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## INFORMATION ASYMMETRY, RACE, AND THE "DEATH TAX"

Rebecca Safford

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# INFORMATION ASYMMETRY, RACE, AND THE "DEATH TAX"

Rebecca Safford\*

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## *I. Introduction*

As early as 1789, Benjamin Franklin astutely commented, "In this world, nothing is certain but death and taxes."<sup>1</sup> Or, as is now the case, the two are one and the same: you die, and you are taxed at your death. This belief has been the central motivator for the recent push for Congress to repeal the estate tax permanently. Currently, a phase-out process is in effect

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<sup>1</sup> Letter from Benjamin Franklin to Jean-Baptiste Leroy (Nov. 13, 1789).

that will culminate in a one year repeal.<sup>2</sup> Repeal proponents want to extend this repeal indefinitely and have sparked a nation-wide debate that has jumped to the top of the political agenda.<sup>3</sup>

The movement for repeal has been led by creative groups who know how to manipulate voters by disseminating incorrect information. Americans are particularly susceptible to manipulation when it comes to taxes in general. Taxpayers rarely have a good understanding of the tax code, but still harbor strong feelings about this "necessary evil."<sup>4</sup> Indeed, even the name of the estate tax has been twisted to garner support for repeal proponents – the "death tax." "Estate tax sounds like it only hits the wealthy, but "death tax" sounds like it hits everyone. . . . You don't have to be really rich to be worried about a death tax."<sup>5</sup> As a Washington journalist put it, the repeal advocates had a winning formula: "[c]all it the death tax and make it appear that many more people have to pay it than actually do, appeal to the Republican anti-tax sentiment and make it a moral issue, and spread the gospel to politically powerful constituents" who are not affected by the tax nearly as much as they believe, if at all.<sup>6</sup> A poll done in 1999 by the Americans Against Unfair Family Taxation showed that 77 percent of taxpayers believed the estate tax affects all Americans, far below the 2 percent who are actually subject to the estate tax.<sup>7</sup> In reality, approximately 99 percent of estates pay \$0 in estate taxes.<sup>8</sup>

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<sup>2</sup> Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 511(c)(2)(B), 521(a), 115 Stat. 38 (2001) (codified at I.R.C. §§ 2001(c)(1)-(2), 2010(c)) [hereinafter EGTRRA].

<sup>3</sup> See Donald G. Carlson, *PwC Submits Summary of 2006 Legislative Outlook*, TAX NOTES TODAY, Jan. 19, 2006, at 12–14, available at LEXIS, 2006 TNT ("Congress also is expected to continue consideration of . . . permanent estate tax repeal. . . ."); see also Keith W. Lantz, A. Lee Gurley III & Kenneth W. Linna, *Popular Support for the Elimination of Estate Taxes in the United States?*, 99 TAX NOTES TODAY, May 26, 2003, at 1263, available at LEXIS, 2003 TNT (introducing the EGTRRA and its appearance on the nation's political agenda); Board Briefing, Council on Funds., *Federal Estate Tax—Should it be eliminated or retained?*, 1 (April 2001) available at [http://www.cof.org/files/Documents/Governing\\_Boards/bb3estatetax.pdf](http://www.cof.org/files/Documents/Governing_Boards/bb3estatetax.pdf) (discussing the estate tax debate).

<sup>4</sup> See J. SCOTT MOODY, WENDY P. WARCHOLIK & SCOTT A. HODGE, TAX FOUNDATION SPECIAL REPORT: THE RISING COST OF COMPLYING WITH THE FEDERAL INCOME TAX 1 (Dec. 2005), <http://www.taxfoundation.org/files/054c1788c5389208f4608b195a6ff302.pdf> (noting that the increasing complexity of the tax code has made the cost of compliance increase); see also AMITY SHLAES, THE GREEDY HAND: HOW TAXES DRIVE AMERICANS CRAZY AND WHAT TO DO ABOUT IT (1999) (discussing public opinion regarding taxes in the context of withholding).

<sup>5</sup> See MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 77 (2005) (quoting a "key staffer to a high-ranking congressional Republican").

<sup>6</sup> *Id.* at 78 (quoting a "prominent Washington journalist").

<sup>7</sup> *Id.* at 125.

<sup>8</sup> CTR. ON BUDGET AND POLICY PRIORITIES, THE ESTATE TAX: MYTHS AND REALITIES (2006), available at <http://www.cbpp.org/estatetaxmyths.pdf> [hereinafter MYTHS AND REALITIES].

The identity of those individuals who support permanent repeal is in some respects easily predictable, and in other respects a surprise. Alongside the predictable support of wealthy white taxpayers, blacks of all income levels have been encouraged to support repeal.<sup>9</sup> While all classes and races have been encouraged to support repeal, the support from black individuals is perplexing, because black taxpayers are disproportionately poor and will therefore be hit the hardest by the repercussions that will occur if the estate tax is repealed. It is most likely that this group's support springs from incorrect perceptions of the estate tax. Politicians and other repeal proponents have proliferated misinformation and have deluded most taxpayers, including the nation's black minority population, into thinking that the repeal of the estate tax is a good thing.<sup>10</sup> Playing upon the misbelief that all Americans are affected by the estate tax and casting the tax in a negative light, estate tax opponents have led blacks to believe that estate tax repeal will benefit them as a class. Unfortunately, while the misinformation has kept most of the national population blind to the real effects of estate tax repeal, those effects will have a particularly negative effect on the black population as a whole.

Part II of this Note introduces the federal estate tax: providing its background and subsequent changes, as well as the policy rationales behind its creation and evolution. Part III discusses the negative effects of repeal in five key areas. The first effect is that the concentrations of wealth among the nation's richest individuals will increase. Second, the government's revenue will decrease and will have to be made up from alternative sources. Third, the progressivity of the nation's tax system—the system's keystone—will be severely damaged, if not eliminated. Fourth, like the federal government, the states will lose substantial amounts of revenue and will be forced to compensate for this loss on their own. Finally, charities will likely suffer as taxpayer incentive for charitable gifts and bequests would be eliminated by an estate tax repeal. Part IV explains how these effects of repeal are likely to have a disproportionate effect on blacks and will widen the already vast

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<sup>9</sup> Harry C. Alford, President & CEO, National Black Chamber of Commerce, Editorial, Blacks Should Help in Doing Away With the "DEATH TAX," [http://www.nationalbcc.org/index.php?option=com\\_content&task=view&id=77&Itemid=](http://www.nationalbcc.org/index.php?option=com_content&task=view&id=77&Itemid=) (last visited Nov. 12, 2006); see also Joshua Green, *Black Death*, THE AMERICAN PROSPECT (June 4, 2001) (noting the advertisements run by estate tax supporters in newspapers, claiming the tax discriminates against blacks and urging its repeal).

<sup>10</sup> See Green, *supra* note 9 (laying out the falsehoods about the estate tax that have been used by politicians to garner black support); see also Gary Bass, Ellen Taylor & Cate Paskoff, *Race Poverty and the Estate Tax*, POVERTY & RACE NEWSLETTER (Poverty & Race Research Action Council, D.C.), September/October 2002, available at [http://www.prrac.org/full\\_text.php?text\\_id=767&item\\_id=7799&newsletter\\_id=64&header=September/October%202002%20Newsletter](http://www.prrac.org/full_text.php?text_id=767&item_id=7799&newsletter_id=64&header=September/October%202002%20Newsletter) (claiming that the argument that the estate tax hurts the black community is false).

economic gap between whites and blacks in this nation. It will go on to describe why, despite these harmful effects, blacks have been among the supporters of the repeal movement. Part V proposes a compromise between repealing the estate tax and returning it to its prior form. This proposal is designed to serve the needs of the government while protecting the interests of blacks as a group.

## II. What is the Federal Estate Tax?

The estate tax, more recently known as the "death tax"<sup>11</sup> is an excise tax, rather than a direct tax,<sup>12</sup> imposed on the privilege to transfer one's property at death.<sup>13</sup> The tax is measured by the size of the decedent's gross estate at death, which generally includes all the property the decedent owned, plus all property in which the decedent possessed incidents of ownership, or exercised control of at death, less any allowed deductions.<sup>14</sup> In 2004, estate taxpayers deducted \$87 billion from their estate taxes.<sup>15</sup> Deductions include administrative costs, such as debts belonging to the decedent at his death and funeral expenses paid by the estate,<sup>16</sup> estate casualty losses,<sup>17</sup> a marital deduction for a surviving spouse,<sup>18</sup> charitable deductions,<sup>19</sup> and a deduction for certain family-owned businesses.<sup>20</sup> Finally, the net estate tax is computed by subtracting the unified transfer tax credit<sup>21</sup> and other credits<sup>22</sup> from the gross estate.

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<sup>11</sup> The nickname is used to describe the Federal Estate Tax because it is imposed when the taxpayer dies. It was coined by Jim Martin, President of seniors' organization 60 Plus. William J. Murray, THE CHAIRMAN'S ACTION REPORT (Religious Freedom Coalition, D.C.), March 9, 2006, at 2, available at <http://rfcnet.org/pdfs/pdf2006/06f04internet.pdf>.

<sup>12</sup> An excise tax is a tax applied to transfers of property, as opposed to a direct tax, which is applied to the property itself.

<sup>13</sup> See Debra Rahmin Silberstein, *A History of the Death Tax: A Source of Revenue, or a Vehicle for Wealth Redistribution?*, PROBATE & PROPERTY, May/June 2003, at 58 (defining the "death tax").

<sup>14</sup> I.R.C. § 2001(b) (2005).

<sup>15</sup> JANE G. GRAVELLE & STEVEN MAGUIRE, CRS REPORT FOR CONGRESS, ESTATE AND GIFT TAXES: ECONOMIC ISSUES, 3 (2006).

<sup>16</sup> I.R.C. § 2053(a) (2005). This is the most prevalent deduction, totaling \$483 million in 2004. GRAVELLE & MAGUIRE, *supra* note 15, at 3.

<sup>17</sup> I.R.C. § 2054 (2005) (provided such losses are not deducted for income tax purposes (I.R.C. § 642(g) (2005))).

<sup>18</sup> I.R.C. § 2056 (2005). The most valuable of the estate tax deductions, totaling \$59.9 billion in 2004. GRAVELLE & MAGUIRE, *supra* note 15, at 3.

<sup>19</sup> I.R.C. § 2055 (2005).

<sup>20</sup> I.R.C. § 2057 (2005) (deduction permitted for closely held business interests).

<sup>21</sup> I.R.C. § 2010 (2005). The Unified Transfer Tax Credit, provided under I.R.C. § 2010 is the amount that equals the I.R.C. § 2001(c) tax on the "applicable exclusion amount," established under I.R.C. § 2010(c). In 2006, the applicable exclusion amount is \$2 million dollars, which results in a credit of \$555,800, subject to the limitation under I.R.C. § 2010(d) that the amount of the credit shall not exceed the amount of the tax imposed.

