. The marital exemption, the exemption for dependent lineal descendants, the exemption for disabled lineal descendants, and the exemption for lineal ascendants all allow a decedent to provide for family members who may need support. In addition, each of these exemptions rec-

284. *See* I.R.C. § 2040 (1988).

285. *But see infra* note 299 (spousal joint tenancies).

286. *See* I.R.C. § 2038 (1988).

287. The typical revocable *inter vivos* trust continues after the death of the grantor, primarily for the benefit of the surviving spouse. If the continuing trust qualified for the marital exemption, part or all of the tax would be deferred until the death of the surviving spouse. *See infra* notes 289-99 and accompanying text. Similarly, if, upon the death of the grantor or the surviving spouse, the trust provided for a different exempted beneficiary (for example, a disabled lineal descendant or a lineal ascendant), there might still be no tax to pay. *See infra* notes 300-32 and accompanying text. But as soon as the trust ran out of exempted beneficiaries it would terminate in favor of the federal government.

288. *But see infra* note 299 (spousal joint tenancies); *infra* text accompanying notes 354-60 (gifts in contemplation of death); *infra* text accompanying notes 391-93 (life insurance).

ognizes the legal and ethical entitlements family members have in a decedent's estate. The marital exemption and the exemption for lineal ascendants also recognize the innumerable ways spouses, parents, and grandparents contribute to the accumulation of wealth. Each is thus easy to justify conceptually.

The other two exceptions are harder to justify. Ultimately, the rationales for allowing a universal exemption boil down to decreasing the proposal's administrative costs and increasing its feasibility. The charitable exemption responds to this country's apparent commitment to do through charity things the government is either unable or unwilling to do directly.

I also suggest a reinvigorated gift tax designed to backstop the death tax.

A. *Marital Exemption*

In 1981 Congress determined that interspousal transfers were generally inappropriate occasions for imposition of either the estate tax or the gift tax.[289] By removing quantitative limitations on the marital deduction for both estate and gift tax purposes, Congress essentially immunized the spousal unit from both taxes. This is one aspect of the recent spate of tax "reform" that has received little criticism, from either academics or the Bar.[290] Given "the common understanding of most husbands and wives that the property they have accumulated is 'ours,' "[291] it does seem appropriate to ignore spousal transfers whenever possible.

Would complete freedom of interspousal transfer continue to make sense against the backdrop of sharply curtailed inheritance? Or would unmarried seventy-seven-year-olds, denied unlimited testamentary freedom, marry more frequently to avoid the death tax? Certainly changes in the transfer tax system ought not encourage people to marry who would not otherwise. The number of predominantly tax-motivated marriages may be quite small. If so, a quantitatively unlim-

289. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403, 95 Stat. 172, 301 (1981) (codified as amended at I.R.C. §§ 2056, 2523 (1988) (quantitatively unlimited estate tax and gift tax marital deduction)).

290. There was impressive support for enactment of a quantitatively unlimited marital deduction long before Congress took action. *See, e.g.*, R. WAGNER, *supra* note 192, at 65-68; Osgood, *supra* note 186, at 319-24; Kurtz & Surrey, *Reform of Death and Gift Taxes: The 1969 Treasury Proposals, the Criticisms, and a Rebuttal*, 70 COLUM. L. REV. 1365, 1394-96 (1970); U.S. TREAS. DEPT., TAX REFORM STUDIES AND PROPOSALS, 91st Cong., 1st Sess., pt. 3, at 357-60 (1969), *reprinted in* READINGS IN DEATH AND GIFT TAX REFORM, *supra* note 180, at 114-17.

291. U.S. TREAS. DEPT., *supra* note 290, at 358; *see also* C. SHAMMAS, M. SALMON & M. DAHLIN, *supra* note 101, at 211 ("[T]he vast majority of married couples, when surveyed, want the surviving spouse to inherit the entire estate.").

ited marital exemption would continue to make sense. On the other hand, curtailing inheritance would increase the tax "cost" of dying single. Thus, full interspousal immunity probably would result in an increase in the number of marriages of senior citizens. Intrafamily generation-skipping marriages might even occur. For example, if there were no other way to keep the family fortune in the family, a seventy-seven-year-old widower and his fifty-year-old cousin might give serious thought to marriage, especially if they were already close. I therefore conclude that full interspousal immunity ought not always be available.

If the only reason to abandon full interspousal immunity is to avoid tax-motivated marriages, why not tailor the amount of spousal immunity to the length of the marriage? After some length of time, all of us would probably be willing to concede that a particular marriage was not entered into to avoid taxes. The period of time that comes to my mind is twenty years.[292] Couples who have remained married twenty years occupy a special place in this society. They have shared their lives and property long enough that the inheritance expectations of either are likely to be safe in the hands of the other. Moreover, any children are likely to be approaching the age of independence. Their rightful demands on their parents' wealth therefore are subsiding. It seems entirely proper that spouses' claims on each others' estates should mature as their children's claims fade.

Yet the difficulty of selecting a period of time sufficient to shield a marriage from accusations of tax motivation highlights the logically obvious fact that a marriage's longevity is an imperfect measure of the motives behind it. Reliance on that measure, therefore, must be judicious. An all-or-nothing twenty-year rule would be much too arbitrary. Perhaps marriages should be able to "earn" immunity over a period of years. If twenty years entitled a marriage to full interspousal immunity, perhaps one year should entitle a marriage to one-twentieth immunity. Thus, for each year of marriage, a decedent could leave his or her spouse 5% of the estate. This scheme has the additional advantage that it is consistent with the "sharing principle"[293] that motivates

292. Please do not reject my proposal simply on the basis of the numbers I suggest. All tax proposals are, at bottom, political. *See Final Report of the American Assembly on Death, Taxes and Family Property,* in DEATH, TAXES AND FAMILY PROPERTY, *supra* note 15, at 183, 185 ("It would appear that limitations on wealth transmission ultimately will be set by political judgments rather than solely by a process of reasoning and logic."); Gutman, *supra* note 279, at 262 ("Political considerations rather than substantive judgments were the principal motivation for the 1981 changes [to the Tax Reform Act of 1976]."). The numbers they contain are especially so. Therefore, please regard every number I suggest as highly negotiable.

293. *See generally* Prager, *Sharing Principles and the Future of Marital Property Law,* 25 UCLA L. REV. 1 (1977).

so much of current divorce law,[294] as well as community property and the Uniform Marital Property Act.[295] The idea is not that a spouse is entitled to share in property owned prior to marriage, but that a spouse is entitled to share in everything acquired during marriage. Accruing marital immunity simulates this accrual of spousal rights.

Still, the idea of relegating spouses to a pure accrual theory of spousal immunity sticks in the craw. In most cases, willingness to endure the marriage ceremony does mean something. Moreover, that the spouse widowed after less than a year would be entitled to no marital exemption under a pure accrual theory may lead some to conclude that pure accrual would be unduly sensitive to the needs of the government and disrespectful of the institution of marriage. Finally, particularly in cases involving small estates and marriages of short duration, the reasonable needs of the surviving spouse may extend to a larger portion of the estate than pure accrual would allow.

One way of making accrual more palatable is to "front-load."[296] Perhaps every marriage, regardless of length, should be entitled to some amount of spousal immunity. Still, since we resorted to accrual solely to minimize the incidence of tax-motivated marriages, front-loading must be used sparingly. Twenty percent seems appropriate. I am prepared to live with the knowledge that tax-motivated marriages could cost the government 20% of its take.

In summary, this proposal would allow an exemption for transfers to spouses. The exemption would grow with the length of the marriage until sufficient, after twenty years, to shelter the full value of the estate of the first to die. On the other hand, all marriages, however short, would qualify for a 20% exemption. An additional 4% (the remaining 80% divided by twenty years) would accrue for each full year the mar-

294. *See generally* Comment, *The Development of Sharing Principles in Common Law Marital Property States,* 28 UCLA L. REV. 1269 (1981); Annotation, *Divorce: Equitable Distribution Doctrine,* 41 A.L.R.4th 481 (1985).

295. 9A U.L.A. 21 (1987 Supp.). *See generally* Wenig, *The Marital Property Act,* 69 WOMEN LAW. J. 9 (1983); Volkmer, *Spousal Rights at Death: Re-evaluation of the Common Law Premises in Light of the Proposed Uniform Marital Property Act,* 17 CREIGHTON L. REV. 95 (1983); Note, *Sharing Debts: Creditors and Debtors Under the Uniform Marital Property Act,* 69 MINN. L. REV. 111 (1984).

