READINGS AND MATERIALS

TAX POLICY

by

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> [Inherited wealth] all too often leaves [heirs] broken and debauched. * * * Supine on expensive piles of pillows, they receive injections of more legal drugs from elegant doctor feelgoods or have their Q-spots probed by maritally ambitious nurses and suave trustees of museums, universities, and environmental societies. * * *
>
> Conservatives who decry the corrupting impact of welfare payments of a few hundred dollars a month will have trouble denying the potential damage to be caused by a trust fund yielding tens of thousands. * * *
>
> Whether money is doled out in foodstamps and spent on booze, or assigned in a bequest and poorly invested, the act of giving may well reduce the total level of wealth, employment and wellbeing in the country.[n]

Obviously, the "victims" themselves do not call for relief. The dominant feeling among potential heirs is perhaps best summed up by the character Tevye in *Fiddler on the Roof*: "May the Lord smite me with the curse! And may I never recover!"

Do you think Mr. Gilder's portrait of the heirs of great fortunes is accurate in many cases? Do you agree that the receipt of unearned, undeserved wealth is a curse for the recipient?

B. THE GOAL OF EQUALIZATION OF OPPORTUNITY

As discussed in subchapter A, one of the primary justifications for the estate tax is the nonrevenue goal of breaking up the largest concentrations of wealth. This is said to serve the egalitarian goal of equality of opportunity. In the following excerpt, Professor Ascher carries the social equality argument to its logical extreme: Our goal should be abolition of inheritance, accomplished through a death tax of one hundred percent (subject to important limitations).

CURTAILING INHERITED WEALTH

Mark L. Ascher[*]

89 Michigan Law Review 69, 70-78, 80-93, 96-104, 106-07, 110, 116-17, 121 (1990)

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. 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

n. George Gilder, *Wealth, Poverty and Inheritance: The Voice from the Coffin*, 11 PROB. LAW. 1, 2-3, 6 (1985).

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ourselves that education evens out most differences. Still, we know there are immense differences in the values various parents imbue in their children. And we also know there are vast differences in the educations parents can afford for their children. Here too, however, we feel there is little to be done. 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. 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."

Meanwhile, [t]he continuing failure of the federal government seriously to address the deficit indicates to many * * * that higher taxes are inevitable. * * * The only real issue is what type of tax could help reduce the deficit least painfully while achieving significant social objectives.

About $150 billion pass at death each year. Yet in 1988 the federal wealth transfer taxes raised less than $8 billion.

Obviously, these taxes could raise much more. If, to take the extreme example, we allowed the government to confiscate all property at death, we could 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. 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

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.

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. * * *

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. 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 to zero at an age of presumed independence. A separate exemption would allow generous provision for disabled lineal descendants of any age. Inheritance by lineal ascendants (parents, grandparents, etc.) would be unlimited. A universal exemption would allow a moderate amount of property either to pass outside the exemptions or to augment amounts passing under them. 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. In addition, to prevent circumvention by lifetime giving, the gift tax would increase substantially.

My proposal strikes directly at inheritance by healthy, adult children. * * * 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. 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. But inheritance by healthy, adult children would cease immediately, except to the extent of the universal exemption.

* * *

Inheritance in Principle

John Locke, in his *Two Treatises of Government*, first published in 1690, argued that inheritance was the natural right of children. He derived that right from the fact that children were "born weak, and unable to provide for themselves." 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, his conception of inheritance as a natural right never took firm root here. * * *

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

According to Blackstone, inheritance was merely a custom turned into positive law. * * *

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

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[63] * * *

Still, the natural rights conception may help to explain Americans' continuing fascination with inheritance. * * *

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]

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

50. Kornstein, *Inheritance: A Constitutional Right?*, 36 RUTGERS L. REV. 741, 766-67, 789-91 (1984).

51. T. Roosevelt, *Seventh Annual Message* (Dec. 3, 1907), in 16 MESSAGES AND PAPERS OF THE PRESIDENTS 7070, 7084 n.1.

63. 15 T. JEFFERSON, THE PAPERS OF THOMAS JEFFERSON 392-93 (J. Boyd ed. 1958) (emphasis in original).