### A. History of the Estate Tax

This is not the first time the estate tax has found its way into the national spotlight or been the subject of political controversy. The notion of an estate tax was created by the Egyptians and later adopted by the Greeks and Romans.<sup>23</sup> The concept first appeared in the United States in 1797 in the form of a legacy tax in order to generate revenue to construct a navy.<sup>24</sup> The tax consisted of stamp duties, a stamp that was placed upon letters of probate when an inheritor took possession of the deceased's property at his death.<sup>25</sup> This early estate tax was imposed on all testamentary dispositions, descents, and successions to the estate of intestates, excepting those to parents, husbands, wives, or lineal descendants.<sup>26</sup> The tax was repealed in 1802 and not replaced again until 1862, when Congress designed new estate taxes to raise revenue for the Civil War.<sup>27</sup> This time, an inheritance tax was levied against each legacy or distributive share, and a probate duty was charged against the entire estate.<sup>28</sup> By 1864, the tax applied to both personal and real property and remained in effect until 1870, when the Civil War had passed and the need for the revenue had ceased.<sup>29</sup>

The next estate and inheritance tax was enacted by Congress in 1898, again to raise government revenue for military spending.<sup>30</sup> The determination of the amount of the tax was based on the size of the estate and the relationship between the decedent and the inheritor.<sup>31</sup> Like today's estate tax, any legacies passing to the decedent's spouse were exempt from the 1898 tax.<sup>32</sup> Shortly after its enactment, the constitutionality of the 1898 tax

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<sup>22</sup> Other credits whose function is to avoid or lessen the possibility of "double" taxation include the credit for state death taxes under I.R.C. § 2011, the credit for pre-1977 gift tax on gifts included in the gross estate under I.R.C. § 2012, the credit for estate tax on prior transfers of decedent under I.R.C. § 2013, and the credit for foreign death taxes under I.R.C. § 2014.

<sup>23</sup> See Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223, 223 (1956) (explaining the origin of the modern estate tax).

<sup>24</sup> Silberstein, *supra* note 13, at 59 (introducing the emergence of the estate tax in the United States) (citing DAVID MCCULLOUGH, JOHN ADAMS (2001)).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* (discussing the imposition of the predecessor to today's estate tax) (citing Knowlton v. Moore, 178 U.S. 41, 50 (1900)).

<sup>27</sup> *Id.* (tracing the estate tax through the first half of the 19th century) (citing JOHN K. MCNULTY, FEDERAL ESTATE AND GIFT TAXATION 1 (5th ed., 1994)); see also Jerry J. McCoy, *Charitable Planning in the Post-Estate-Tax Era*, TAX MANAGEMENT ESTATES, GIFTS AND TRUSTS JOURNAL, 2001, at 70 (discussing the emergence of the precursor to the modern estate tax).

<sup>28</sup> See Silberstein, *supra* note 13, at 59 (noting the changes in the estate tax during the Civil War) (citing Knowlton v. Moore, 178 U.S. 41, 50 (1900)).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (indicating that the estate tax correlated with times of war); see also McCoy, *supra* note 27, at 70 (explaining that the need for revenue for the Spanish American War led to the enactment of the 1898 death tax).

<sup>31</sup> See Silberstein, *supra* note 13, at 59 (explaining the methods for estate tax imposition in 1898).

<sup>32</sup> *Id.*

was challenged in *Knowlton v. Moore*.<sup>33</sup> The case rose to the Supreme Court, which found the tax constitutional by characterizing the tax as an excise tax (as opposed to a direct tax), which only requires that the tax be applied uniformly.<sup>34</sup> Despite the ruling, however, Congress repealed the tax in 1902.<sup>35</sup>

In 1916 the direct ancestor of today's federal estate tax was enacted, both to help defray the cost of military preparedness for World War I and to break up concentrations of wealth created through inheritance.<sup>36</sup> In order to justify the new tax, the House of Representatives' Committee on Ways and Means stated that "a new type of tax was needed, because the consumption taxes in effect at that time bore most heavily upon those least able to pay them."<sup>37</sup> Congress intended to balance the revenue system equitably and to collect more revenue from those with a greater ability to pay.<sup>38</sup> As before, the constitutionality of the federal estate tax was challenged and upheld in the Supreme Court case *New York Trust Co. v. Eisner*.<sup>39</sup>

As time passed, the original estate tax was subject to changes and additions. In 1924, in response to taxpayer manipulation and avoidance, Congress enacted the federal credit for state death transfers and also enacted

<sup>33</sup> See *Knowlton v. Moore*, 178 U.S. 41 (1900) (finding the estate tax of 1898 constitutional). The constitutionality of the 1898 estate tax was challenged on the grounds that it was a direct tax, which must be apportioned between the states in proportion to the state's population as required by Article I, Section 8 of the Constitution (the Direct Tax Clause), that the tax was administered in a manner that treated the states unequally. *Id.* at 44-45. The Court evaluated whether the tax was direct by "ascertain[ing] whether the one upon whom by law the burden of paying it is first cast, can thereafter shift it to another person. If he cannot, the tax would then be direct in the constitutional sense." *Id.* at 81-82. The Court determined that the tax was not a direct tax by evaluating its traditional use. The Court found that the tax was traditionally considered an excise tax because "death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested," and the tax therefore be apportioned unequally between the states. *Id.* at 56.

<sup>34</sup> See Silberstein, *supra* note 13, at 59 (discussing the Court's reasoning in *Knowlton v. Moore*).

<sup>35</sup> *Id.* at 60; see also McCoy, *supra* note 27, at 70 (noting the reasons for repeal despite the Supreme Court's finding that the 1898 tax was constitutional).

<sup>36</sup> See Silberstein, *supra* note 13, at 60 (discussing the origin of the direct precursor to today's estate tax) (citing JOHN K. MCNULTY, FEDERAL ESTATE AND GIFT TAXATION 3 (5th ed., 1994)); see also McCoy, *supra* note 13, at 70 ("The government's revenue needs for World War I led Congress to enact the modern estate tax in 1916, with rates ranging from a 1 percent to 10 percent top rate on estates over \$5,000,000").

<sup>37</sup> Eisenstein, *supra* note 23, at 230 (citing H.R. REP. NO. 64-922, at 5 (1916)).

<sup>38</sup> *Id.*

<sup>39</sup> *New York Trust Co. v. Eisner*, 256 U.S. 345 (1921) (finding the estate tax of 1916 constitutional). Plaintiffs brought suit alleging the estate tax imposed by an Act of Congress on September 8, 1916, was unconstitutional because it was not uniformly applied. *Id.* at 346. The Court, relying on the analysis in *Knowlton*, found that the tax was imposed on the net estate of every decedent and did not interfere with the rights of the states to regulate descent and distribution. *Id.* at 350. Similarly, the tax had historically been considered not to be a direct tax, but an excise tax, and therefore equal application was not required. *Id.* at 349.

the federal gift tax.<sup>40</sup> The passage of the Tax Reform Act of 1976<sup>41</sup> established a unified transfer tax and credit system that integrated the tax rate schedules of the separate estate and gift taxes.<sup>42</sup> In 1976, Congress attempted, rather unsuccessfully,<sup>43</sup> to address further taxpayer avoidance with the enactment of the generation-skipping tax.<sup>44</sup>

Major changes occurred again when the Economic Recovery Tax Act of 1981<sup>45</sup> was passed under the direction of President Reagan.<sup>46</sup> Most significantly, the law included an unlimited marital deduction for both the estate and gift taxes, which treat a married couple as a single person for transfer tax purposes.<sup>47</sup> In addition, the gift tax annual exclusion was raised to \$10,000 per individual, per year.<sup>48</sup> Finally, an increase in the wealth transfer credit created an exemption for all estates, in the amount of \$600,000.<sup>49</sup> Together, these changes decreased the long-term revenue of the transfer taxes by two-thirds.<sup>50</sup>

### *B. Economic Growth and Tax Relief Reconciliation Act of 2001*

The most recent changes to the estate tax, which this Note addresses, occurred with the enactment of President Bush's Economic Growth and Tax

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<sup>40</sup> See Silberstein, *supra* note 13, at 60 (noting the emergence of the gift tax and the state estate tax credit) (citing JOHN K. McNULTY, FEDERAL ESTATE AND GIFT TAXATION 4 (5th ed., 1994)). When the 1916 estate tax was enacted, many states did not have their own estate or transfer taxes, causing taxpayers to change their domiciles to avoid paying a "double tax," paying both state and federal estate taxes. The federal credit for state death transfer taxes allowed taxpayers to subtract any state estate taxes paid from their federal estate taxes. The gift tax was designed to prevent taxpayer avoidance of the death taxes by taxing any transfers made during life so that taxpayers would not deliberately decrease their estates before death. *Id.*

<sup>41</sup> Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976).

<sup>42</sup> See Silberstein, *supra* note 13, at 60 (discussing the unification of the transfer tax and credit system).

<sup>43</sup> Congress had enacted a generation-skipping tax designed to prevent taxpayers from escaping the estate tax by leaving assets to beneficiaries more than one generation below them. This tax proved to be cumbersome and complicated, and was repealed retroactively. The generation tax was eventually successfully revised in the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

<sup>44</sup> See Silberstein, *supra* note 13, at 61 (noting the first emergence of the generation skipping tax). Generation skipping occurs when an individual creates a trust that benefits an individual more than one generation below (or 37.5 years younger) than the donor. Without a generation skipping tax, such a gift would escape estate taxes which are designed to tax assets passing from one generation to the next.

<sup>45</sup> Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (1981).

<sup>46</sup> See Silberstein, *supra* note 13, at 61 (discussing the changes to the tax that occurred in the 1980s).

<sup>47</sup> See *id.* (explaining that this change allowed for transfer between spouses to occur without generating any tax liability) (citing JOHN K. McNULTY, FEDERAL ESTATE AND GIFT TAXATION 9 (5th ed., 1994)).

<sup>48</sup> *Id.* I.R.C. § 2503(b).

<sup>49</sup> *Id.*

<sup>50</sup> Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 262 (1983).



Relief Reconciliation Act of 2001 (EGTRRA).<sup>51</sup> The Act leads to a one year "repeal" of the estate tax that is accomplished through periodic increases in the applicable exclusion amount, as well as reductions in the marginal tax rate.<sup>52</sup> The applicable exclusion amount will increase in stages until 2009, and the marginal tax rate will decrease until 2007, at which point it will remain steady at 45 percent.<sup>53</sup> In addition, beginning in 2005, instead of the current state death credit, there is a deduction from the federal estate tax for any state-imposed estate taxes paid by the taxpayer.<sup>54</sup> Eventually, the tax will be eliminated altogether for the 2010 tax year.<sup>55</sup> However, the Act includes a "sunset" provision, which repeals all provisions of the EGTRRA after December 31, 2010.<sup>56</sup> As a result, if Congress does not enact any new laws, the applicable exclusion amount and marginal tax rates will return to their 2002 levels, \$1 million<sup>57</sup> and 55 percent, respectively.<sup>58</sup>

Currently, the debate centers over the issue of whether or not Congress should permanently repeal the estate tax. As this Note shows, however, the repeal of the estate tax will not only have negative effects on the distribution of wealth across the nation, but, by allowing for concentrations of wealth to form and increase, will also disproportionately burden the nation's black population, which is already disproportionately poor.<sup>59</sup>

### C. Policy Rationale Behind the Creation and Evolution of the Estate Tax

At its inception, the estate tax was established to generate revenue for the government's war expenditures. When the need for the additional

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<sup>51</sup> Pub. L. No. 107-16, 115 Stat 38 (2001).