296. Even a mildly front-loaded accrual system may not deal adequately with all marriages of short duration. Perhaps, therefore, the marital exemption should include a fixed, dollar-amount minimum, such as $250,000, as the pre-1981 estate tax marital deduction did. *See* Internal Revenue Code of 1954, ch. 736, § 2056(c)(1)(A)(i), 68A Stat. 3, 394 (1954) (amended 1976, repealed 1981). For similar reasons, Langbein and Waggoner have advocated a minimum spouse's forced share of $50,000. Langbein & Waggoner, *Redesigning the Spouse's Forced Share,* 22 REAL PROP. PROB. & TR. J. 303, 319-20 (1987). This proposal rejects such a refinement, instead allowing a $250,000 universal exemption, which a decedent could use to pass property to a surviving spouse. *See infra* notes 319-32 and accompanying text.

riage endured. The following chart illustrates how the marital exemption would grow:

1 year	24%
7 years	48%
14 years	76%
20 years	100%

The scheme can be faulted on many grounds. It may front-load too much or too little. It may accrue too quickly or too slowly. Even if 20 years is the correct time period, perhaps the accrual should occur at a decelerating rate or an accelerating rate. These, however, are not the crucial elements. The crucial elements are: that a marital exemption should exist; that it should not be total for every marriage; that it should be total for many marriages; and that it should accrue over the life of the marriage.[297]

Jointly Owned Property. Jointly owned property presents a problem for an accrual-based marital exemption. The idea that property owned jointly by spouses married less than twenty years might be sold to pay death taxes goes down hard. With respect to property owned by the decedent and adult children, however, this is the correct result. If we really believe in limiting inheritance, a decedent ought not be able to avoid it by holding assets in joint ownership with individuals not granted an exemption. A forced sale is not, however, an obviously correct result with respect to spousal joint property. A family residence probably ought not be sold out from under a surviving spouse, simply because the marriage has not lasted twenty years. On the other hand, a $250,000 universal exemption goes a long way toward solving the problem.[298] The 20% front-loading of the marital exemption, when added to a $250,000 universal exemption, would allow a jointly owned home worth $625,000 to remain in the hands of a surviving spouse, even if the marriage had lasted less than a year, the house was unencumbered, and the decedent owned nothing else.[299]

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297. Each of these elements is shared by a recent proposal for reform of spouse's forced share statutes. Langbein & Waggoner, *supra* note 296, at 316-17. That proposal settles on 10% front-loading and a constant 5% rate of accrual over 18 years of marriage. Those numbers are entirely acceptable for this purpose as well. Correlation of the two proposals is not, however, particularly important, since the proposed spouse's forced share rises to a maximum of 50% of an estate.

298. *See infra* note 323 and accompanying text.

299. The decedent would be treated as owning one half, or $312,500. I.R.C. § 2040(b) (1988). Twenty percent of the decedent's $312,500 would equal $62,500, leaving the amount of the universal exemption, $250,000.

I do not regard protecting "family" residences worth more than $625,000 for the benefit of spouses married less than one year as particularly important. If it is, there are simple ways to do it. For example, a decedent might be allowed to designate one jointly owned residence for exemp-

B. *Exemption for Dependent Lineal Descendants*

Any effort to impose truly meaningful limitations on inheritance must have, as a primary goal, a substantial decrease in inheritance by healthy, adult children. Unlike spouses, who generally contribute to the acquisition of wealth, children rarely do. Moreover, inheritance by children usually occurs in middle or late life, long after they are well established.[300] In few cases do they really need the property they inherit. In fact, "most heirs of wealthy decedents are rich adults."[301] What most inheritance by children therefore represents is the unearned passing of financial advantage from parent to adult child.

In some situations, however, inheritance by children must be tolerated and even encouraged. Sometimes parents do die while their children are unable to take care of themselves. Surely parents ought to be encouraged to provide for that contingency. In this society, until a child's education is complete, he or she remains, in a very real sense, a dependent. Therefore, children under the age at which formal education generally is complete should be permitted to inherit their parents' property, as necessary for their support and educational needs.[302]

In 1976 Congress created an "orphan's deduction."[303] It was hedged with limitations and so chintzy that even estate planners called for its repeal, which occurred in 1981.[304] The provisions allowed, in certain rare instances, an estate tax deduction equal to $5000 for each year a child was less than the age of twenty-one at the time of a par-

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tion, regardless of the size of the marital exemption. The decedent's share of the residence would then "count against" both the marital exemption and the universal exemption.

300. *See* C. SHAMMAS, M. SALMON & M. DAHLIN, *supra* note 101, at 148 (children who inherit "are often in their fifties and sixties and are parents and grandparents themselves"); Verbit, *supra* note 28, at 615 n.72 ("[I]nheritances of above $25,000 tend to be received by beneficiaries heavily concentrated in the age 55-74 category."); Bittker, *Federal Estate Tax Reform: Exemptions and Rates,* 57 A.B.A. J. 236, 238 (1971) ("Solicitude for the orphaned babe in arms or young child should not blind us to the fact that the children of these estate tax decedents are less likely to be five or fifteen years old than thirty or forty.").

301. Graetz, *supra* note 14, at 284. Wedgwood put it this way:

> But it is nonsense to suggest that the great bulk of the property bequeathed and inherited goes to sustain indigent widows and young children, who cannot fend for themselves. . . . [T]he average age of children who survive well-to-do parents is somewhere about forty. . . . The sons who inherit large estates are usually men rather beyond the prime of life, at the time of their inheritance, whose parents gave them in youth an expensive training, and who were already receiving before their inheritance a considerable income whether from earnings and savings, or from gifts of property made during their parents' lifetime.

J. WEDGWOOD, *supra* note 7, at 190.

302. For a similar proposal, see Andrews, *What's Fair About Death Taxes?,* 26 NATL. TAX J. 465, 466 (1973).

303. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2007(a), (c), 90 Stat. 1520, 1890-91 (1976) (adding I.R.C. § 2057 (repealed 1981)).

304. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 427(a), 95 Stat. 172, 318 (1981) (repealing I.R.C. § 2057).

ent's death. Both the amount and the age were objectionable,[305] but the structure could support a workable exemption for dependent children.

Few children are still in school after attaining age twenty-five. If inheritance were allowed for children based on a particular amount per year they were under the age of twenty-five, their inheritance would match, at least in a rough sense, their needs. Picking the amount allowed per year is obviously difficult. The amount I have in mind is $40,000. Even given current tuition costs at the nation's most expensive schools, such a figure would provide a reasonable standard of living for almost any child. Using twenty-five as the cut-off age and $40,000 as the annual allowance, the following chart illustrates the amounts children of various ages could inherit:[306]

< 1 year old,	$1,000,000
6 years old,	760,000
13 years old,	480,000
17 years old,	320,000
25 years old,	0

The orphan's deduction was unavailable if the decedent had a surviving spouse.[307] Under my proposal, however, the exemption would be available in that event. Because the marital exemption may be as low as 20%, it could shelter even less than the marital deduction did when the orphan's deduction was enacted. Moreover, if a surviving spouse were not the parent of the decedent's children, an increasingly likely situation, the children could hardly count on support from the marital exemption assets.

The orphan's deduction was also unavailable if, after the death of the decedent, the child still had a "known parent."[308] This limitation is also inappropriate. The remaining parent might not be the surviving spouse of the decedent and would, therefore, qualify for inheritance only under the universal exemption. Even if the remaining parent were the surviving spouse, the theory of the marital exemption relates ex-

305. Ten years before enactment of the orphan's deduction, Shoup had advocated one with much wider availability (children under "age 30 or 40"). C. SHOUP, *supra* note 180, at 114.

306. The present value of a right to receive $40,000 annually for a term of years is substantially less than $40,000 multiplied by the number of years. Perhaps, therefore, the actual amount of the exemption should be reduced to the appropriate present value. For ease of analysis, however, I have chosen to discuss the exemption without reference to a present value discount.

307. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2057(a)(1), 90 Stat. 1520, 1890 (1976) (repealed 1981).

308. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2057(a)(2), 90 Stat. 1520, 1890 (1976) (repealed 1981).

clusively to the surviving spouse and does not envision requiring the surviving spouse to support minor children. It shelters the smallest amounts during the early years of marriage, which are the very years in which there are most likely to be young children. Accruing the marital exemption is, therefore, inconsistent with depending on the surviving spouse to support minor children out of the assets sheltered by the marital exemption. Even if there were a surviving spouse entitled to an unlimited marital exemption, the decedent justifiably might prefer to divide the estate between the spouse and dependent children.

If restricted to inheritance from parents, little wealth would pass pursuant to an exemption for dependents, because few parents die with children under age twenty-five.[309] But many grandparents do. If this exemption were available for lineal descendants generally, it would permit transmission of much more wealth. I do not propose to broaden the exemption in this fashion. Parents generally support and educate their children. I suspect this remains true, even as to children who have inherited wealth sufficient to satisfy their own needs. If this is so, an exemption for lineal descendants generally would permit the grandchildren of the wealthy to acquire assets unnecessary for the purposes underlying the exemption. Presumably those assets would be used to purchase luxuries beyond the parents' means or would be saved to give the child a purely financial advantage over his or her peers later in life. Neither seems particularly attractive. Accordingly, this proposal does not include an exemption for all lineal descendants.

In one instance, however, inheritance should be permitted from generations older than parents. Suppose a child's parents die while the child is still a dependent. The child may inherit everything his or her parents own but still be in dire financial need. As to such a child, inheritance from grandparents, great grandparents, and so on, subject to the limitations already described, is entirely appropriate. Nor need both parents die first. Even if one survives, the death of the other is so likely to have impaired the family's financial affairs that the child should be allowed to inherit from any lineal ancestor.[310]

Multiplicity of wealthy ancestors should not, however, enable any descendant to exceed, on a cumulative basis, the limits mentioned above. The exemption exists only to satisfy the needs of dependents, and its limitations are designed to assure fit between those needs and the amount inherited. The exemption should, therefore, be available not on a per-decedent basis, but on a per-beneficiary basis. All inheri-

309. *See supra* notes 300-01 and accompanying text.