65. J. LOCKE, TWO TREATISES OF GOVERNMENT bk. 2, § 27, at 287-88 (P. Lassett ed. 1988) (emphasis in original).

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. * * *

According to John Stuart Mill, * * * no presumptions in favor of the propriety of inheritance were to be drawn from its antiquity, because Mill believed the feudal family to be fundamentally different from our own. 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. * * *

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. * * *

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. 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. 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*." * * * 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.

Constitutional Concerns

* * * In 1942, the Supreme Court of the United States * * * 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 attempted to abolish inheritance, all such statements are, of course, merely dicta. These statements are, nonetheless, overwhelmingly in favor of such legislative power.

Concluding that a state legislature could abolish inheritance does not, however, also justify concluding that Congress could do so. * * * But Congress' authority to raise revenue from property passing at death appears to extend to anything less than complete abolition of inheritance. 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.

Inheritance as a Matter of Policy

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.

* * * Put another way, the wealth they accumulate is "largely the result of the recipient being favorably positioned vis-a-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] * * *

Arguments in Favor of Curtailing Inheritance

Leveling the Playing Field

The inequality of accumulation that occurs as the by-product of capitalism is hardly to be despised, as Andrew Carnegie and Theodore Roosevelt well realized. Thus, absolute equality is a goal for which society ought not to strive and that, in any event, society could never even

79. Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942).

91. Brannon, *Death Taxes in a Structure of Progressive Taxes*, 26 NAT'L TAX J. 451, 451 (1973).

92. *Id.*

93. T. Roosevelt, *Sixth Annual Message* (Dec. 3, 1906), in 16 MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 51, at 7023, 7042.

approximate without eugenics and state socialism. Equality of opportunity, however, is at the very core of American values. Philosophers tend to agree that equality of opportunity is a fundamental good. It is hardly open to debate that inherited wealth contradicts equality of opportunity. 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. Thus, Thomas Jefferson advocated a steeply progressive death tax as a "means of silently lessening the inequality of property."[104] So did Thomas Paine. 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. * * *
>
> 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. * * *

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. * * *

102. R. MUSGRAVE & P. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 483-84 (4th ed. 1984).

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

106. T. ROOSEVELT, *supra* note 51, at 7085.

112. F. HAYEK, THE CONSTITUTION OF LIBERTY 87, 88-89, 91 (1960).

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 much as the federal wealth transfer taxes currently raise. 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. 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. * * *

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. 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.

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

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 material exemption, the tax base would drop to $33 billion. Assuming all other decedents fully utilized the universal exemption, 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, because few parents die with children under age 25; the exemption for disabled lineal descendants, because few beneficiaries are totally and permanently disabled; and the exemption for lineal ascendants, 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. Johnson, *supra*, at 48-50 (Table 2).) Third, an invigorated gift tax would yield additional revenue. Fourth, if the amount of wealth passing at death increases as much as some expect, the prospects for future growth in revenue are substantial.

children to play. It also secures the form of elective representative government we cherish. * * *

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 and improve the prospects for another two centuries of elective representative government in America.

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. 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. A system that encourages family members to provide for the care of the elderly and disabled is, therefore, desirable. 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. In addition, it would allow an unlimited exemption for lineal ascendants, most of whom would be elderly. * * *

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. By making it much more expensive during lifetime to give large amounts to one's children, and by limiting the amount healthy children could inherit, this proposal would achieve much greater privatization at the "near-rich" level.

* * *

Increasing Lifetime Charitable Giving

* * * Given the incentives for lifetime giving that reallocation at death would create, the allowance of a gift tax charitable deduction would surely result in a marked increase in lifetime charitable giving.

* * *

Arguments Against Curtailing Inheritance

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.

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. People, however, work for many other reasons. 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. * * *

Another of the most important reasons we work and accumulate is to "provide" for others, particularly our children. * * * 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. * * *

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.

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180. *See, e.g.*, J. PECHMAN, FEDERAL TAX POLICY 234 (5th ed. 1987) ("[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, THE INHERITANCE TAX 212 (2d ed. 1908) ("The inheritance tax is less a discouragement to industry than an income tax . . . ."); Harris, *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, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 284 (1983) ("[T]axes on bequests are preferable to high tax rates on income."); Brannon, *supra* note 91, at 451-52; Westfall, *Revitalizing the Federal Estate and Gift Taxes*, 83 HARV. L. REV. 986, 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 incentive less.") *But see* Boskin, *An Economist's Perspective on Estate Taxation*, in DEATH, TAXES AND FAMILY PROPERTY 56, 62 (E. Halbach ed. 1977) ("[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, FEDERAL ESTATE AND GIFT TAXATION 1, 3 (6th ed. 1990) ("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%.