<sup>52</sup> EGTRRA, §§ 511(c)(2)(B), 521(a) (codified at I.R.C. §§ 2001(c)(1)-(2), 2010(c)).

<sup>53</sup> *Id.* Illustrated in the following table:

Year	Applicable Exclusion Amount	Top Marginal Rate*
2002	\$1,000,000	50%
2003	\$1,000,000	49%
2004	\$1,500,000	48%
2005	\$1,500,000	47%
2006	\$2,000,000	46%
2007	\$2,000,000	45%
2008	\$2,000,000	45%
2009	\$3,500,000	45%

\*applicable to taxable estates in excess of \$2,500,000

<sup>54</sup> EGTRRA, § 532(db) (codified at I.R.C. § 2058).

<sup>55</sup> EGTRRA, § 901 (codified at I.R.C. § 2664).

<sup>56</sup> *Id.*

<sup>57</sup> As adjusted for inflation prior to 2002 Amendment to I.R.C.

<sup>58</sup> EGTRRA, § 901(b).

<sup>59</sup> See Spencer Overton, *But Some Are More Equal: Race, Exclusion, and Campaign Finance*, 80 TEX. L. REV. 987, 1009 (2002) (discussing the disproportion in income and wealth between white and black households).

revenue ceased, the tax was repealed.<sup>60</sup> It was only in the 1800s that the idea of using the tax to allow for a redistribution of the nation's wealth emerged. Andrew Carnegie led this movement, declaring that at least half of a "rich man's estate" should be taken in taxes in order to prevent that man's heirs from using his inheritance as an excuse not to work or contribute to society.<sup>61</sup>

In 1906, President Theodore Roosevelt brought this concept into the heart of the political forum, proposing a "radical death duty for the purposes of improving the distribution of the tax burden, producing revenue, and preserving equality of opportunity."<sup>62</sup> In 1916, a progressive estate tax was imposed in response to the harmful social effects of wealth concentration.<sup>63</sup> Even today, many believe that wealth concentration is "detrimental to the nation's long term economic growth" and gives affluent members of society a disproportionately large political voice.<sup>64</sup>

President Franklin Roosevelt greatly feared the negative effects generated by concentrations of wealth and, in 1935, he recommended large and progressive estate taxes to regulate the wealth of a few for the benefit of the many.<sup>65</sup> Today, the estate tax is designed to accomplish three primary goals: (1) reduce the concentrations wealth in the United States; (2) produce revenue; and (3) increase the progressiveness of the national tax system.<sup>66</sup> The proposed repeal of the estate tax would significantly and negatively affect each of these goals.

### *III. Effects of the Proposed Repeal*

#### *A. Reducing Concentrations of Wealth*

The concentration of wealth in the nation's elite is far from the ideal of liberty and equality for all upon which our nation was founded. Wealth concentration has been an enduring characteristic of the nation's economic

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<sup>60</sup> Silberstein, *supra* note 13, at 61.

<sup>61</sup> *Id.*; see also McCoy, *supra* note 27, at 70 (providing background on the current estate tax).

<sup>62</sup> Silberstein, *supra* note 13, at 61; see also McCoy, *supra* note 27, at 70 (discussing the viewpoints of historical supporters of the estate tax).

<sup>63</sup> James R. Repetti, *Democracy, Taxes and Wealth*, 76 N.Y.U. L. REV. 825, 825 (2001).

<sup>64</sup> *Id.* at 827, 843 (noting evidence of the effects of wealth on economic growth and arguing that wealth provides additional access to political officials and candidates); see also Martin J. McMahon, Jr., *The Matthew Effect and Federal Taxation*, 45 B.C. L. REV. 993, 997 (2004) (noting that there is a "rapidly growing body of economic literature supporting the thesis that economic inequality impedes, rather than fosters, economic growth. Thus, not only do the tax cuts not spur economic growth, but because they increase inequality, they probably impede economic growth.").

<sup>65</sup> Eisenstein, *supra* note 23, at 235.

<sup>66</sup> *Id.* at 231, 235-36.

landscape since the beginning of the twentieth century.<sup>67</sup> The top 1 percent of the nation's wealth-holders has consistently held 30 percent of total household sector wealth. Since the early 1920s, the same group has held almost 40 percent of net worth and, in the late 1980s and 1990s, it held nearly half of all financial assets.<sup>68</sup> The wealthiest of the top 1 percent of society increased their holdings from 37.4 percent of total wealth in 1989 to 38.5 percent in 1995.<sup>69</sup> Furthermore, studies of wealth mobility have shown that upward movement is rare, and in the 1980s and 1990s, two-thirds of all financial wealth increases were among those in the top 1 percent. At the same time, there was little to no movement into the top sectors of the wealth distribution by those from lower wealth divisions.<sup>70</sup> These disparities are disturbing in large part because wealth provides avenues for success in society. Wealth represents one of the critical resources "available for improving life chances, providing future opportunities, securing prestige, passing status along to one's family, and influencing the political process."<sup>71</sup>

These drastic differences in wealth distribution are not new and have not gone unnoticed. Both Theodore and Franklin Roosevelt hailed the estate tax as a political measure that would reduce large concentrations of wealth that are dangerous to the health and stability of the nation because they reduce long-run economic performance.<sup>72</sup> The correlation between wealth concentration and poor national economic performance over time has been well documented.<sup>73</sup> Wealth concentration creates educational disadvantages

<sup>67</sup> See Lisa A. Keister & Stephanie Moller, *Wealth Inequality in the United States*, 26 ANN. REV. SOC. 63 (2000) (explaining that the nation's wealth is highly concentrated and has been held by the same families for generations).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 69.

<sup>70</sup> *Id.* at 63.

<sup>71</sup> See Overton, *supra* note 59, at 1008 (discussing the importance of wealth in moving through the ranks of society) (quoting MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 581 (1995)); see also DALTON CONLEY, *BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA*, 42-53 (1999) (claiming that a large number of racial inequalities result from the disparities in generational family wealth).

<sup>72</sup> See Charles Davenport & Jay A. Soled, *Professors Discuss Details of Enlivening the "Death Tax"*, 84 TAX NOTES TODAY, July 26, 1999, at 591, 598, available at LEXIS, 1999 TNT (noting that even early proponents of the estate tax cited reducing concentrations of wealth as a goal); see also Sarah E. Waldeck, *An Appeal to Charity: Using Philanthropy to Revitalize the Estate Tax*, 24 VA. TAX REV. 667, 676-77 (2005) (citing RONALD CHESTER, *INHERITANCE, WEALTH AND SOCIETY*, 60 (1982) (quoting Theodore Roosevelt, Speech at the House of Representatives Office Site (Apr. 14, 1906)) (discussing Theodore Roosevelt's first suggestion of an inheritance tax in 1906 "so framed as to put it out of the power of the owner of one of these enormous fortunes to hand more than certain amount to any one individual").

<sup>73</sup> See Repetti, *supra* note 63, at 831-32 ("A survey of . . . studies stated: '[S]everal studies have examined the impact of inequality upon economic growth. The picture they draw is impressively unambiguous, since they all suggest that greater inequality reduces the rate of growth.'" (citing Philippe Aghion et al., *Inequality and Economic Growth: The Perspective of the New Growth Theories*, 37 J. ECON. LIT. 1615, 1617 (1999))); see also Waldeck, *supra* note 72, at 677 (noting that recent economic

for the poor, increases social malaise, and harms the democratic process by providing the wealthy with too much power.<sup>74</sup> John Rawls, a modern philosopher, supports the estate tax, claiming it will "gradually and continually...correct the distribution of wealth and...prevent concentrations of power detrimental to the fair value of political liberty and fair equality of opportunity."<sup>75</sup> Because society contributes to the creation of income and wealth, it is only fair that federal taxation should be able to help decrease inequalities in wealth.<sup>76</sup> While the estate tax has largely failed to break up the targeted wealth concentration in the nation significantly,<sup>77</sup> scholars such as Charles Davenport and Jay Soled point out that "[t]hese [existing] great concentrations of wealth prove only that the tax has not been as effective as it might have been. [It is unknown] whether they would have been greater, or lesser, if the estate tax had not existed."<sup>78</sup>

While it may be true that wealth concentration continues to exist, repeal of the estate tax would affect the degree of concentration. Without further checks, it is likely that wealth concentration will sharpen, and that this wealth will be used to create more wealth throughout generations.<sup>79</sup> Society is structured to permit the affluent to buy hugely disproportionate political influence by financing campaigns and supporting causes.<sup>80</sup> While

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studies have been unanimous in finding that high wealth concentration correlates with poor economic performance).

<sup>74</sup> See Repetti, *supra* note 63, at 827 (explaining the factors that cause wealth concentration to harm economic performance); see also Debra Lyn Basset, *The Politics of the Rural Vote*, 35 ARIZ. ST. L.J. 743, 744 (2003) (indicating that concentrated wealth allows certain individuals to possess more political influence and power than others).

<sup>75</sup> Repetti, *supra* note 63, at 829 (citing JOHN RAWLS, A THEORY OF JUSTICE 227 (1971)).

<sup>76</sup> See John G. Steinkamp, *A Case for Federal Transfer Taxation*, 55 ARK. L. REV. 1, 84 (2002) (arguing that inherited economic power is inconsistent with the country's ideals).

<sup>77</sup> Davenport & Soled, *supra* note 72, at 591, 598.

<sup>78</sup> *Id.* at 598–99; see also Waldeck, *supra* note 72, at 683 (citing John Laitner, *Inequality and Wealth Accumulation: Eliminating the Federal Gift and Estate Tax*, in RETHINKING ESTATE AND GIFT TAXATION 258, 279 (William G. Gale et al. eds., 2001) (showing that "repealing the estate tax would lead to a 32 percent increase in the share of wealth held by the wealthiest 1 percent of asset-holders"); Lisa A. Keister, *Repealing the Estate Tax: A Recipe for More Inequality?*, CONTEXTS MAGAZINE, Winter 2003, at 47 (adding that if Congress had not increased the estate tax cutoff in 1980, "the top 20 percent would have held 73 percent instead of 83 percent of the national wealth," and "the share of wealth owned by middle-class and poor families would have increased"). Factors other than the estate tax may have contributed to increasing wealth inequality in recent decades—assets owned by the wealthy have appreciated rapidly, while lower class wages have failed to keep up. *Id.* Therefore, "it is really no surprise that wealth inequality has grown. But perhaps the estate tax prevented more dramatic increases." *Id.*

<sup>79</sup> See Waldeck, *supra* note 72, at 683 (citing Laitner, *supra* note 78, at 279 (showing that "repealing the estate tax would lead to a 32 percent increase in the share of wealth held by the wealthiest 1 percent of asset-holders").