310. *Cf.* I.R.C. § 2612(c)(2)(B) (1988) (generation-skipping transfer tax exception available even if one parent is still alive).

tances would count toward exhaustion of the exemption.[311] In other words, if father and mother both died in the first year of a child's life, the child could inherit $1,000,000, not $2,000,000. Similarly, if both father and grandfather died after a child had reached age thirteen, the child could inherit a total of $480,000.[312]

C. *Exemption for Disabled Lineal Descendants*

Physically or mentally disabled descendants also provide a compelling case for allowing inheritance. Quite apart from the legitimate desire of parents and grandparents to provide for such descendants, society has a direct interest in having family members, rather than the government, see to their care. Given the potentially enormous costs involved, limitations akin to those applicable to the exemption for dependent lineal descendants are inappropriate.[313]

Defining who qualified for the exemption would be an important and sensitive task. One possibility is the "totally and permanently disabled" standard already used in disability insurance contracts. Yet, this standard might require additional safeguards against fraud in order to avoid the manipulation of medical opinion that seems inevitable if substantial sums are inheritable by adult children only if they are found to be disabled. Requiring the beneficiary to qualify for Social Security disability benefits is one possibility.

In addition, the exemption should be available only if the amount

311. In addition, the present value (at decedent's death) of any taxable lifetime transfers to the beneficiary in question would count against the exemption.

312. How should prior inheritances exhaust the exemption? Return to the example in which a child's father dies during the child's first year. The exemption would permit the child to inherit $1,000,000, but the father may have only $500,000. Later, when the child is six, her grandmother may die. How much should she be able to inherit from her grandmother? If she had inherited nothing from her father, she could inherit $760,000 (19 years × $40,000). On the other hand, if she had inherited $1,000,000 from her father, she could inherit nothing more. The primary limitation decreases $40,000 per year, so the reduction on account of the prior inheritance should too. Thus, the $500,000 already inherited should be decreased by $40,000 times the number of years since the first inheritance ($40,000 × 6). In other words, the reduction on account of the first inheritance should be $260,000 ($500,000 − $240,000). Reducing the primary limitation for a six-year old ($760,000) by $260,000 leaves a maximum second inheritance of $500,000.

Sometimes there would be no reduction on account of prior inheritances. Assume the previous facts, except that the grandmother dies when the child is 20. The primary limitation would be $200,000 (5 years × $40,000). Again, the $500,000 inherited before reaching age 1 must be reduced by $40,000 for each of the intervening years. Twenty years times $40,000 equals $800,000. Since the initial inheritance was less than $800,000, it is ignored. The child would, therefore, be entitled to a second inheritance of the full $200,000.

313. There may, however, be limits on the needs of even the most severely disabled descendant. Therefore, a limit of, say, $5,000,000 might be appropriate. If there were a limitation, it should be on a per-beneficiary (rather than a per-decedent) basis, like the dependent lineal descendant exemption. Similarly, the present value (at decedent's death) of any taxable lifetime transfers, as well as any continuing medical insurance or prepaid nursing-home care arranged for during the decedent's lifetime, would count against the exemption.

exempted is held in trust, under rather rigid terms, for the exclusive benefit of the qualified beneficiary. For example, a qualified trust might be defined as one under which only income was payable to or for the benefit of the qualified beneficiary until death, when the trust principal and any accumulated income would pass to the government.[314] I have three reasons for requiring use of such a trust. First, use of a sufficiently rigid trust would assure the government of its money after the death of the qualified beneficiary. Since the only reason for allowing the exemption is the disability of a given descendant, he or she, at least as a general rule, ought not be able to transfer the exempted amount either during lifetime or at death.[315] Second, use of such a trust would assure the beneficiary of a constant and dependable stream of support over an entire lifetime. Third, the trustee would not be forced to make impossibly difficult choices between dipping into principal to provide the beneficiary with immediate care and refusing to do so to ensure continued benefits.[316]

D. *Exemption for Lineal Ascendants*

As the cost of health and old-age care explodes, and as America grays, the number of needy parents surviving their children promises to increase. Surely social policy should favor allowing children to pro-

314. Assuming the exemption was available only for transfers in trust, a federal statutory mechanism for converting attempted outright bequests and rights under intestate succession laws into qualified trusts would be necessary. Otherwise, in the absence of local law to that effect, the exemption would be unavailable. Similarly, there would need to be a federal statutory mechanism for cutting down trusts for qualified beneficiaries that contained excessive benefits, such as powers to invade principal. Likewise, if trusts for disabled beneficiaries purported to create interests in nonqualified beneficiaries, those interests would necessarily be ignored. Upon the death of the qualified beneficiary, the trust property would pass to the government, regardless of whether the controlling instrument purported to create a subsequent interest in another beneficiary, subject, perhaps, to the embellishment discussed *infra* note 315.

315. Obviously, disabled lineal descendants can have surviving spouses, dependent lineal descendants, disabled lineal descendants, lineal ascendants, etc. Allowing the trust to continue after the death of the disabled beneficiary for whom it was created, so that trust income could continue to benefit those in an exempted category who may have come to depend on it during the beneficiary's lifetime involves no theoretical obstacle and may be a desirable embellishment. I have not included such a suggestion in the hope of keeping the proposal as simple as possible.

316. At funding levels near $5,000,000, this suggestion seems reasonable. The income from such a trust ought to provide adequately for all contingencies. If the trust were smaller, however, use of principal for the benefit of the qualified beneficiary frequently would seem appropriate when analyzed from either the decedent's or the beneficiary's perspective. Yet, from the government's perspective, each invasion would constitute a loss in revenue. I am gravely torn about how rigid a qualified trust should be. On the one hand, I would prefer not to allow the truly wealthy to pass $5,000,000 in trust for the benefit of disabled children (some of whom inevitably will be much less disabled than others) and then allow the trustee to spend not only the income but also the principal, leaving the government with nothing. On the other hand, if a parent had only $300,000 to care for a truly disabled child, I would want the trustee to be able to use the $50,000 in excess of the universal exemption in any way the trustee saw fit. I have opted in the text for the more rigid approach to emphasize the position of the government as remainderman.

vide for their elders.[317] My proposal therefore exempts all transfers to lineal ascendants.

Several reasons support making this exemption completely unlimited. First, lineal ascendants rarely survive their descendants. Second, when they do, they are usually old. To put it bluntly, the government would not have long to wait for the tax at the ascendant's death. Third, this may be a reverse-flow situation. In other words, the wealth passing from child to parent may have come from the parent originally. If it did, and if large amounts were involved, its transfer would have cost the parent a heavy gift tax.[318] In a sense, therefore, the government would already have taken its share and could well afford to allow the wealth to return to its original owner during his or her remaining time.

E. *Universal Exemption*

Whether every decedent should be able to pass a minimum amount to whomever he or she pleases is a difficult question. If so, with respect to the estates of the vast majority of decedents, this proposal would have neither the potential for inheritance reform nor the ability to raise revenue. Estates below the exempted amount would be completely unaffected. If we really believe that almost all inheritance is bad, a universal exemption would be a major step in the wrong direction. But if we believe that inheritance in small doses is less bad than in large doses,[319] perhaps we can live with exemption of almost the entire population.

Exempting almost everyone does carry with it very distinct benefits. First, a universal exemption of any significant size, by removing most of the population from the operation of the tax, would substantially decrease the administrative costs of imposing the tax. A proposal that affected only two percent of the population[320] would be much cheaper for the government to administer than one that affected everyone.[321] Similarly, if almost everyone were exempt, the public would spend far less on planning and compliance.

Second, a universal exemption would serve to exempt assets in

317. Locke argued that, but for children's supposed natural right to inherit their parents' property, a decedent's parents ought to be preferred. J. LOCKE, *supra* note 34, bk. 1, § 90, at 207-08.

318. *See infra* notes 344-93 and accompanying text.

319. *See* E. HALBACH, *Introduction to Chapters 1-4,* in DEATH, TAXES AND FAMILY PROPERTY, *supra* note 45, at 4.

320. In 1985 federal estate tax returns reporting gross estates of $300,000 or more were filed on behalf of 1.52% of all decedents. J. PECHMAN, *supra* note 14, at 350 (Table B-9).

321. It would also be more politically feasible.

which the government has little interest but that are of significant value to a decedent's family. Heirlooms and mementos are classic examples. The family portrait of grandfather and grandmother Carrington likely would be essentially valueless if sold at public auction. Yet, hanging on the walls of the home of Mr. and Mrs. J. Blake Carrington, III, the portrait may be the source of legitimate family pride. Allowing it to hang there poses no significant threat to equality of opportunity. An exemption designed specifically for such items would be difficult to draft and enforce. A universal exemption, on the other hand, would allow a decedent to pass a few chosen items, be they a family portrait, the family Bible, a favorite chair, or shares of I.B.M.

Third, exempting a limited amount of property would respond to two of the most serious arguments against curtailing inheritance. Inheritance, it is said, provides not only an incentive to work but also an incentive to save.[322] A universal exemption would virtually obliterate these arguments for those below — and likely to remain below — the exempted amount. In other words, a threshold amount relatively few people would actually realize would dramatically reduce any diminution of incentive curtailing inheritance might have.