Increased consumption and decreased savings

The second economic argument against curtailing inheritance focuses on its supposed tendency to encourage consumption. For years, estate planners 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.

* * * [U]nder the current system, which itself provides strong incentives to transfer wealth during life, parents almost always keep their money. In short, the incentives to retain property dwarf the incentives to give it away.

Would this parental tendency to retain property change if inheritance were curtailed? * * * [T]he 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. 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. * * *

Curtailing inheritance as suggested in this article would affect less than 10% of the population. 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? * * *

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. * * *

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. * * *

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. This concern is, however, irrelevant to a tax providing deficit financing. * * *

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. Such wealth generally is not moveable. * * *

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. These are drastic measures few would undertake, even under a system that curtailed inheritance. * * *

"Wiping Out the Dream"

* * *

I suggest *curtailing* inheritance, not abolishing it. A universal exemption would allow *every* decedent to bequeath a substantial amount of property. If set at $250,000, this exemption would exempt approximately 98% of the population. 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.

* * *

Notes and Questions

5. Professor Ascher advocates an extreme form of estate tax, claiming that it would achieve both increased revenue and increased social justice. Which of these is more important to Professor Ascher?

6. Professor Ascher contends that his proposal would generate considerable revenue. (See footnote 120.) But suppose we decided that no additional revenue would be obtained from its implementation. For example, hypothesize that the government's cost of administering and collecting the tax would exactly equal the tax revenues derived. Can an argument still be advanced that such a tax would be beneficial to society? Such a tax would have the effect of making some taxpayers (the rich, the near-rich, and their

heirs) poorer without making the government richer. Would such a tax be simply legislating envy into law? Conceding, *arguendo*, that large inheritances by healthy adults are undeserved accessions to wealth, does it follow that society is improved if the wealth is removed?

7. Leaving aside the questions usually raised when any tax proposal is considered—revenue, efficiency, equity, etc.—would outright confiscation of a decedent's property be morally wrong?

8. Certainly taxes that appear to have as their principal purpose punishment of the taxpayer or his activities rather than revenue have been levied. For example, a state might levy a high tax on illegal narcotics. Regardless of whether we think fines a wise way to combat illegal drugs, we can realize that such a tax would be a thinly disguised form of fine,[o] and might not be surprised if administering and collecting the fine cost the government as much or more than the money collected. Can transfer taxes, at least in some cases, be justified on a similar theory? Do you find dispositive the fact that accumulating wealth, unlike trafficking in narcotics, is legal?

9. Professor Ascher acknowledges the inevitability, and in some senses desirability, of inequality arising from differences in important matters such as ability, luck, education, and nurturing. Why would he single out inherited wealth as the area in which to move toward socially mandated equality?

10. Which is the more economically valuable thing to inherit from a parent—$1 million in cash; or the genes, nurturing, and encouragement that will enable one to play professional sports at a salary of several millions of dollars per year? Do you find persuasive the argument of F.A. Hayek (quoted in the Ascher excerpt) that "there seems to be no sensible ground for limiting [parental efforts to benefit their children] to non-material benefits"?

11. Probably the most important benefits fortunate children receive from their parents—such things as a sense of values; religious faith; self discipline; appreciation of the world, of nature, of people, of art—have little direct economic effect. Why should these major benefits go untaxed, while something as relatively trivial as an inheritance of $1 million is taxed? Does the fact that some children receive these intangible benefits from their parents and others do not, doom taxation as a means of achieving equality of opportunity?

o. *See Dept. of Rev. of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994). In this case, the Supreme Court held, five-to-four, that imposition of the Montana Dangerous Drug Tax constituted an unconstitutional imposition of double jeopardy, because the taxpayers had already been subjected to criminal punishment of their drug activities.

12. The income tax treatment of parents who choose either additional nurturing time or additional working time—both, let us hypothesize, with the goal of benefitting their children—differs considerably. The nurturing parent generates untaxed imputed income, while the working parent creates taxable income. What might be made of these facts in the debate concerning transfer taxes?