<sup>80</sup> See Richard Schmalbeck, *Does the Death Tax Deserve the Death Penalty? An Overview of the Major Arguments for Repeal of Federal Wealth-Transfer Taxes*, 48 CLEV. ST. L. REV. 749, 753 (2000) ("[F]ree speech considerations have made it difficult to constrain the ability of the wealthy to use their wealth to influence the outcome of political contests."); see also Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 88 (2004) ("While voters

there are statutory limitations designed to combat this problem, in reality it is easy to circumvent the contribution caps. As a result, the large majority of the individuals who make contributions to political causes and campaigns are "well-to-do."<sup>81</sup> In 2002, 0.22 percent of the voting-age population contributed 76 percent of the funds given to federal candidates by individuals.<sup>82</sup> Candidates and political officers are more likely to cater to individuals with greater wealth, and money wins elections.<sup>83</sup> Furthermore, the wealthy have greater access to elected officials than others, and thus greater access to the legislative process.<sup>84</sup> Wealthy donors are able to give large contributions to fund American politics and determine which candidates will be successful.<sup>85</sup> Inherited wealth is especially dangerous because it magnifies the effects of wealth on the political process.<sup>86</sup> When wealth is simply passed from generation to generation, it is less likely that new perspectives or ideas will be brought to the political agenda.<sup>87</sup> A high concentration of wealth undermines the strength of democracy by denying all participants an equal voice.<sup>88</sup> As a result of disparities in resources, a small, homogenous, wealthy group donates contributions that comprise almost all of American political funding, and disparities in the distribution of the

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make decisions in the voting booth, money often plays a critical role in the agenda-setting and persuasion that precede election day.").

<sup>81</sup> See Repetti, *supra* note 63, at 845 (citing statistical data that shows that the vast majority of political contributions come from families with incomes over \$100,000 per year); see also Basset, *supra* note 74, at 744 (noting that 81% of political donors have annual incomes of over \$100,000).

<sup>82</sup> Overton, *supra* note 80, at 105.

<sup>83</sup> See *id.* at 89 ("[Contributors] often give their contributions with the hope of purchasing special access and influence during legislative deliberation."); see also Mark C. Alexander, *Money in Political Campaigns and Modern Vote Dilution*, 23 LAW & INEQ. 239, 244 (2005) (stating that "the wealthy have special access and influence; power is concentrated in the hands of the few who control money. After the campaigns, the wealthy wield inordinate power, enjoying access to elected officials that others do not.").

<sup>84</sup> See Repetti, *supra* note 63, at 847 (explaining how access granted by wealth leads to political influence). In *Buckley v. Valeo*, 424 U.S. 1, (1976), the Supreme Court found that spending money is akin to political speech because it is so closely connected to effective political communication.

<sup>85</sup> See Overton, *supra* note 80, at 105 (indicating that financial contributions are often the primary factor in determining the success of political candidates and in setting their agendas once they are elected); see also Alexander, *supra* note 83, at 245 ("Accordingly, power, access, and attention flow to people based on their access to money instead of the people represented, constituency spoken for, or ideology espoused.").

<sup>86</sup> See Repetti, *supra* note 63, at 850 (noting that inherited wealth allows for the proliferation of similar political ideas); see also Alexander, *supra* note 83, at 255 ("As a result of well-placed campaign contributions, the few have many members of Congress working for them, while the many see their power diluted.").

<sup>87</sup> Repetti, *supra* note 63, at 850; see also *Buckley v. Valeo*, 424 U.S. 1, 22 (1976) (finding that contributions permit "like-minded persons to pool their resources in furtherance of common political goals.").

<sup>88</sup> See Repetti, *supra* note 63, at 840 (noting the effect of political contributions on democracy); see also Alexander, *supra* note 83, at 244 (noting that Equal Protection requires equality of participation in the political process).

nation's wealth lead to disparities in political participation.<sup>89</sup> In 1998, blacks represented 30 percent of the national population, but only 1 percent of those who made political contributions to federal campaigns.<sup>90</sup> Even individuals elected in districts that are primarily inhabited by black residents get the majority of their contributions from whites.<sup>91</sup> Repealing the estate tax will only permit concentrations of wealth to strengthen, allowing wealthy persons to pass even more assets along to their descendents, increasing the property held by the wealthiest sector of society, and in turn increasing the political power these individuals may wield.<sup>92</sup>

The bottom line is that the greater the percentage of the nation's wealth that is held in the hands of a small number of families, the greater the degree of wealth inequality.<sup>93</sup> "Wealth concentration can create pressure on democratic institutions, especially within the framework of the American democracy, where free speech considerations have made it difficult to constrain the ability of the wealthy to use their wealth to influence the outcome of political contests."<sup>94</sup> Because bequests and gifts represent about 50 percent of all wealth accumulation in the country, a recent study has found that eliminating the estate tax would increase the richest one percent's share of the nation's wealth by 20 percent.<sup>95</sup> This would only exacerbate the inequalities that plague our democracy today, as inherited wealth provides "subsequent generations with incredible economic and political advantages not afforded the masses."<sup>96</sup> While wealth concentration may exist under the current estate tax, its repeal would only worsen the harmful division of the nation's assets, widening the chasm between the poor and the wealthy.

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<sup>89</sup> See Overton, *supra* note 80, at 74–75 (suggesting that financial resources instead of political interest determine the class of political contributors); see also Basset, *supra* note 74, at 744 (noting that 95% of political donors are white, 80% are men, and 80% are over the age of 45).

<sup>90</sup> See Spencer Overton, *Racial Disparities and the Political Function of Property*, 49 UCLA L. REV. 1553, 1554 (2002) (citing a study done by The Joyce Foundation indicating that in a survey of individuals who contributed more than \$200 to political campaigns, less than 1% were black, while 95% were white).

<sup>91</sup> See Overton, *supra* note 90, at 1569 (noting the lack of political contributions from blacks) (citing ROBERT SIGNH, *THE CONGRESSIONAL BLACK CAUCUS: RACIAL POLITICS IN THE U.S. CONGRESS* 125–26 (1998)).

<sup>92</sup> See Keister, *supra* note 78 at 45 ("When wealth ownership becomes more concentrated, the benefits of wealth are enjoyed by fewer and fewer people. The wealthy gain more control of major institutions, while those with little or no wealth lose control . . .").

<sup>93</sup> See Schmalbeck, *supra* note 80, at 752–53 (pointing out the correlation between concentration of wealth and inequality).

<sup>94</sup> *Id.* at 753.

<sup>95</sup> Repetti, *supra* note 63, at 856 (citing John Laitner, *Simulating the Effects on Inequality and Wealth Accumulation of Eliminating the Federal Gift and Estate Tax 2* (Apr. 17, 2000) (unpublished manuscript, on file with the New York University Law Review)).

<sup>96</sup> Steinkamp, *supra* note 76, at 74.

### B. Raising Revenue

Historically, the estate tax met its original primary goal of generating revenue. In 1934, transfer tax revenues were 27 percent of individual income tax revenues, and in 1936 more than 56 percent of income taxes were derived from transfer taxes.<sup>97</sup> While currently transfer taxes compose a mere 1.2 percent of total tax receipts,<sup>98</sup> yielding \$24.1 billion in 2004,<sup>99</sup> they are significant enough that their elimination or reduction would force some fiscal offset: other taxes would have to be raised; other taxes could not be cut; borrowing would be greater; or spending would have to be slashed.<sup>100</sup> In addition, these revenue values have a strong potential to increase with time due to stock market potential and increases in inter-generational transfers as the baby boom generation gets older.<sup>101</sup> Regardless of one's political or ideological position on government spending, the loss of the revenue generated by the current estate tax will cause fiscal constraints.<sup>102</sup>

EGTRRA will cost an estimated \$138 billion between 2001 and 2011.<sup>103</sup> The Joint Committee on Taxation estimates that permanent repeal of the estate tax as of 2010 would reduce revenues by at least \$270 billion through fiscal year 2015,<sup>104</sup> and Congressional Budget Office projections estimate that by 2014 annual revenue losses of more than \$60 billion will result if repeal is permanent.<sup>105</sup> The Center on Budget and Policy Priorities has determined that repealing the estate tax would "add trillions of dollars to future deficits."<sup>106</sup> The Center estimates that repealing the estate tax would cost \$1 trillion dollars over the period between 2012 and 2021, including

<sup>97</sup> Krisanne Schlachter, Note, *Repeal of the Federal Estate and Gift Tax: Will it Happen and How Will It Affect Our Progressive Tax System?*, 19 VA. TAX REV. 781, 789 (2000).

<sup>98</sup> GRAVELLE & MAGUIRE, *supra* note 15, at 1.

<sup>99</sup> *Id.*

<sup>100</sup> See Davenport & Soled, *supra* note 72, at 591, 593 ("[E]limination or reduction [of the estate taxes] would force some fiscal offset. . ."); see also GRAVELLE & MAGUIRE, *supra* note 15, at 1 (noting that one tax cannot be cut without causing a change in the overall system).

<sup>101</sup> GRAVELLE & MAGUIRE, *supra* note 15, at 1.

<sup>102</sup> See Davenport & Soled, *supra* note 72, at 591, 593 ("The loss of transfer taxes would further constrain fiscal action whether one is desirous of less government spending, the same, or more government spending."); see also Waldeck, *supra* note 72, at 692-93 ("[T]he vast majority of Americans should favor the tax; in its absence, individual tax burdens will increase, or government [benefits] will be curtailed.").

<sup>103</sup> GRAETZ & SHAPIRO, *supra* note 5, at 201

<sup>104</sup> Leonard E. Burman, William G. Gale & Jeffrey Rohaly, *Options to Reform the Estate Tax*, TAX POLICY ISSUES AND OPTIONS (Urban-Brookings Tax Policy Center, D.C.), March 2005, at 5; see also GRAVELLE & MAGUIRE, *supra* note 15, at 1 (noting a cost of \$290 billion over the 2006-2015 budget window: \$9.1 billion over 2006 to 2010, and \$280.9 billion over 2011 to 2015).

<sup>105</sup> Karen C. Burke & Grayson M.P. McCouch, *Estate Tax Repeal and the Budget Process*, TAX NOTES TODAY, Sept. 6, 2004, at 1049, 1051, available at LEXIS, 2004 TNT (citing CONGRESSIONAL BUDGET OFFICE, ANALYSIS OF THE PRESIDENT'S BUDGETARY PROPOSALS FOR FISCAL YEAR 2005 11 (Mar. 2004)).

<sup>106</sup> MYTHS AND REALITIES, *supra* note 8.