Fourth, a universal exemption would allow strict conformity of the other exemptions to the policies that recommend them. Should they prove too constraining in any individual case, the decedent by will or the state by its law of intestate succession could provide relief. For example, the marital exemption suggested above would operate on an accrual basis, modified only by a limited amount of front-loading.[323] If, therefore, one spouse died before twenty years of marriage, the survivor could not take the entire estate. Less than the entire estate might, however, fail to satisfy the surviving spouse's needs, particularly if the estate were small. A universal exemption would allow the decedent or the state to augment the amount passing to such a surviving spouse.

Fifth, allowance of a universal exemption would eviscerate the most likely constitutional objection. As discussed above, progressive federal estate and gift taxes have long been upheld as constitutional on the ground that they are not direct taxes but excise taxes on the transfer of wealth.[324] Without a universal exemption, a decedent might qualify for no exemption and thus be unable to make any transfer. By

322. *But see supra* notes 169-218 and accompanying text.

323. *See supra* notes 289-99 and accompanying text.

324. *See supra* text accompanying note 82.

allowing everyone to devise a moderate amount of wealth, a universal exemption would allow every decedent to make a transfer.

Sixth, allowance of a universal exemption would substantially reduce one particularly vexatious type of tax evasion. In the absence of such an exemption, there would be a great incentive to remove items of moveable property from a decedent before a representative of the estate (or the government) arrived. Undoubtedly, these removals would also occasionally occur prior to the decedent's death, sometimes without the decedent's permission. A universal exemption would eliminate the need for most people to engage in such activity. It would also make those who do engage in such activity less "criminal" than they would be if they were also engaging in tax fraud.

I propose a universal exemption of $250,000. The exemption equivalent of the current unified credit is $600,000.[325] As a result, at 1982 wealth levels, all but three tenths of one percent of the population are exempt from the federal transfer taxes.[326] Many have ventured the opinion that these taxes should reach a substantially larger segment of society,[327] an opinion I share. On the other hand, in 1976 Congress determined that the old $60,000 exemption was too low.[328] And in 1981 Congress indicated that it meant what it said in 1976.[329] My suggestion of $250,000 is mid-way between the pre-1976 figure and the current figure. That figure approximates what the $60,000 figure would be worth today, after adjustment for inflation.[330] It also is the figure Congress chose in 1976 for the minimum marital deduction.[331] A more general reason for settling on a figure in that range is that relatively few Americans attain that level of wealth. A rather con-

325. *Cf.* I.R.C. § 6018(a)(1) (1988) (return required at over $600,000). *Compare* I.R.C. § 2010(a) (1988) ($192,800 unified credit) *with* I.R.C. § 2001(c)(1) (1988) (rate table).

326. S. SURREY, P. MCDANIEL & H. GUTMAN, *supra* note 16, at 715; Gutman, *supra* note 279, at 253.

327. *E.g.*, S. SURREY, P. MCDANIEL & H. GUTMAN, *supra* note 16, at 715; Gutman, *Reforming Federal Wealth Transfer Taxes After ERTA*, 69 VA. L. REV. 1183, 1207-12 (1983).

328. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2001(a)(2), (d)(1), 90 Stat. 1520, 1848 (1976) (creating I.R.C. § 2010 and an immediate $121,000 exemption equivalent); H.R. REP. No. 1380, 94th Cong., 2d Sess. 15-16 (1976). The $60,000 exemption would have exempted all but seven to nine percent of decedents at 1981 wealth levels. S. SURREY, P. MCDANIEL & H. GUTMAN, *supra* note 16, at 690. On the other hand, Professor Bittker had argued that the old $60,000 exemption should have been reduced to $25,000. Bittker, *supra* note 300, at 239.

329. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 401(a)(2)(A), 95 Stat. 172, 299 (1981) (amending I.R.C. § 2010 to increase the exemption equivalent to $225,000 in 1982 and providing for further annual increases through 1987, when the exemption equivalent reached $600,000); H.R. REP. No. 201, 97th Cong., 1st Sess. 154-55 (1981).

330. The $60,000 exemption, adjusted for inflation to 1981, would have been $280,000. S. SURREY, P. MCDANIEL & H. GUTMAN, *supra* note 16, at 690.

331. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2002(a), 90 Stat. 1520, 1854 (1976) (amending I.R.C. § 2056(c)(1)(A)(i) (repealed 1981)).

crete way of verifying the last point is through reflection on the fact that a major component of most Americans' wealth is their home. Home ownership occupies a very special and important place in the work ethic and acquisitive fabric of this society. Yet $250,000 still buys a fine home in most parts of the country. Selecting a figure in that range therefore responds nicely to the fear that this proposal might otherwise impair incentives for work and saving.[332]

The universal exemption should be on a per-decedent basis. If it were on a per-beneficiary basis, many testators, facing limitations on their ability to bequeath property, would execute wills that read like family trees, address books, or even the telephone book. Blocks of wealth would be disbursed, but no revenue would be raised. The reason the gift tax annual exclusion works, though available on a per-beneficiary basis, is simple. Gifts are different from bequests. The self-interest of a living donor ensures that he or she will not spray gifts in essentially random directions. The self-interest of a decedent is decidedly less.

F. *Charitable Exemption*

Currently, the income tax, the estate tax, and the gift tax all have deductions for transfers to charity.[333] Traditionally, these deductions stand on the logic that charities provide services the government would otherwise have to provide.[334] There are other justifications, as well:

> [P]rivate philanthropy serves a valuable function in our social order in supporting a variety of exceedingly important activities whose support otherwise would depend upon the bestowal of political favor. Private schools and universities provide alternatives to government in educating the populace. Religious institutions provide an important diversity in the articulation of cultural norms and common concerns, as well as in the undertaking of certain charitable activities. Private foundations offer alternative sources of support for a variety of scientific, cultural, and charitable activities. By diminishing contributions to private philanthropic institutions, estate taxation promotes government monopoly over such

332. A final reason for setting the universal exemption at a figure many consider low is to minimize abuse by generation-skipping trusts. This proposal assumes continuation of the generation-skipping transfer tax. Under that tax, however, each individual has an exemption of $1,000,000. I.R.C. § 2631(a) (1988). If generation-skipping is a temptation under the current system of essentially voluntary estate and gift taxes, think how much greater the temptation would be under this system. One way of minimizing the temptation, without modifying the generation-skipping tax, is to minimize the amount available for generation-skipping trusts.

333. I.R.C. § 170 (1988) (income tax); I.R.C. § 2055 (1988) (estate tax); I.R.C. § 2522 (1988) (gift tax).

334. *See, e.g.*, H.R. REP. No. 1860, 75th Cong., 3d Sess. (1938), *reprinted in* 1939-1 (Pt. 2) C.B. 728, 742.

> areas. Yet concern for the maintenance of basic liberties, the preservation of minority preferences and points of view, and effectiveness in providing services all suggest that competition among institutions providing related services is preferable to monopoly.[335]

Moreover, an exemption for charitable bequests poses almost no threat to equality of opportunity.[336]

The current estate and gift tax deductions for charitable transfers are quantitatively unlimited.[337] If those deductions were transplanted unmodified into this proposal, the government would raise little revenue. Almost every testator would be able to find at least one charity he or she preferred to the federal government. So, like the income tax charitable deduction,[338] the charitable exemption must be quantitatively limited.[339] I suggest limiting deductibility of charitable bequests to 20% of a decedent's estate, after payment of debts and administration expenses.[340]

No doubt charity would vigorously oppose any limitation on charitable transfers. Yet I believe the combination of substantial limitations on inheritance and a charitable exemption in any reasonable amount would yield a net increase in charitable bequests.[341] In particular, I think that a 20% charitable bequest would become standard equipment in the wills of those with wealth potentially in excess of the other exemptions.[342] Thus, notwithstanding the quantitative limitation on charitable bequests, my proposal would probably increase the amount of wealth passing to charity at death.[343]

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335. R. WAGNER, *supra* note 192, at 58.

336. An exemption for charity might, however, pose a low-level threat to elective representative government. Notwithstanding I.R.C. § 501(c)(3) (1988), some charities deliberately attempt to influence public opinion or even the political process. Others do so as the incidental consequence of carrying out their primary missions. Yet many charities are supported almost exclusively by the wealthy. This potential for distorting the political system merits strict monitoring by the Internal Revenue Service, Congress, and the public at large.

337. *See* I.R.C. § 2055(a) (1988) (estate tax); I.R.C. § 2522(a) (1988) (gift tax).

338. For income tax purposes, each taxpayer may deduct only a percentage of his or her tax base for the year. Depending on various factors, a taxpayer may deduct 20%, 30%, or 50% of his or her tax base. *See* I.R.C. § 170(b) (1988).

339. *See* Westfall, *supra* note 14, at 1002-06 (suggesting a percentage limitation on the charitable deduction).

340. The pre-1976 marital deduction was subject to a ceiling of 50% of "adjusted gross estate," which was defined as "gross estate," the estate tax base, less debts and administration expenses. *See* Internal Revenue Code of 1954, ch. 736, § 2056(c)(1)-(2), 68A Stat. 3, 394 (1954) (amended 1976, repealed 1981).