13. An obvious concern with confiscatory taxation is its effect on incentives. Do you agree with Professor Ascher that adoption of his proposal would not materially undercut the incentive to work of parents who would be unable to bequeath their wealth to their offspring? What effect would it have on the working patterns of the sons and daughters who would lose inheritances they otherwise would have received?

14. A related concern is that high death taxes create an incentive toward too much consumption. Some proponents of high death taxes have suggested coupling transfer tax increases with greater reliance on consumption taxation.[p]

15. Professor Edward McCaffery, by contrast, argues for a steeply progressive consumption tax (steeper still if the consumption is out of inherited wealth), but with no transfer tax at all. He maintains that this approach would create optimal incentives and disincentives. It would not discourage (desirable) creation of wealth, but would discourage (undesirable) conspicuous consumption. Using the example of billionaire H. Ross Perot, he argues:

why?!

> We may actively want Mr. Perot * * * to work and save, because we value whatever he does to produce that wealth and we appreciate his accumulation of capital, but we may be afraid of his spending his billions personally and quickly. If we are concerned about curtailing his extravagant consumption, however, then we have to let him pass on his wealth. We cannot concede Mr. Perot his earnings while at the same time checking both his consumption and his savings: Something has to give. Under the progressive consumption-without-estate tax with a higher rate schedule on spending out of inheritance, we do not burden Mr. Perot's earnings or savings or wealth transfers *per se*. Instead we monitor the use of the wealth, both at Mr. Perot's and later generation's levels, to make sure that such use is not decadent or offensive, without pushing Mr. Perot to consume it himself.[q]

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p. *See, e.g.,* Gerald M. Brannon, *Death Taxes in a Structure of Progressive Taxes*, 36 NAT'L TAX J. 451, 452-53 (1973).

q. Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283, 353 (1994). See also McCaffery excerpt in Chapter Seven.

16. Professor Ascher would protect the right of even the rich to give property, while sharply curtailing their right to transfer property at death. (Gifts would be subject to transfer taxes much higher than under present law, but still considerably more favorable than the one hundred percent marginal rate he would impose on certain transfers at death.[r]) He justifies the difference, in part, because transfers at death reflect sentiments "less worthy of enforcement by society," and amount to "garbage-can parental 'giving.'" Do you agree with his characterization of transfers at death?

17. Professor Ascher noted but dismissed the argument that taxpayers would emigrate and renounce American citizenship to avoid even a confiscatory estate tax.

State death taxes have raised a somewhat comparable problem. Although the taxes have never approached the 100 percent envisioned by Professor Ascher, considerably less drastic measures were necessary in order to defeat the tax; simply moving to another state sufficed. As a result: "Competition among the states for the aged wealthy was very keen and took the form of outdoing other states in leniency of death taxes."[s] To deal with this perceived problem, Congress enacted a credit against the federal estate tax for state death taxes up to a stated maximum. Section 2011. No state thereafter had any incentive to reduce its death taxes below the amount of the allowable federal credit, because the reduction would benefit not the estate but the federal government.

18. In some respects, Professor Ascher would reduce the burden of death taxes. For example, he would allow a substantial tax-free bequest to a disabled child of any age (he suggests $5 million). Should this general idea be incorporated into whatever form of death taxation is utilized?

C. THE ROLE OF TRANSFER TAXES IN A PROGRESSIVE TAX SYSTEM

Transfer taxes do not exist in a vacuum, but are one relatively minor element of the tax system. In the pair of excerpts in this subchapter, the authors express sharply different views concerning the appropriate role for these taxes. Professor Graetz argues that Congress should retain and strengthen transfer taxes, not because they either bring in much revenue or break up concentrations of wealth, but because they contribute to

r. In a portion of his article not excerpted (*see* 89 MICH. L. REV. at 137-48), Professor Ascher proposed gift tax rates that would increase with age (i.e., would increase as the taxpayer approached death and the proposed confiscatory estate tax). The range would be from 100 percent to 300 percent of the amount of the gift. This is still less than a 100 percent estate tax, however. While a 100 percent estate tax is simply confiscatory, a 100 percent gift tax means that a gift can still be made, but that it results in a tax of equal amount.

s. Harold M. Groves, *Retention of Estate and Gift Taxes by the Federal Government*, 38 CAL. L. REV. 28, 32 (1950).