\$745 billion in lost revenue and \$225 billion in increased interest payments on the national debt.<sup>107</sup>

Repealing the estate tax would likely result in greater government borrowing to make up for the decrease in government revenues, increasing the government deficit,<sup>108</sup> and decreasing capital that would otherwise be available for investment in the economy.<sup>109</sup> All of this would come at the same time the government is already making huge cuts in government spending.<sup>110</sup> Federal discretionary spending is currently being cut, while domestic programs are fighting for limited resources with increasing military spending and homeland security costs.<sup>111</sup> Without the federal and state revenue generated by the estate tax, the effects of cuts in programs designed to help low-income and vulnerable families will be worsened.<sup>112</sup> For example, the budget proposal for Fiscal Year 2007 provides no new money for Title I funding for poverty aid to school districts, does not increase federal Pell Grants,<sup>113</sup> and eliminates 42 programs, including parent-resource centers and vocational programs targeted at the poor.<sup>114</sup> The Department of Housing and Urban Development received similar cuts, slashing funds for the Community Development Block Grants Fund by 20 percent, a program whose budget is used for affordable housing in needy areas, among other things.<sup>115</sup> These budget cuts weigh heavily on programs designed to help the poor, a group that is disproportionately black, and therefore are likely to unfairly burden this minority population.

Further, the current values of revenue derived from the estate tax must be put in context. The estate tax generates 1.4 percent of total tax receipts, a seemingly paltry number. While it appears that the estate tax's contribution to government revenues could easily be eliminated, the revenue loss will have an effect. The tax expenditure budget for 2001 shows estate tax revenues in 2001 were approximately \$30 billion. As a consequence of

<sup>107</sup> *Id.* The reason for the discrepancies between this figure and the one proposed by the Joint Committee is that those estimates cover only four years of the repeal.

<sup>108</sup> *See id.* (noting repercussion of repeal on the nation's economy).

<sup>109</sup> *Id.*

<sup>110</sup> *See* GARY D. BASS & JOHN S. IRONS, OMB WATCH, THE ESTATE TAX AND CHARITABLE GIVING 3 (2003) (discussing current government overspending).

<sup>111</sup> *Id.*; *see also* *FY 2007 Budget Proposal: Agency-by-Agency Breakdown, Domestic Programs Take Hit*, WASH. POST, Feb. 7, 2006, at A19 [hereinafter *FY 2007 Budget Proposal*] ("The \$2.77 trillion budget plan President Bush sent to Congress yesterday emphasizes spending on the country's fight against terrorism, while deeply cutting domestic programs to deal with a budget deficit projected to reach an all-time high this year.").

<sup>112</sup> *Id.*

<sup>113</sup> A need-based financial aid program for college students.

<sup>114</sup> *See* Lois Romano, *FY 2007 Budget Proposal*, *supra* note 111 (discussing the specific budget provisions for education).

<sup>115</sup> *See* Zachary A. Goldfarb, *FY 2007 Budget Proposal*, *supra* note 111 (summarizing the budget for the Department of Housing and Urban Development).



homeowners' ability to deduct their state and local property taxes, the government lost \$23.1 billion in fiscal year 2001.<sup>116</sup> Similarly, because it imposes only a partial tax on social security benefits, the government lost \$25.8 billion in revenues the same year.<sup>117</sup> If the estate tax were permanently repealed, the lost revenues could easily be replaced by eliminating the homeowner's deduction or taxing social security benefits, but the public is unlikely to support such measures.<sup>118</sup> Taxpayers view the homeowner's deduction and social security benefits as essential parts of the tax structure. It is unlikely they would be willing to sacrifice them for the benefit of millionaires.

### *C. Progressivity: Who Pays the Estate Tax?*

Not only do transfer taxes raise revenue, but they raise revenue from those who have the ability to pay.<sup>119</sup> A progressive tax system places larger societal costs on those who receive the most and benefit the most from our society.<sup>120</sup> The estate tax is very progressive,<sup>121</sup> as taxpayers in the highest 10 percent income bracket pay almost all of it.<sup>122</sup> Despite the fact that taxpayers with substantial resources are able to hire professionals to help them avoid taxes and exploit any loopholes in the system, almost 99 percent of the tax is paid by the top 5 percent, and over one-third is paid by the richest 1 in 1,000.<sup>123</sup> In 2004, only 1.3 percent of 2.4 million decedents paid any estate tax.<sup>124</sup> Further, estates over \$5 million made up 11.5 percent of taxable estates, but contributed 51 percent of the estate tax revenues in 2004.<sup>125</sup> The reason for this is the high applicable exclusion amount. In 2006, the applicable exclusion amount is \$2 million; therefore, only estates composed of more than \$2 million dollars worth of assets will be subject to the tax. Those with estates over \$2 million represent only a small proportion

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<sup>116</sup> Schmalbeck, *supra* note 80, at 762–63.

<sup>117</sup> *Id.* If the government were to fully tax taxpayer Social Security benefits, it could recoup an additional \$25.8 billion in revenues.

<sup>118</sup> See Mark Schwanhauser, *Dreaded Tax Hitting More Americans*, BRADENTON HERALD, Feb. 19, 2006, at 1 (noting that one of Bush's tax advisory panel suggested cutting mortgage interest deductions in order to make up for tax cuts, and that the suggestion was met with immediate outrage from homeowners).

<sup>119</sup> See Davenport & Soled, *supra* note 72, at 591, 597 (noting the progressivity of the estate tax); see also Waldeck, *supra* note 72, at 684 (noting the estate tax has the ability to contribute to the progressivity of the nation's tax system).

<sup>120</sup> See Davenport & Soled, *supra* note 72, at 598 (explaining what progressivity means).

<sup>121</sup> The term "progressive" means that the rate of the tax increases as the total amount taxable increases.

<sup>122</sup> Burman et al., *supra* note 104, at 2.

<sup>123</sup> *Id.*

<sup>124</sup> GRAVELLE & MAGUIRE, *supra* note 15, at 9.

<sup>125</sup> *Id.* at 10.

of society, showing that most of the large majority that has been encouraged to despise the estate tax has little reason to fear actually paying it.<sup>126</sup> In fact, the average size of inheritances is expected to reach only \$99,000 in 2015, well below the \$1 million exemption that would be in place if repeal were not made permanent and the sunset provision of EGTRRA came into effect.<sup>127</sup>

The estate tax is by far the most progressive of any of the federal taxes.<sup>128</sup> Of the approximately 2.3 million deaths per year, only 1.9 percent of estates pay any estate tax, and only 4.3 percent file a return at all.<sup>129</sup> As stated, approximately 99 percent of estates pay \$0 in estate taxes.<sup>130</sup> Additionally, for the few estates that do pay the estate tax, the effective tax rate (the percentage of the estate paid in taxes) is far less than the top estate tax rate.<sup>131</sup> For example, in 2004, the effective tax rate averaged only about 19 percent, while the top estate tax rate imposed was 50 percent.<sup>132</sup> The effective tax rate is so much lower than the marginal rate, as previously stated, because taxes are only imposed on the amount of the estate that exceeds the exemption level.<sup>133</sup> The increasingly large exemption amount results in a decreasing effective tax rate. Therefore, unable to escape the taxes despite their many tax advisors, only the richest of the rich, the top 1 percent, pay estate taxes that represent a figure anywhere near a significant portion of their estates.<sup>134</sup> By the time the exemption level reaches the maximum amount in 2009, \$3.5 million, only 3 in 1000 decedents will have an estate large enough to be taxed—hence the nickname for bills proposing estate tax repeal: the "Paris Hilton tax cut."<sup>135</sup> However, the problem is that "polls routinely show that some 20 percent of the American population

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<sup>126</sup> Davenport & Soled, *supra* note 72, at 591, 595–96 (citing DAN MILLER, THE ECONOMICS OF THE ESTATE TAX 9 (Joint Economic Committee 1998)).

<sup>127</sup> GRAETZ & SHAPIRO, *supra* note 5, at 95.

<sup>128</sup> See Brian Roach, *Progressive and Regressive Taxation in the United States: Who's Really Paying (and Not Paying) their Fair Share?* 7, 16 (Global Dev. and Env't Inst., Tufts University, Working Paper No. 03-10, 2003), available at [http://www.ase.tufts.edu/gdae/Pubs/wp/03-10-Tax\\_Incidence.pdf](http://www.ase.tufts.edu/gdae/Pubs/wp/03-10-Tax_Incidence.pdf) (evaluating the degree of progressivity of each of the nation's federal taxes); see also Jane G. Gravelle & Steven Maguire, *Estate and Gift Taxes: Economic Issues*, TAX NOTES TODAY, July 24, 2000, at 551, 555, available at LEXIS, 2000 TNT (discussing the vertical equity of the tax); see also Graetz, *supra* note 50, at 272 (claiming that the estate tax is responsible for one-third of the progressivity of the federal tax system).

<sup>129</sup> Gravelle & Maguire, *supra* note 128, at 551, 555 (using statistics from 1999).

<sup>130</sup> MYTHS AND REALITIES, *supra* note 8, at 1.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 2.

<sup>134</sup> MYTHS AND REALITIES, *supra* note 8, at 1.

<sup>135</sup> *Id.*; see also INDEPENDENT SECTOR, ESTATE TAX FACT SHEET 2 (2005), <http://edinonline.org/programs/gr/EstateTaxFactSheet.pdf> [hereinafter INDEPENDENT SECTOR] ("[I]f the estate tax is retained at its 2009 levels, only 0.3 percent of all persons who die that year would be subject to the tax.").

believe that they are in the top 1 percent, and another 20 percent believe that they will soon reach that echelon."<sup>136</sup>

If the estate tax were to be removed, all of the progressivity in the country's tax system would be derived solely from the nation's income tax.<sup>137</sup> Because realized rates of return fall as wealth increases,<sup>138</sup> the income tax does not properly tax the wealth that creates the taxed income, and the income tax alone will not be able to maintain the progressivity of the nation's federal tax system.<sup>139</sup> Consequently, the estate tax is not only a significant part of the progressivity of the nation's tax system, but also necessary if the nation intends to keep the tax system progressive and reflective of the nation's value of equal opportunity for all.

#### D. On States

As previously indicated, § 2011 of the Internal Revenue Code allowed a federal estate tax credit for any estate tax paid to a state government.<sup>140</sup> The credit had been a fixture in the federal estate tax since 1926.<sup>141</sup> At that time the federal government was considering either reducing estate tax rates or repealing the tax altogether because the government no longer needed the revenues to fund World War I.<sup>142</sup> At the same time, the states were looking for ways to diminish the competition that had begun to arise between the states to attract wealthy residents.<sup>143</sup> In addition, the states had always made better use of the revenues from the tax than the federal

<sup>136</sup> GRAETZ & SHAPIRO, *supra* note 5, at 96.

<sup>137</sup> See Graetz, *supra* note 50, at 272–73 (discussing the need for the estate tax in order to maintain a progressive tax system); see also Roach, *supra* note 128, at 7, 16 (noting that aside from the estate tax, the nation's only other progressive taxes are corporate and personal income taxes).