341. *See* Westfall, *supra* note 14, at 1006 (noting the increased "dollar incentive" for charitable giving that would exist under higher estate tax rates).

342. Only 20% of all 1986 decedents whose estates filed estate tax returns passed *anything* to charity. *See* Johnson, *supra* note 120, at 50 (Table 2). Even at the highest levels (gross estates in excess of $10 million) less than 43% made charitable bequests. *See id.*

343. Boskin, *Estate Taxation and Charitable Bequests,* 5 J. PUB. ECON. 27 (1976), concludes that even a 50% ceiling on charitable bequests would result in a substantial decrease in the

G. *The Gift Tax*

Curtailing inheritance would surely encourage lifetime giving. Thus, if the current weak and leaky gift tax structure were left unmodified, this proposal likely would raise little revenue.[344] One alternative would be to bar gifts, in order to preserve the proposed limitations on inheritance. It is doubtful, however, whether such an alternative would be even vaguely workable. Massive evasion would almost certainly occur. Moreover, the ability to make gifts seems such an important component of the bundle of sticks we call property that abolition of gifts is essentially unthinkable, and probably should be.

1. *Rates*

Assuming, then, that lifetime giving must be allowed, there must be a gift tax, and it must be far more effective than the current gift tax. First, the gift tax must be imposed at far higher marginal rates than at the present. Currently, the gift tax is imposed at relatively low rates, on a tax-exclusive basis.[345] The highest marginal rate is 55%.[346] Thus, the highest cost the gift tax ever imposes on the transfer of a dollar is fifty-five cents. Put in slightly different terms, out of a total diminution of wealth equal to $1.55, the share taken by the government is a mere 35%. In contrast, the estate tax is calculated on a tax-inclusive basis. The 55% marginal rate on the last dollar still yields the government fifty-five cents. But, after paying the fifty-five cent tax, only forty-five cents remain for beneficiaries. In short, 55% currently means 55% only when referring to the estate tax. It means 35% when referring to the gift tax. The difference in the rates of the estate and gift taxes thus

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amount passing to charity. He does not, however, assume substantial limitations on inheritance as the background. Instead, he assumes the continued existence of a host of noncharitable alternatives. His conclusions, therefore, are essentially irrelevant in evaluating my proposal.

344. One reason the current gift tax will never be a significant revenue raiser is that it is imposed, at relatively low rates, on a tax-exclusive basis. *See infra* notes 345-48 and accompanying text. Another is that the gift tax is graduated on the basis of the amount of wealth transferred by the donor. *See infra* note 350 and accompanying text. Yet another is the $600,000 unified credit equivalent. *Compare* I.R.C. § 2505(a) (1988) *with* I.R.C. § 2001(c) (1988).

345. *See* Sims, *Timing Under a Unified Wealth Transfer Tax*, 51 U. CHI. L. REV. 34, 39 (1984); *see also* W. VICKREY, *supra* note 186, at 204-05; Harriss, *Economic Effects of Estate and Gift Taxation*, in READINGS IN DEATH AND GIFT TAX REFORM, *supra* note 180, at 174; Gutman, *A Comment on the ABA Tax Section Task Force Report on Transfer Tax Restructuring*, 41 TAX LAW. 653, 656-57 (1988); Isenbergh, *Simplifying Retained Life Interests, Revocable Transfers, and the Marital Deduction*, 51 U. CHI. L. REV. 1, 8-9 (1984); Isenbergh, *Further Notes on Transfer Tax Rates*, 51 U. CHI. L. REV. 91 (1984).

346. *See* I.R.C. §§ 2502(a), 2001(c)(2)(D) (1988). The highest marginal rate is scheduled to drop to 50% in 1993. *See* I.R.C. § 2001(c)(1)-(2) (1988). For amounts between $10 million and $21,040,000 ($18,340,000 after 1992), there is also a 5% surtax designed to deny the ultra-wealthy the benefits of the graduated rate structure and the unified credit. I.R.C. § 2001(c)(3) (1988). For purposes of simplicity, and because the surtax, by its own terms, applies to only a handful of taxpayers, this article ignores its effect on the highest marginal transfer tax rate.

constitutes an incentive for lifetime giving, even under the current system.[347] A death tax equal to 100% of nonexempt property would make the current gift tax rates an even bigger (and less justifiable) bargain.[348]

Arriving at a gift tax rate that correlates well with a 100% death tax is difficult. The only true match would be confiscation of all lifetime transfers. But that would be functionally indistinguishable from barring gifts, which we have already found unacceptable. So the gift tax rate must necessarily be lower than that imposed at death. A rate differential would thus continue to exist, and it would continue to constitute an incentive for lifetime giving. So if giving is not to gut the principle of curtailed inheritance, the gift tax rates must approximate the tax imposed at death (100% on a tax-inclusive basis).

One gift tax rate that seems particularly attractive, given the possibility of reallocation to the government at death, is 100%. Admittedly, a tax-exclusive gift tax rate of 100% is really only a tax-inclusive rate of 50%, or a matching grant to the government. In other words, the person who made a $1,000,000 taxable gift to an adult child would be required to write the government a check for another $1,000,000.[349] Yet stating the rate as "100%" gives the illusion of consistency between the tax consequences during lifetime and those at death. In any event, increasing the tax-inclusive gift tax rate from a high of 35% under the current system to 50% would be a meaningful move in the direction of protecting the death tax.

2. *Graduation*

Another reason the current gift tax raises little revenue is that it is graduated on the basis of the amount of wealth transferred by the donor. Those rates are as low as 37%[350] (27% on a tax-inclusive basis). Moreover, they rise to only 55% (35% on a tax-inclusive basis), and then only on transfers exceeding $3,000,000.

In advocating reallocation to the government at death, my proposal abandons graduation. The first dollar unprotected by any exemption is just as repugnant to the level playing field and just as effective in

347. *See generally Hearings on Tax Reform Act of 1969 Before the House Committee on Ways and Means*, 91st Cong., 1st Sess., pt. 11, at 3977, 3981-82 (1969) (statement of J. Kurtz), *reprinted in* READINGS IN DEATH AND GIFT TAX REFORM, *supra* note 180, at 67.

348. *Cf.* Eisenstein, *supra* note 14, at 244 (describing the federal gift tax as "a bargain made available to those who are willing to give before they die").

349. This statement ignores the effect of the various exclusions. *See infra* text accompanying notes 361-70.

350. I.R.C. § 2001(c) (1988). The $600,000 unified credit equivalent traverses brackets as low as 18%.

reducing the deficit as the thirty-millionth dollar.[351] Assuming the validity of these propositions, there is no need for graduation, at least that based on the amount transferred, in the gift tax, either. But another kind of graduation is appropriate.[352] Consider the incentive for giving that reallocation to the government at death would create for the seventy-seven-year old. Paying a 100% gift tax that was really only a matching grant to the government might seem incredibly attractive — at least to those who could afford to make gifts. Perhaps, therefore, gift tax rates should be graduated on the basis of the donor's age. A 100% tax might be appropriate for a forty-year old, but 300% (75% on a tax-inclusive basis[353]) might be necessary to control a seventy-seven-year old with estate planning on the brain. Such age-based graduation might look like this:

Age of Donor	Tax-exclusive rate	Tax-inclusive rate
Under 41	100%	50%
41-50	150%	60%
51-60	200%	67%
61-70	250%	71%
Over 70	300%	75%

3. *Gifts in Contemplation of Death*

Notwithstanding graduation based on age, the gift tax rates suggested above would still encourage lifetime giving, even at age seventy-seven. A 75% gift tax often would be substantially more attractive than a 100% tax at death. Even the rates suggested above would therefore aggravate the familiar problem of gifts made in contemplation of death.

One way of dealing with gifts in contemplation of death would be to subject them to an even higher rate of tax than that suggested for donors over seventy. For example, gifts in contemplation of death

351. *See* L. THUROW, *supra* note 25, at 158 ("If society really believes its rhetoric that no one should start life with a substantial financial head start on the rest of the population the inheritance tax might be organized with two rates, zero and 100 percent."); *cf.* I.R.C. § 2641 (1988) (abandoning graduation for purposes of the generation-skipping transfer tax).

352. *See* W. VICKREY, *supra* note 186, at 216-23 (suggesting graduation on the basis of the difference in the ages of the donor and the donee); E. RIGNANO, *supra* note 235, at 51-55 (suggesting graduation on the basis of the method of the donor's acquisition of the property in question); Jantscher, *supra* note 15, at 54 (suggesting graduation on the basis of the age of the donor).