<sup>138</sup> See C. EUGENE STEUERLE, U.S. DEPARTMENT OF THE TREASURY, OTA PAPER 50: THE RELATIONSHIP BETWEEN REALIZED INCOME AND WEALTH, (1982) (looking at reported or realized income relative to the value of assets). Realized income is generally in the form of a direct cash flow from the underlying assets, while unrealized income is in the form of appreciation of the value of assets. Because the federal income tax is a tax on realized income, the wealthy, who generally hold a larger percentage of their assets, rather than earn them on a yearly basis, pay a lower percentage of income taxes than those who might be less wealthy overall. Since a progressive tax should impose more tax on those who have more assets, the income tax lacks a certain degree of progressivity needed to maintain the overall progressivity of the federal tax system. *Id.*

<sup>139</sup> See Graetz, *supra* note 50, at 273 (explaining why the income tax alone cannot create a progressive tax system); see also Roach, *supra* note 128, at 7, 16 (demonstrating that without the extremely progressive estate tax, the nation's overall tax progressivity, which is currently only very slightly progressive, will swing up and become regressive).

<sup>140</sup> I.R.C. § 2011 (2005)

<sup>141</sup> See Oskar R. Harmon, *The Estate Tax: Repeal or Reform?*, TAX NOTES TODAY, June 18, 2001, at 2072, available at LEXIS, 2001 TNT (discussing the "compromise" legislation that led to today's estate tax) (citing *Repeal of Federal Estate Tax Would Have Effect on States*, FTA BULLETIN (Federation of Tax Administrators, D.C.), Feb. 22, 2001).

<sup>142</sup> *Id.* (citing FTA BULLETIN, *supra* note 141).

<sup>143</sup> *Id.*

government.<sup>144</sup> Therefore, the state death tax credit was established in 1926 to serve two goals: (1) to divert tax revenues from the federal government to the states, and (2) to halt the competition between the states by establishing a minimum combined federal and state estate tax rate.<sup>145</sup>

If a state imposed its own estate tax, the state death tax credit reduced the amount of the federal estate tax dollar for dollar with the state's tax, up to a certain limit.<sup>146</sup> The state death tax credit was designed to be the largest amount possible without increasing the estate's total tax burden.<sup>147</sup> Essentially, "[t]he state tax act[ed] as a 'pick-up' or 'sponge' tax, [by] merely imposing tax[es] up to the amount of the allowable federal credit, thereby shifting revenue from the federal government to the states."<sup>148</sup> The credit operated to make state death tax law more uniform, to reduce the state's administrative responsibility to collect and enforce state death taxes, and to minimize the costs of taxpayer compliance.<sup>149</sup> However, EGTRRA provisions phased out the state credit, reducing the amount of credit by 25 percent in 2002, 50 percent in 2003, and 75 percent in 2004.<sup>150</sup> As of 2005, a taxpayer is no longer given any state death tax credit. Instead, taxpayers are given a limited deduction for any state estate taxes paid. Some states have chosen not to—or been constitutionally prevented from<sup>151</sup>—enacting their own state death taxes.<sup>152</sup> Other states have passed laws to "decouple" the state estate tax from the federal system or to tie the state death tax system to pre-EGTRRA law.<sup>153</sup>

Several problems have resulted from the change and will worsen if repeal is made permanent. First, various legislative and administrative

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 2073 (citing FTA BULLETIN, *supra* note 141).

<sup>146</sup> I.R.C. § 2011 (2005).

<sup>147</sup> See KATHRYN G. HENKEL, ESTATE PLANNING AND WEALTH PRESERVATION 2–22 (Abridged Student ed., Warren, Gorham & Lamont of RIA 2003) (1998) (discussing estate tax credits as they apply to estate planning).

<sup>148</sup> Schlachter, *supra* note 97, at 799; see also TASK FORCE ON FEDERAL WEALTH TRANSFER TAXES, AM. BAR ASS'N, REPORT ON REFORM OF FEDERAL WEALTH TRANSFER TAXES 7 (2004) [hereinafter TASK FORCE] (explaining how the state death tax credit shifted revenue from state to the federal government in states using a pick-up tax).

<sup>149</sup> See TASK FORCE, *supra* note 149, at 8 (discussing the objectives of the original state death tax credit).

<sup>150</sup> EGTRRA, § 531(a)(1)-(3). The state death tax credit is replaced with a deduction under I.R.C. § 2058 (2005).

<sup>151</sup> NEV. CONST. art. X, § 1(7); FLA. CONST. art. VII, § 5(a). See, e.g., Steven D. Nofziger, Comment, *EGTRRA and the Past, Present, and Future of Oregon's Inheritance Tax System*, 84 OR. L. REV. 317, 325 (2005); Jonathan G. Blattmachr & Mitchell M. Gans, *Wealth Transfer Tax Repeal: Some Thoughts on Policy and Planning*, TAX NOTES TODAY, Jan. 15, 2001, at 393, available at LEXIS, 2001 TNT (citing the state constitutional provisions of Florida and Nevada that prohibit establishment of a state estate tax).

<sup>152</sup> See TASK FORCE, *supra* note 149, at 8 (looking at the effect of the elimination of the state death tax credit in 2005).

<sup>153</sup> *Id.*

requirements need to be put in place in each state to design and implement a new state estate tax.<sup>154</sup> States will be required to spend valuable legislative time and resources to implement new systems of inheritance taxation. For some states, implementing an estate tax is politically difficult, or even impossible—for example, the state constitutions of both Florida and Nevada prohibit the imposition of an estate tax.<sup>155</sup> Any amendment to the state's constitution to impose an estate tax would probably be unpopular and therefore unlikely. Second, the individual estate tax imposed in each state will create a level of competition between the states to have the lowest (or no) estate taxes, encouraging "state-shopping" by taxpayers.<sup>156</sup> Taxpayers, especially elderly taxpayers, would have an incentive to change their domicile in order to receive the most favorable tax treatment. Those individuals who are unable to move will be penalized for their domicile if the state in which they resided at the time of the repeal implements a hefty estate tax to make up for lost revenues. States are already beginning to have to cut their estate taxes in order to attract residents, creating a "race to the bottom" that will leave states with increasingly less or no revenue from estate taxes.<sup>157</sup> Over the ten-year lifespan of EGTRRA, it has been estimated that the states will lose more than \$50 billion in state estate tax revenue.<sup>158</sup> Without this revenue, states will be forced to cut spending or raise taxes in other areas. Similar to the effect on the reduction of revenue to the federal

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<sup>154</sup> See Jeffrey A. Cooper, John R. Ivimey & Donna D. Vincenti, *State Estate Taxes After EGTRRA: A Long Day's Journey Into Night*, 17 QUINNIPIAC PROB. L.J. 317, 324 (2004) (discussing the effect of EGTRRA on states' revenues, and the actions the states have taken in response); see also Harley Duncan, Federation of Tax Administrators, *State Responses to Estate Tax Changes Enacted as Part of the Economic Growth and Tax Relief Reconciliation Act of 2001*, (Oct. 24, 2002), <http://www.taxadmin.org/fta/rate/Estatetax.html> (laying out the effects of the EGTRRA on states and their responses to these changes).

<sup>155</sup> NEV. CONST. art. X, § 1(7); FLA. CONST. art VII, § 5(a). See, e.g., Nofziger, *supra* note 151, at 325; Blattmachr & Gans, *supra* note 151, at 393 (citing the state constitutional provisions of Florida and Nevada that prohibit establishment of a state estate tax).

<sup>156</sup> See Schlachter, *supra* note 97, at 800 (noting that state estate tax rates are likely to spark competition between states to bring in elderly residents); see also TASK FORCE, *supra* note 148, at 8 (pointing out that states will have little incentive to conform their estate tax rates to federal estate tax rates).

<sup>157</sup> See Cooper et al., *supra* note 154, at 332 (explaining that states with no estate tax will likely experience an influx of new residents). A "race to the bottom" means that residents in a state will be inclined to move to a state that has a lower estate tax rate if they have considerable assets to protect. Their current state will recognize this incentive, and lower its estate tax rate in order to compete with other states' rates. Eventually, this competition will bring states to eliminate their estate tax, and the corresponding revenues, in order to keep their residents. *Id.*; see also Dean L. Surkin, *The Impact of Decoupling of State Estate Taxes on a Taxpayer's Choice of Domicile*, 101 J. TAX'N 49, 49 (2004) (discussing the estate tax options for the residents of different states).

<sup>158</sup> Cooper et al., *supra* note 154, at 323; ELIZABETH C. MCNICHOL, IRIS J LAV & JOSEPH LLOBRERA, CTR. ON BUDGET AND POLICY PRIORITIES, STATES CAN RETAIN THEIR ESTATE TAXES EVEN AS THE FEDERAL ESTATE TAX IS PHASED OUT 1 (2003), available at <http://www.cbpp.org/1-31-02sfp.pdf>.

government, this most likely will hurt taxpayers less able to pay taxes than wealthy estate holders, a group that is disproportionately black.

### *E. On Charities*

The current estate tax law permits decedents to donate an unlimited amount of their estate to qualified charities and to deduct 100 percent of those donations from their gross estate. Essentially, taxpayers are often faced with a decision to leave money to the federal government in the form of taxes or to charity in the form of bequests.<sup>159</sup> The charitable deduction is the second largest type of deduction taken from the estate tax behind the unlimited marital deduction.<sup>160</sup> The deduction was based on the theory that the loss of revenue from taxes to the government would be balanced out by the decrease in the government's financial obligations for appropriations from public funds, as well as by the benefits to the nation's general welfare.<sup>161</sup> This deduction is most heavily utilized by the largest estates.<sup>162</sup> Estate tax returns in 2003 showed that estates valued at more than \$10 million were responsible for over half of charitable bequests, and estates valued at over \$5 million contributed more than two-thirds of all charitable bequests.<sup>163</sup> In 2004, estates filing returns donated 7.8 percent of their total assets to charities, with estates of \$20 million or greater donating 17.6 percent of their assets.<sup>164</sup> Because intergenerational transfers of wealth are likely to increase over time, charitable bequests should also increase,<sup>165</sup> but this will not be the case if the estate tax is permanently repealed.

Section 2055 of the Internal Revenue Code permits unlimited charitable bequests to be deducted from a decedent's taxable estate, causing the cost of charitable giving to decrease as estate tax rates increase.

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<sup>159</sup> See GRAETZ & SHAPIRO, *supra* note 5, at 170 (discussing William Gates' explanation of the risks repeal create for charities).

<sup>160</sup> Coalition for America's Priorities, *Get the Facts: The Estate Tax and Charitable Giving*, [http://www.psapoll.com/img/estate/etfs\\_6.htm](http://www.psapoll.com/img/estate/etfs_6.htm) (last visited Jan. 24, 2006).

<sup>161</sup> See Vada Waters Lindsey, *The Charitable Contribution Deduction: A Historical Review and a Look to the Future*, 81 NEB. L. REV. 1056, 1073 (2003) (explaining how charitable organizations are subsidized through tax incentives rather than direct government expenditures).

<sup>162</sup> See Burman et al., *supra* note 104, at 5 ("[T]hose with very large estates make the most bequests."); see also Waldeck, *supra* note 72, at 699 (noting that at every income level, the wealthier individuals make the larger annual contributions to charities).

<sup>163</sup> Burman et al., *supra* note 104, at 5. The same trend was true in FY2000. In that year, more than 70% of charitable bequests were from estates greater than \$3.5 million, more than 60% from estates larger than \$7 million, and more than 40% from estates larger than \$20 million. ROBERT MCCLELLAND & PAMELA GREENE, CONGRESSIONAL BUDGET OFFICE, *THE ESTATE TAX AND CHARITABLE GIVING 2-3* (2004).

<sup>164</sup> GRAVELLE & MAGUIRE, *supra* note 15, at 16.

<sup>165</sup> See BASS & IRONS, *supra* note 110, at 4 (demonstrating that evidence shows that between 1995 and 2001 charitable bequests almost doubled, from \$8.7 billion in 1995 to \$16.2 billion in 2001).

Essentially, repeal would put a heavy price tag on giving and would increase the amount of the after-tax wealth of the decedents.<sup>166</sup> A full repeal, which effectively reduces the estate tax rate to zero, increases the cost of giving to 100 percent of the amounts given.<sup>167</sup> Studies have shown that the cost of giving affects taxpayers, and that the tax rate is the single most significant incentive for charitable giving.<sup>168</sup> In 2003, returns filed demonstrated an 18.2 percent decrease in charitable giving from 2002, dropping from \$17.83 billion in 2002 to \$14.6 billion in 2003.<sup>169</sup> Among other contributing factors, this decline is the result of more wealthy individuals becoming exempt from the estate tax, which decreases their incentive to give.<sup>170</sup> If the cost of giving rises to 100 percent, charities will suffer immensely.

Research has consistently illustrated that the more estate taxes are levied, the larger charitable bequests become.<sup>171</sup> Charitable bequests are an important source of funding for programs designed to supplement programs for the poor in the areas of education, health, and housing. In 1921, when the charitable deduction was first established, charitable bequests jumped from 0.121 percent of gross estates to 3.043 percent.<sup>172</sup> Over time, charitable giving has increased as the marginal estate tax rate has increased.<sup>173</sup> Treasury economist David Joulfaian found that 1997 charitable bequests would have declined by at least 12 percent if the estate tax had been

<sup>166</sup> See Jon M. Bakija & William G.M. Gale, *Effects of Estate Tax Reform on Charitable Giving*, TAX NOTES TODAY, June 23, 2003, at 1841, 1842, available at LEXIS, 2003 TNT (providing data on the correlation between estate tax rates and the amount of charitable giving). For example, a charitable bequest of \$1 from an estate taxed at a 45% rate creates a 45 cent reduction in the estate's tax bill and cuts bequests to other beneficiaries by 55 cents. Therefore, the cost of giving the dollar to the charity was 55 cents, the amount the estate was reduced. As the tax rate decreases, the cost of giving to charity increases. A decrease in the tax rate from 45% to 30% increases the cost of giving \$1 from 55 cents to 70 cents. MCCLELLAND & GREENE, *supra* note 163, at 3.

<sup>167</sup> MCCLELLAND & GREENE, *supra* note 163, at 3.

<sup>168</sup> *Id.*; see also Waldeck, *supra* note 72, at 671 (noting that charitable giving is sensitive to changes in the tax code because donors care about the price of making charitable gifts).

<sup>169</sup> INDEPENDENT SECTOR, *supra* note 135.

<sup>170</sup> See Jim Grote, *Coping with Wrenches in the Charitable Giving Toolbox*, JOURNAL OF FINANCIAL PLANNING, Aug. 2003, available at [http://www.fpanet.org/journal/articles/2003\\_Issues/jfp0803-art-two.cfm](http://www.fpanet.org/journal/articles/2003_Issues/jfp0803-art-two.cfm) (discussing the primary factors of the 2003 decline in charitable giving: economic downturn, changes in the tax code and estate tax, and negative reactions to the handling of Sept. 11 donations).

<sup>171</sup> IRIS J. LAV & JAMES SLY, CTR. ON BUDGET AND POLICY PRIORITIES, ESTATE TAX REPEAL: A COSTLY WINDFALL FOR THE WEALTHIEST AMERICANS, (2001), <http://www.cbpp.org/5-25-00tax.pdf> (citing David Joulfaian, *Estate Taxes and Charitable Bequests by the Wealthy* (Nat'l Bureau of Econ. Research, Working Paper No. 7663, 2000)); see also Waldeck, *supra* note 72, at 670 (finding that studies show "when the marginal estate tax rate is higher, so is the ratio of charitable bequests to the gross value of estates").

<sup>172</sup> Frank J. Doti, *Estate Tax Repeal: Historical Data Indicate Philanthropy May Suffer*, TAX NOTES TODAY, Apr. 14, 2003, at 283-84, available at LEXIS, 2003 TNT.

<sup>173</sup> See BASS & IRONS, *supra* note 110, at 10 (showing the trend of charitable bequest giving as a percentage of estates).

repealed.<sup>174</sup> Congressional Budget Office economists Robert McClelland and Pamela Greene found that repeal would likely decrease giving by 6 to 12 percent, which in 2000 would have slashed charitable giving by \$13 billion to \$25 billion.<sup>175</sup> This amount is greater than the \$11 billion in corporate charitable contributions from that year.<sup>176</sup> Further evidence in support of the estate tax as an incentive for giving is suggested by the fact that widows, widowers, and single decedents—those who cannot use the marital deduction to avoid the estate tax—tend to give a larger percentage of their estates to charity.<sup>177</sup>

Even larger numbers have been suggested by scholars Jon M. Bakija and William G. Gale, who found that a repeal of the estate tax would reduce charitable bequests by an amount between 22 and 37 percent (\$3.6 to \$6 billion) per year.<sup>178</sup> Their research was reported to be the "most comprehensive" study by the OMB Watch.<sup>179</sup> Bakija and Gale argue that "[t]he qualitative conclusion that repeal would significantly reduce giving holds even if repeal raises aggregate pretax wealth and income by plausible amounts."<sup>180</sup> In their article, they show three different types of evidence supporting their claim that repeal would significantly reduce charitable giving.<sup>181</sup> Time-series and cross-sectional evidence, along with evidence collected over time and from varying locations, indicated that the increase in the price of giving caused by the repeal would largely decrease the amount of giving.<sup>182</sup> Further, heirs are unlikely to be as charitable as those who have earned their money.<sup>183</sup> A study recently found that for every \$1000 of earned wealth, entrepreneurs each give \$4.56 to charity, but for every \$1000 of inherited wealth, heirs give only \$0.76.<sup>184</sup>

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<sup>174</sup> Lav & Sly, *supra* note 171; *see also* GRAVELLE & MAGUIRE, *supra* note 15, at 16–17 (finding similar numbers to those David Joufaian published).

<sup>175</sup> Burman et al., *supra* note 104, at 6; *see also* DAVID KAMIN, CTR. ON BUDGET AND POLICY PRIORITIES, NEW CBO STUDY FINDS THAT ESTATE TAX REPEAL WOULD SUBSTANTIALLY REDUCE CHARITABLE GIVING (2004), <http://www.cbpp.org/8-3-04tax.pdf> (showing similar numbers).

<sup>176</sup> Kamin, *supra* note 175.

<sup>177</sup> *See* BASS & IRONS, *supra* note 110, at 11 (showing that individuals facing the estate tax tend to give more to charity); *see also* IRS Statistics of Income Bulletin, *Estate Tax Returns Filed for 2001 Decedents Making Charitable Bequests*, Publication 1136, revised Sept. 2005, <http://www.irs.gov/pub/irs-soi/01es04ms.xls> (showing that in 2001 single decedents left \$2.9 billion to charities and widowers and widows left \$7.9 billion to charities, while married decedents left only \$1.4 billion to charities).

<sup>178</sup> Bakija et al., *supra* note 166, at 1841–42.

<sup>179</sup> BASS & IRONS, *supra* note 110, at 1.

<sup>180</sup> Bakija et al., *supra* note 166, at 1841–42.

<sup>181</sup> *Id.* at 1843.

<sup>182</sup> *Id.*

<sup>183</sup> *See* Coalition for America's Priorities, *supra* note 160 (looking at the effect of the estate tax on charitable giving).

<sup>184</sup> *Id.*; *see also* BASS & IRONS, *supra* note 110, at 3 (finding that research shows "wealthy entrepreneurs gave six times as much to charities as people who inherited their wealth").



The revenue the government raises from the estate tax, among other things, is used to fund necessary and important programs, primarily for the benefit of the poor, ranging from health care and education to housing.<sup>185</sup> If the estate tax were repealed, these revenues would have to be collected from other sources, most likely from other taxpayers, who would empirically be less wealthy than those paying the estate tax.<sup>186</sup> Alternatively, a repeal could cause cuts in the benefits and services funded by the estate tax revenue, which would affect even those too poor to have to pay taxes at all.<sup>187</sup> Furthermore, the reduction in charitable donations would force charities to rely on direct expenditures by the government, creating an additional governmental cost to add to the already monstrous national debt, while at the same time increasing the government's authority and unwelcome influence in the charitable arena.<sup>188</sup>

The most damaging feature of the potential repeal of the estate tax is its vicious double punch. Not only will there be less incentive to provide charitable bequests, but lifetime giving will also suffer. Because there will be no estate tax, taxpayers will have a reduced incentive to decrease their estate by engaging in tax-free charitable gift giving during life, and charitable donations will no longer provide a way to escape heavy taxes at death.<sup>189</sup> The decision to make a taxable gift when there is no estate tax makes sense only if the non-tax benefits to the donee outweigh the donor's gift tax costs.<sup>190</sup> Even with the annual gift tax exclusion,<sup>191</sup> it is likely that the amount a transferor can transfer free of tax during life will be

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<sup>185</sup> See Bass et al., *supra* note 10 (noting that the estate tax "[g]enerates revenue at the state and federal level to sustain many of the programs that serve low-income and disadvantaged people."); see also OMB WATCH, ESTATE TAX AND GOVERNMENT REVENUE (2001), <http://www.ombwatch.org/article/articleview/400/1/93> (stating that "in very direct ways, the estate tax repeal can result in significant cuts in human needs programs").

<sup>186</sup> Bass et al., *supra* note 10; William H. Gates et al., *Bill Gates, Sr., George Soros, Steven Rockefeller, 100 Others Oppose Estate Tax Repeal*, U.S. NEWswire, Feb. 14, 2001, at P1 ("The billions of dollars in state and federal revenue lost will inevitably be made up either by increasing taxes on those less able to pay or by cutting Social Security, Medicare, environmental protection, and many other government programs so important to our nation's continued well-being.").

<sup>187</sup> Gates et al., *supra* note 186.

<sup>188</sup> See Blattmachr & Gans, *supra* note 151, at 395 (discussing the negative effects of repeal on charitable contributions); see also MYTHS AND REALITIES, *supra* note 8 (discussing the effect repeal would have on the already mounting national deficit).

<sup>189</sup> See TASK FORCE, *supra* note 148, at 6 (noting that taxpayers are likely to be less charitably inclined when the tax benefit from charitable contributions is removed); see also Waldeck, *supra* note 72, at 670-71 (finding that because charitable bequests can be deducted from the estate tax, "charitable giving will decrease in the wake of repeal, perhaps precipitously").