353. The marginal estate tax rates (tax-inclusive) were as high as 77% as recently as 1976. Internal Revenue Code of 1954, ch. 736, § 2001, 68A Stat. 3, 374 (1954) (amended 1976). Even then, Senator Muskie advocated increasing the highest rate to 80%. *See* Covey, *Estate and Gift Taxation*, 26 NATL. TAX J. 459, 460 (1973). Earlier, Professor Bittker had advocated the same thing. Bittker, *supra* note 300, at 240.

might be subjected to a tax-exclusive rate of 400% or 500%, which would be a tax-inclusive rate of either 80% or 83%. At either rate, however, gifts in contemplation of death would continue to occur. As long as the rate of tax imposed on gifts in contemplation of death was less than that imposed at death, gifts in contemplation of death would make sense. The only solution is that gifts in contemplation of death must be taxed at the same rate as that imposed at death. In other words, if a transfer is determined to have been made in contemplation of death, the government must be entitled to confiscate the gift itself, unless the donee is willing and able to pay an additional tax equal to the value of the gift.[354]

This presents the thorny issue of determining which gifts were made in contemplation of death. Prior to 1976, the test was exactly that.[355] But determining which gifts actually were made "in contemplation of death" proved an incredibly fertile source of litigation, even though a presumption operated in favor of such a finding with respect to gifts made within three years of death and barred such a finding with respect to gifts made outside that period.[356] In 1976 Congress gave up on the literal test and resorted to a black-and-white three-year rule.[357] If a gift occurred within three years of death, it was included in the estate tax base. If it was made outside the three-year period, it was excluded. Although there were exceptions,[358] and although Congress in essence repealed section 2035 for decedents dying after 1981,[359] the three-year rule worked. I adopt it here, with one caveat.

An escape hatch is necessary to ameliorate the rigid operation of the three-year rule. Placing the burden of proof on the donee to demonstrate that the gift was not made in contemplation of death did not work prior to 1976 and would not work under this proposal, either. A more workable escape hatch might be limited to "accidental deaths." Presumably those words already have meaning from their use

354. Currently, the donee of any property included in gross estate is liable for the tax as a transferee. *See* I.R.C. § 6901(a)(1)(A)(ii) (1988). Under my proposal a gift that would have qualified for an exemption at death would not be retaxed. Thus, as to such a gift, no transferee liability would exist.

355. Internal Revenue Code of 1954, ch. 736, § 2035, 68A Stat. 3, 381-82 (1954) (amended 1976).

356. Internal Revenue Code of 1954, ch. 736, § 2035(b), 68A Stat. 3, 382 (1954) (amended 1976).

357. Tax Reform Act of 1976 § 2001(a)(5), (d)(1), Pub. L. No. 94-455, 90 Stat. 1520, 1848 (1976) (amending I.R.C. § 2035(a)).

358. *E.g.*, I.R.C. §§ 2035(b)(2) (1988) (exception for transfers with respect to which no return was required).

359. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 424(a), 95 Stat. 172, 317 (1981) (enacting I.R.C. § 2035(d)).

in accidental death insurance policies. A donee would be allowed to show that the decedent's death had been accidental. Gifts made within three years of an accidental death would not be confiscated.[360]

4. *Exclusion for Transfers in Discharge of Legal Obligation*

Parents spend a great deal of money raising children. In fact, state law generally imposes various legal obligations on parents to support minor and disabled children and on spouses to support each other.[361] Under the current version of the gift tax, transfers made in discharge of a legal obligation of the donor are deemed made for "adequate and full consideration in money or money's worth" and thus fall outside the scope of the gift tax.[362] This is entirely proper. Transfer taxes ought not intrude upon the "normal" transfers of wealth that occur in raising children or supporting family members.

Continuing this exception against the backdrop of curtailed inheritance poses problems of significant scope for equality of opportunity.[363] Children supported in a grand style during minority may well gain substantial advantages on life's playing field. The governmental intrusion necessary to tax all intrafamily transfers, however, would be unacceptable. Moreover, the ability to support family members in a particular lifestyle is one of the greatest incentives this society offers its workers, entrepreneurs, and investors. Take that away, and this nation's productivity would certainly suffer. Thus, my proposal draws the line at "normal" intrafamily transfers.[364] Defining what is "normal" is obviously difficult. In the absence of a better guide, I adopt the current exemption of transfers in discharge of a legal obligation.

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360. Jantscher has suggested a fascinating alternative. He would include in the death tax base a fraction of all gifts made during a much longer period preceding death, such as 20 years. The older the gift, the smaller the fraction included. Jantscher, *supra* note 15, at 54. His solution would nicely avoid the blatant arbitrariness of the three-year rule. I have, however, chosen to rely on the three-year rule. First, it represents less of a departure from the current system. Second, I have proposed that the gift tax be graduated on the basis of the age of the donor at the time of the gift. *See supra* notes 350-53 and accompanying text. Thus, in the usual case, gifts made in contemplation of death would produce a substantially enhanced tax, even if they escaped the operation of the three-year rule. Third, precise estate planning would be extremely difficult if gifts remained potentially taxable for such a long time. All taxes should be "plannable" — especially those with rates as high as those I advocate.

361. *See supra* note 54.

362. *See* I.R.C. § 2512(b) (1988); Treas. Reg. § 25.2516-2 (1990); Rev. Rul. 68-379, 1968-2 C.B. 414; Gutman, *supra* note 327, at 1241 n.168.

363. *See supra* notes 1-7, 107-19 and accompanying text.

364. *See Final Report of the American Assembly on Death, Taxes and Family Property,* in DEATH, TAXES AND FAMILY PROPERTY, *supra* note 15, at 185 (society should not intervene to prevent transfers of "human capital" through "[e]ducation, home environment, genetic and nutritional differences, and family tradition and status").

5. *Exclusion for Medical and Educational Expenses*

Section 2503(e) excludes from the gift tax transfers made directly to an educational institution as tuition for the education or training of any individual or to a provider of medical care for the medical care of any individual. The educational and medical expenses of minor children are generally legal obligations of parents, so their discharge usually falls outside the scope of the gift tax in any event.[365] But in many families, even if the recipient of education or medical care is an adult, someone else may pay the expense. For example, parents frequently continue to pay the tuition of "adult" children they are no longer legally obligated to support. Or adult children may pay the medical expenses of elderly parents. Section 2503(e) exempts these transfers from the gift tax. Section 2503(e) is thus an important response to the concerns described in the preceding paragraphs. The transfers of wealth that occur in providing education for one's children or medical care for one's parents do not occur for estate planning reasons. Instead, these transfers satisfy generally accepted and socially approved needs. They are an inherent part of a lifestyle society encourages. Moreover, satisfaction of such needs is a good that society itself desires. Society as a whole benefits when any of its members is educated or provided with medical care. And if certain members of society are educated or provided with medical care at private expense, government need not bear those costs.

The prospect of reallocation to the government at death makes the presence of an exclusion for educational and medical expenses all the more important. As discussed above, one of the primary arguments against curtailing inheritance is that doing so would increase spending.[366] What one spends during lifetime cannot be reallocated to the government at death. Presumably, one of the forms this increased consumption would take is increased spending for the educational and medical needs of family members. For all the reasons stated above, an increase in these types of spending is desirable. Therefore, my proposal continues to exempt direct expenditures for education and medical care.[367]

365. *See supra* notes 361-64 and accompanying text.

366. *See supra* notes 181-218 and accompanying text.

367. In fact, the scope of § 2503(e) could even be expanded. For example, extending the exclusion to cover direct payments for nursing-home care seems entirely consistent with the motivations that underlie enactment of § 2503(e), as well as those that underlie my proposal. *See supra* text accompanying notes 151-60, 313-18. Section 2503(e) might also be expanded to cover direct payment for room and board at educational institutions. *See* A.B.A. Task Force on Transfer Tax Restructuring, *Report on Transfer Tax Restructuring*, 41 TAX LAW. 395, 402 (1988).

6. *Annual Exclusion*

The annual exclusion is not only a popular and frequently used component of the current gift tax; it also provides a measure of immunity from the gift tax roughly analogous to that the universal exemption would provide from the death tax. By excluding from the gift tax all transfers to any person during any year under a fixed amount, the annual exclusion exempts from the gift tax most transfers not made primarily for estate planning reasons. Exemption of these transfers seems appropriate and ought to be continued. The administrative savings, from the perspectives of both the government and the donor, are substantial. And the freedom to make gifts of reasonable amounts of property without even telling the government is desirable in and of itself.

The amount of the exemption is another issue. The current level of $10,000 has been the subject of serious criticism.[368] Not only is it an amount beyond the means of most people; those with persistence can use it to pass immense amounts outside the transfer tax system.[369] Therefore, the amount of the exclusion should be reduced to no more than $5000.[370]

7. *Exclusion for Transfers to Lineal Ascendants*

We have already concluded that transfers to lineal ascendants should be exempt from taxation at death.[371] Such transfers should also be exempt from taxation during the lifetime of the donor. If transfers to lineal ascendants were excluded from the gift tax base, there would be a powerful incentive to care for one's elders. Increased privatization of the care of the elderly is one of the goals underlying my proposal.[372] It therefore exempts all transfers to lineal ascendants.

8. *Marital Deduction*

One of the reasons for allowing the marital deduction for gift tax purposes is to permit spouses to rearrange their property interests so

368. *E.g., A.B.A. Task Force on Transfer Tax Restructuring, Report on Transfer Tax Restructuring, supra* note 367, at 401-02.

369. A 30-year-old who, with the consent of his or her spouse, undertakes a program of annual gifts of $20,000 to each of three children can deplete his or her estate by almost $3,000,000 by the time he or she attains age 77.

370. An additional reason for settling on $5000 is elimination of the need for estate planning gimmickry to deal with the lack of conformity between the annual exclusion and the "5 and 5" exception for taxable lapses. *Compare* I.R.C. § 2503(b) (1988) ($10,000 annual exclusion) *with* I.R.C. §§ 2041(b)(2), 2514(e) (1988) ($5000 or five percent exception for lapsing powers).

371. *See supra* notes 317-18 and accompanying text.

372. *See supra* notes 151-60 and accompanying text.

that, regardless which spouse dies first, each can exhaust his or her estate tax exemption. The presence in this proposal of a universal exemption means that a gift tax marital deduction would remain important on that basis alone. But there are other reasons to allow a gift tax marital deduction. Interspousal transfers frequently occur for reasons unrelated to estate planning. Almost every home purchased in this country is titled in the name of husband and wife, as joint tenants with right of survivorship. Even if one spouse contributes disproportionately, the title is likely to come out the same way. This phenomenon reflects the fact that spouses generally want to share not only the use of certain assets but also the ownership of those assets.[373] Even outside the context of jointly owned property, interspousal transfers often occur for reasons other than estate planning. Expensive anniversary rings usually are not given to avoid the estate tax. Presumably one gives a spouse a mink coat, a sailboat, or an expensive car for other reasons. Thus, interspousal gifts of such items ought not cause a gift tax if the gift tax's primary mission is to prevent avoidance of the death tax.

The marital deduction, however, cannot be quantitatively unlimited. If it were, the limitations on the death tax marital exemption[374] would be voluntary. Any spouse not married long enough to pass a "sufficient" amount at death to the survivor could give the difference during lifetime at no tax cost. The gift tax marital deduction should, therefore, be limited in the same fashion as the death tax marital exemption. The percentage limitations would be based on the donor's net worth, calculated as of the end of the taxable year in which the gift occurred. Thus, a spouse married seven years could transfer 48% of his or her net worth to his or her spouse, free of gift tax.

Requiring net worth reporting is, from several perspectives, unattractive.[375] It would represent an additional governmental intrusion

373. Joint ownership also frequently occurs with respect to cars and bank accounts.

374. *See supra* notes 289-99 and accompanying text.

375. Requiring such reporting, however, would carry with it an important benefit. The government would receive a great deal of information about donors' wealth. This information would be invaluable in dealing with subsequent claims for marital deductions, in proving subsequent unreported gifts, and in enforcing the death tax. Additionally, the information would be more reliable than much of the information currently obtained from taxpayers. Under the present system, there is acute pressure on the taxpayer to low-ball almost all values reported. Generally speaking, the lower the value, the lower the tax. In determining one's net worth for purposes of sheltering a spousal transfer, however, the pressure would be just the opposite. To shelter such transfers fully, it would often be necessary for the donor to report the existence of all assets and to value them accurately. Since the tax would be imposed only on assets transferred, the downside potential of a high value on assets retained would be limited to the possibility that the overvalued asset might itself become the subject of a subsequent gift or that, at death, it might qualify for one of the exemptions.

into individuals' private financial affairs. It would also sometimes require appraisals of hard-to-value assets. Yet gifts to spouses married more than twenty years would not necessarily require even a gift tax return. And with respect to gifts to spouses married less than twenty years, the donor would not necessarily be required to report his or her full net worth if reporting less would justify the marital deduction in question. Moreover, the decision to make a gift to a spouse is generally voluntary. If the additional intrusion and expense of filing the gift tax return were too great, a would-be donor could simply refrain from making the gift until later in the marriage.[376]

The gift tax would continue to be imposed on an annual basis. Thus, because the marital deduction would grow with each year of marriage (up to twenty years), and with the donor's net worth, each donor would be permitted repeated uses of the marital deduction, even if exhausted in a previous year. Yet each subsequent use would take into account all prior uses. In other words, the gift tax marital deduction would operate cumulatively.[377]

9. *Charitable Deduction*

The freedom to make gifts to charity during lifetime is at least as important as the freedom to make such gifts at death. Therefore, my proposal includes a gift tax charitable deduction. To avoid completely undermining the quantitative limitation imposed on the death tax charitable exemption,[378] however, the gift tax charitable deduction would also be quantitatively limited.[379] Computation would be on a cumulative basis, just as in the case of the marital deduction.[380]

It may not, however, be necessary to limit the gift tax charitable

376. An alternative, for those who find lifetime net-worth reporting unacceptable, would be a marital deduction equal to the applicable percentage (based on years of marriage) of the spousal transfer. *Cf.* Internal Revenue Code of 1954, ch. 736, § 2523(a), 68A Stat. 3, 412 (1954) (amended 1976) (marital deduction equal to one half the spousal transfer). Under this variation, the gift tax would be the excess of the "spousal transfer" over the allowable marital deduction.

377. The marital deduction might be limited to the excess of (1) the current applicable percentage times the total of current net worth, previous taxable gifts, gift tax previously paid, and previously allowed marital and charitable (*see infra* text accompanying note 378) deductions, over (2) the total of marital deductions previously allowed.

Allowing a gift tax marital deduction would necessitate making the death tax exemption cumulative, as well. To calculate a similarly limited marital exemption, one would multiply the total of net wealth at death, taxable gifts, gift tax paid, and marital and charitable deductions allowed by the applicable percentage. Then one would subtract the total of marital deductions allowed during the decedent's lifetime.

378. *See supra* notes 333-43 and accompanying text.

379. Much of the discussion dealing with the marital deduction is directly applicable to the issue of a charitable deduction.

380. The death tax charitable exemption would also be reduced on account of charitable deductions allowed during lifetime.

deduction as severely as the death tax charitable exemption. The need for strict limitation at death-time is clear. Almost every decedent for whom the government is essentially the only alternative will become charitably inclined. During lifetime, however, there are thousands of alternatives to charity. A gift to charity may deprive the donor of the ability to make a subsequent gift. More importantly, it deprives the donor of the ability to use the wealth for his or her own benefit. It also deprives the donor of economic security, additional income, and possibly even prestige. In short, a gift to charity during lifetime costs something very real, but a gift to charity at death, when the alternative is reallocation to the government, does not. Is this a difference that justifies making the charitable deduction quantitatively unlimited in all cases? Probably not. One can imagine a seventy-seven-year-old giving away $50,000,000 of a $55,000,000 estate primarily to avoid reallocation to the government at death. But the difference does mean that the 20% limitation on death-time charitable transfers is much too strict for lifetime giving. The limitation should vary inversely with the age of the donor. Using the same age brackets already used in the gift tax rate structure,[381] one possibility is:

Age of Donor	Maximum Charitable Deduction
Under 41	100%
41-50	75%
51-60	50%
61-70	40%
Over 70	30%

The rationale for the differential between the proposed 30% limitation for gifts by those over age seventy and the proposed 20% limitation at death is not that such a "small" differential would not encourage charitable giving in contemplation of death. It would. But the alternatives to lifetime charitable giving — even those available to a seventy-seven-year-old — are so great that a differential of some sort seems to be in order. Moreover, the three-year pull-back rule[382] would permit confiscation of any transfer within three years of death to the extent it exceeded the death-time 20% limitation.[383]

381. *See supra* notes 350-53 and accompanying text.

382. *See supra* notes 354-60 and accompanying text.

383. Those who find lifetime net-worth reporting unacceptable in the context of the marital deduction, *see supra* note 376, surely also find it unacceptable in the context of the charitable deduction. The same alternative might work here. The charitable deduction could equal the applicable percentage (based on the donor's age) of the charitable transfer. Under this formulation, the gift tax would be the excess of the "charitable transfer" over the allowable charitable deduction.

10. *Universal Exemption*

Currently the unified credit is available for both estate tax and gift tax purposes.[384] Even before creation of the unified credit, there were exemptions, albeit of different sizes, for both taxes.[385] A gift tax universal exemption would further decrease administrative costs for both the government and taxpayers. But several reasons suggest there should be no universal exemption for gift tax purposes.[386] One of the primary purposes of this proposal is to increase equality of opportunity. Unfortunately, few people can afford to make gifts.[387] Thus, the primary beneficiaries of a gift tax universal exemption would be the adult children of wealthy parents. That is hardly an egalitarian effect. Because this proposal includes an annual exclusion,[388] it has already minimized administrative inconvenience. Moreover, the amount of the annual exclusion is itself out of the reach of most people. Given all the other incentives for lifetime giving, a universal exemption for gift tax purposes would forgo an unacceptable amount of revenue.

Relying on the annual exclusion as the only universal exemption for gift tax purposes would not impair unreasonably a parent's ability to use wealth for the benefit of children. The exclusion for transfers in discharge of a legal obligation[389] and the exclusion for educational and medical expenses,[390] in addition to the annual exclusion, would continue to allow a parent extensive freedom during his or her lifetime to benefit children in almost any way he or she chose. My proposal would tax transfers to children other than those required for their support, education, or medical care, if greater than $5000 in any given year. Is that inconsistent with "natural" parenting instincts? Parents of means should not be allowed to transfer, free of gift tax, amounts in excess of $5000 to healthy, adult children who have no socially generalizable need for the amounts transferred.

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384. I.R.C. §§ 2010, 2505 (1988) (estate tax and gift tax).

385. Internal Revenue Code of 1954, ch. 11, § 2052, 68A Stat. 3, 389 (1954) (repealed 1976) ($60,000 estate tax exemption); Internal Revenue Code of 1954, ch. 12, § 2521, 68A Stat. 3, 410 (1954) (repealed 1976) ($30,000 gift tax exemption).

386. *See* Dodge, *Redoing the Estate and Gift Taxes Along Easy-to-Value Lines,* 43 TAX L. REV. 241, 341 (1988).

387. *See Hearings on Tax Reform Act of 1969 Before the House Committee on Ways and Means,* 91st Cong., 1st Sess. 3977, 3979, (1969) *reprinted in* READINGS IN DEATH AND GIFT TAX REFORM, *supra* note 180, at 69 ("Except as to those with quite large fortunes, the making of significant irrevocable gifts during lifetime is an impossibility. The individual himself may well need the property.").

388. *See supra* notes 368-70 and accompanying text.

389. *See supra* notes 361-64 and accompanying text.

390. *See supra* notes 365-67 and accompanying text.

11. *Life Insurance*

Under the current estate tax, anyone who has an incident of ownership in a policy on his or her own life can remove it from the tax base at death by giving it away during lifetime.[391] Yet, because so much of its worth is derived from its death benefit, life insurance often has little value during the lifetime of the insured. Thus, its value for gift tax purposes generally is but a tiny fraction of its death benefit. Given the marital deduction and the annual exclusion, gift tax is rarely due on the gift of a life insurance policy. Even now, therefore, gifts of life insurance policies are estate planning bargains. Under this proposal, parents could benefit healthy, adult children at death only to the extent of the universal exemption. And though lifetime gifts would still be allowed, the gift tax would make most nonexempted gifts too expensive for most parents. But gifts of life insurance policies would remain cheap from an estate planning perspective. Such gifts would, therefore, offer an easy way for parents to provide after death for children, or anyone else, not exempted from this proposal.

Earlier, I promised to tilt at only one windmill at a time.[392] This, however, is an opportunity I cannot resist. If a primary effect of my proposal were to encourage the wealthy to convert substantial portions of their assets into life insurance policies given to their children, it would fail either to expand equality of opportunity or to raise revenue. Since life insurance is an inherently testamentary arrangement, section 2042 is woefully underinclusive even under the current transfer tax structure.[393] Given the additional incentives my proposal would provide for gifts of life insurance, its adoption would mandate expansion of the scope of section 2042.

H. *Summary*

My proposal starts from the proposition that inheritance should be permitted only where public policy clearly justifies it. I find that justification in six different contexts. Spousal inheritance would always be allowed, but the amount would depend upon the length of the marriage. Inheritance by dependent lineal descendants would be permitted, subject to limitations based on the beneficiary's age. Large trusts

391. *See* I.R.C. § 2042(2) (1988).

392. *Supra* text accompanying note 288.

393. *See, e.g.*, Gutman, *supra* note 345, at 665-71; Task Force on Transfer Tax Restructuring, A.B.A. Section of Taxation, *supra* note 367, Exhibit E, at 440-41; H.R. REP. No. 2333, 77th Cong., 1st Sess. 57 (1942), *reprinted in* 1942-2 C.B. 372, 417-18 (recognizing "the testamentary nature of insurance on the life of the decedent"); Internal Revenue Code of 1939, ch. 2, § 811(g)(2)(A), 53 Stat. 1, 122 (1939) (amended 1942) (gross estate included life insurance proceeds if decedent paid the premiums).

for disabled lineal descendants would be encouraged. Inheritance by lineal ascendants would be unlimited. Charity could take up to 20%. And, in any event, $250,000 would be exempt. Thus, many types of inheritance would continue. In fact, my proposal leaves untouched estates of $250,000 or less.

My entire proposal would fit snugly within the current federal transfer tax structure.[394] Of the six exceptions, three already exist: the marital exemption, the universal exemption, and the charitable exemption. A fourth, the exemption for dependent lineal descendants, only recently was repealed. Only two, the exemptions for lineal ascendants and disabled lineal descendants, are entirely new. Both respond directly to the biggest change I advocate: reallocation to the government of all property that would otherwise pass at death to nonexempt beneficiaries.

The gift tax would adhere even more closely to the current federal gift tax structure. Since imposing the death tax at the rate of 100% would strongly encourage lifetime giving, the gift tax would be imposed at substantially higher rates than those currently in effect. These rates would increase with the age of the donor but would, except for gifts within three years of death, always be lower than the rate at death. In almost all other respects, the gift tax would mirror the current gift tax. Exclusions would continue for transfers in discharge of a legal obligation of the donor and for direct payment of medical and educational expenses. In addition, there would be an exclusion for transfers to lineal ascendants. And the annual exclusion would remain. There would also be deductions for transfers to spouses and charity.

394. It also would coexist peaceably with many currently popular estate planning devices and techniques. For example, the revocable inter vivos trust would continue to flourish. As is currently the case, creation of such a trust would generate no gift tax liability, because the transfer would be incomplete. *See* Treas. Reg. § 25.2511-2(c) (1990). Thus, revocable inter vivos trusts would continue to provide, during the donor's lifetime, each of the benefits they currently provide: avoidance of the costs, delays, court supervision, and publicity inherent in probate, personal delegation of management responsibility, and financial protection during incompetency. *See generally* J. PRICE, CONTEMPORARY ESTATE PLANNING § 10.10 (1983). As is also currently the case, upon the death of the creator of a revocable inter vivos trust, the trust would be subject to taxation. *See* I.R.C. § 2038 (1988). Even so, the trust would not necessarily be immediately taxed out of existence. If devoted to the benefit of the donor's surviving spouse, depending on the length of the marriage, little or no tax might be due. Similarly, if, upon the death of the donor (or, to the extent the trust qualified for the marital deduction, upon the death of the donor's spouse), the trust provided for another beneficiary (such as a dependent lineal descendant, a disabled lineal descendant, a lineal ascendant, or charity) exempted from the tax, even then there might be little or no tax. Only when the trust had exhausted the donor's pool of exempted beneficiaries would it become subject to taxation, and then only to the extent in excess of any unused portion of the decedent's universal exemption.

CONCLUSION

My proposal builds solidly on taxes this country has imposed for almost a century. It is, therefore, an evolutionary proposal. Curtailing inheritance is very much in keeping with important strands of American ideology that were in existence at the time of the Declaration of Independence and continue to this day. Revolutionaries and presidents, philosophers and entrepreneurs, as well as state legislators, have advocated[395] and sometimes even enacted[396] proposals at least as radical.

The old saying, "Nothing is certain but death and taxes," has never been entirely true, at least with respect to taxes imposed at death. By tolerating almost unrestricted dead hand control over property, this nation has always allowed the children of the wealthy all the financial advantages inheritance has had to offer. Curtailing inheritance as suggested here would make death taxes substantially more certain. Thus, the wealthy could control much less of their property from the grave. Curtailing inheritance would significantly increase equality of opportunity. In addition, it would enable the federal government to reduce its monumental deficit. Yet curtailing inheritance would abridge neither natural nor constitutional rights. It would also be consistent with our notion of property. And its economics seem less frightening than those of an increase in the income tax. The deficit is

395. In 1972, a bill that would have substantially limited the passage of wealth at death was introduced in the California legislature. It would have barred inheritance in excess of $1 million by any given beneficiary. Its only other exemption was for spousal transfers. Assembly Bill 333, Calif. Leg., 1972 Reg. Sess., *reprinted in* J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS 50-51 (1972). The bill was introduced by Assemblymen Burton, Brown, Miller, Waxman, Brathwaite, Bill Greene, Ralph, and Vasconcellos. It was coauthored by Senators Dymally and Roberti. It was not enacted.

In 1887 the Illinois legislature rejected a proposal that would have limited inheritance by direct descendants to $500,000 and inheritance by collaterals to $100,000, notwithstanding recommendation by the Illinois Bar Association. H. READ, *supra* note 32, at xi n.1; Montgomery, *supra* note 45, at 640.

396. In 1908 Oklahoma enacted an inheritance tax that reallocated to the government all inheritance in excess of certain levels. Act of May 26, 1908, ch. 81, 1907-1908 Okla. Sess. Laws 733. There were five classes of beneficiaries, defined in terms of their relationship to the decedent. After modest exemptions (ranging from $10,000 for surviving spouses to $100 for distant relatives and unrelated beneficiaries), bequests (and amounts passing by intestate succession) were subject to taxation at low "primary rates" (ranging from 1% to 5%) on small fixed amounts (ranging from $5000 to $500). On all bequests in excess of the applicable exemption and "primary" amount, however, the rate of tax rose a fixed percentage (ranging from 1/125th of one percent to 1/10th of one percent) for every $100. Given a large enough bequest, this secondary rate would eventually become 100%. After working through the details, one finds that, in the case of bequests to distant relatives and unrelated beneficiaries, this point occurred at $100,600. It occurred for siblings at $502,500. And it occurred for surviving spouses at $1,265,000. The Oklahoma tax was thus designed to abolish inheritance above certain levels. Unfortunately, in McGannon v. State, 33 Okla. 145, 124 P. 1063 (1912), the Supreme Court of Oklahoma gutted the act by interpreting it to provide for only one rate increase per class.

the inheritance we as a nation are leaving our children. We could take a major step toward denying them that sad legacy if we were also willing to deny our healthy, adult children the right to inherit private fortunes.