<sup>190</sup> See TASK FORCE, *supra* note 148, at 6 (noting that taxpayers are likely to be less charitable when the tax benefit from charitable contributions is removed).

<sup>191</sup> I.R.C. § 2503(b) (2005). Beginning in 2006, the annual gift tax exclusion, the amount that may pass tax free to any donor each year, is \$12,000 per year, per donee.

significantly less than the amount a donee can transfer tax-free at death.<sup>192</sup> The Barna Research Group for Epsilon determined that the percentage of adults engaged in charitable giving fell from 80 percent in 2001 to 69 percent a year later in 2002 after the estate tax exemption amount and marginal rates increased.<sup>193</sup> This represented the least amount of giving recorded in the last forty years.<sup>194</sup> While there are several reasons this may have occurred, including fluctuations in the stock market and the economy, one reasonable explanation for this phenomenon is that the uncertainty over whether the estate tax would be repealed caused individuals either to gamble that it would be eliminated or to wait until they knew for sure, both of which led to decreased charitable gifts.<sup>195</sup> Studies have determined that lifetime charitable giving will drop by at least 12 percent if the estate tax is repealed.<sup>196</sup> Estimates indicate that this drop would create an additional loss of more than \$5 billion to charities in addition to the \$3.6 to \$6 billion lost from bequests, resulting in a devastating total loss of revenue to charities of about \$10 billion a year.<sup>197</sup>

The repeal would remove an incentive to create private foundations<sup>198</sup> and low- or no-estate tax trusts for the benefit of charities both during life and at death.<sup>199</sup> Private foundations<sup>200</sup> are generally founded by individuals, families, or groups of individuals and typically are organized as nonprofit corporations or charitable trusts.<sup>201</sup> Private foundations provide billions of dollars each year in grants to charitable organizations, communities and individuals.<sup>202</sup> The non-profit programs' private foundation grants are used to fund activities that range from education to health and human services to arts and humanities.<sup>203</sup>

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<sup>192</sup> *Id.*; see also TASK FORCE, *supra* note 148, at 6 (explaining the effects of the decoupling of the estate and gift taxes).

<sup>193</sup> Doti, *supra* note 172, at 282, 284, 287 (citing THE ORANGE COUNTY REGISTER, December 8, 2002, at 1).

<sup>194</sup> *Id.* (citing THE ORANGE COUNTY REGISTER, December 8, 2002, at 1).

<sup>195</sup> *Id.*

<sup>196</sup> BASS & IRONS, *supra* note 110, at 11.

<sup>197</sup> *Id.*

<sup>198</sup> See David Cay Johnston, *Some Experts Questioning Bush Plan on Estate Taxes*, N.Y. TIMES, January 29, 2001, at A21 (explaining that private foundations are created because gifts made to the charitable private foundations are used to decrease the estate tax).

<sup>199</sup> *Id.*

<sup>200</sup> A private foundation is a domestic or foreign organization under I.R.C. § 501(c)(3) which exempts organizations devoted to religious, charitable or educational purposes, other than excluded categories listed in I.R.C. § 509. Private foundations are given estate tax-exempt status under I.R.C. § 2055(a).

<sup>201</sup> See INTERNAL REVENUE SERVICE, COMPENDIUM OF STUDIES OF TAX-EXEMPT ORGANIZATIONS, 1989-1998: PRIVATE FOUNDATIONS AND CHARITABLE TRUSTS (2002) available at <http://www.irs.gov/pub/irs-soi/98eopfin.pdf> (discussing and defining private foundations).

<sup>202</sup> See *id.* (enumerating beneficiaries of charitable contributions).

<sup>203</sup> See *id.* (describing the typical recipients of private foundation grants).

Private foundations are popular with the wealthy because they allow the donors and their heirs to maintain control over the assets and direct the disposition of funds in the foundations for charitable purposes.<sup>204</sup> For example, a charitable remainder trust allows the donor to leave assets to an heir with the provision that upon the heir's death, the remaining assets are left to charity. Or, the reverse, a charitable lead trust allows the donor to give a charity a right to assets during a fixed period, with the remainder going to a donee named by the original donor at the end of that period. Private foundations, on the other hand, provide control to the donor by establishing an organization to distribute funds to various charities for charitable purposes at the direction of the donor and his heirs. Generally, foundation gifts create continued annual giving to other organizations that increase over time.<sup>205</sup> In 1998, private foundations received 42 percent of all charitable bequests, totaling \$6.4 billion, the largest amount of all charitable bequest recipient categories.<sup>206</sup> Charitable bequests to private foundations were, on average, \$3.6 million each.<sup>207</sup> Repeal of the estate tax will decrease the creation of foundations and gifts to existing foundations, and in turn will decrease the grants charities receive from such foundations.<sup>208</sup> Such grants are often used to fund educational and medical programs, among various other programs, all designed to benefit the poor. Without the revenues from charitable bequests, many of these programs will be eliminated or greatly cut back.

The Independent Sector, a national non-profit organization composed of more than 500 member charities, foundations, and corporate philanthropy programs, opposes full and permanent repeal of the estate tax because of the losses to charities that will result. They state:

Full repeal of the estate tax would have a devastating impact on tens of thousands of charitable organizations, serving millions of individuals, families and communities everyday while benefiting only a very small number of estates. Even estate tax reform legislation that drastically cuts the rate of the estate tax or that effectively eliminates nearly all estates by

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<sup>204</sup> See GRAVELLE & MAGUIRE, *supra* note 15, at 19 (explaining how to transfer assets to charity while still maintaining control over their distribution); see also Waldeck, *supra* note 72, at 689 (contrasting private foundations with public charities).

<sup>205</sup> See BASS & IRONS, *supra* note 110, at 3 (discussing the impact of a decrease in giving to foundations). Private foundations are exempt from income tax, so their gifts can be invested and increase tax-free. I.R.C. § 509(a).

<sup>206</sup> BASS & IRONS, *supra* note 110, at 7.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 2 (citing IRS data that shows that because a significant portion of foundation assets come from estate revenues, especially large estates, repeal of the estate tax would have a large impact on foundations and their charitable works).

raising the exemption level too high would cause billions to be lost to charity.<sup>209</sup>

It is without doubt that charitable giving is sensitive to estate tax rates. The current encouragement to give to charities at death and in life will no longer exist, and gifts and bequests will decline. Charities will be hit from three angles: less money from charitable bequests, fewer funds from private foundation funding, and a decrease in federal revenue available for support. Without the revenues derived directly or indirectly from the tax, charities will be forced to rely on the government for revenue or will be shut down from lack of funding. While it is the wealthy who advocate for such a move, it is the poor, and others who rely on these charities, that will be most seriously affected.

#### *IV. How Repeal Will Unfairly Impact Blacks*

##### *A. Wealth Inequality*

Blacks are more likely than whites to be poor, as evidenced by the vast disparities in wealth between the two groups.<sup>210</sup> The proposed estate tax repeal benefits the wealthy at the expense of the poor. The result: the repeal of the estate tax will negatively and disproportionately affect black minorities. Only the richest individuals in the country would benefit from the repeal, a group that is white by a margin of more than ten to one.<sup>211</sup> Further, the lost revenue to the government would have to be recovered from other sources. The government would most likely recoup lost revenue by imposing additional taxes<sup>212</sup> and by making cuts to domestic programs. In taking compensative measures that will affect all income levels of the population, the government would burden a much larger population of blacks than the selective estate tax affects. Repeal would result in even less federal revenue for important government programs that are already under-funded. Such programs include: enforcing civil rights; providing disadvantaged children with child-care and preschool programs; funding job training programs, housing, or drug and alcohol treatment programs; financing the

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<sup>209</sup> INDEPENDENT SECTOR, *supra* note 135, at 1.

<sup>210</sup> See Overton, *supra* note 59, at 1009 (discussing the disproportion in income and wealth between white and black households); see also Keister & Moller, *supra* note 67, at 73 (using data to indicate the correlation between race and wealth).

<sup>211</sup> See Green, *supra* note 9, at 16 (arguing that repealing the estate tax would not help blacks close the wealth gap); see also Keister, *supra* note 78, at 46 (noting that as of 1995, only 1% of the richest Americans were black).

<sup>212</sup> It is likely that the taxes that are increased in order to compensate for the lost revenue will be taxes paid by all Americans, rich and poor alike, rather than just the wealthy.

No Child Left Behind Act; and providing funds for loans to minorities or for public subsidies of historically black colleges.<sup>213</sup> Overall, eliminating the estate tax would likely raise taxes for most blacks while simultaneously decreasing government benefits.<sup>214</sup> As Bill Gates, Sr., George Soros, and Steven Rockefeller put it, "The billions of dollars in state and federal revenue lost will inevitably be made up either by increasing taxes on those less able to pay or by cutting Social Security, Medicare, environmental protection, and many other government programs so important to our nation's continued well-being."<sup>215</sup>

Research has consistently shown that race affects wealth ownership, regardless of income level.<sup>216</sup> In 1995, the median income for blacks was only 63 percent of the white median income.<sup>217</sup> The median net worth in white households was more than eight times larger, at \$61,000, than in black households, at \$7,400.<sup>218</sup> Further, in 1999, 23.6 percent of blacks lived in poverty while only 7.7 percent of whites had similar financial conditions.<sup>219</sup> In the same year, 15 percent of white households had a zero or negative net worth compared with 31 percent of black households.<sup>220</sup> These differences cannot be explained by inequalities in income alone. Even when black and white families in the same income levels are compared, disparities exist.<sup>221</sup> For example, among families with annual incomes of \$40,000, white families have an average net worth of \$80,000, while black families have a net worth of half that, only \$40,000.<sup>222</sup> These numbers illustrate that individuals in the black middle class continue to be asset-poor. While income can provide for a home, food, and limited education, "wealth is the stuff that upward mobility is made of. Equality of opportunity cannot be achieved under unequal conditions (such as differential access to wealth)."<sup>223</sup> There are many proposed explanations for the wide disparity in wealth, ranging from educational differences to structural barriers and discrimination, to the lack

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<sup>213</sup> Bass et al., *supra* note 10.

<sup>214</sup> See Green, *supra* note 9 (criticizing the viewpoint of wealthy black individuals, that the estate tax will help blacks as a whole).

<sup>215</sup> Gates et al., *supra* note 186, at P1.

<sup>216</sup> See Keister & Moller, *supra* note 67, at 73 (using sociological research and empirical data to indicate the correlation between race and wealth).

<sup>217</sup> Overton, *supra* note 59, at 1007-08 (stating that in 1995, median household income for whites was \$35,766 but only \$22,393 for blacks).

<sup>218</sup> *Id.* at 1009 (citing CHUCK COLLINS & FELICE YESKEL, UNITED FOR A FAIR ECONOMY, ECONOMIC APARTHEID IN AMERICAN: A PRIMER ON ECONOMIC INEQUALITY & INSECURITY 55 (2000)).

<sup>219</sup> Overton, *supra* note 59, at 1011 (citing data from the 1999 U.S. Census Reports).

<sup>220</sup> *Id.* at 1012.

<sup>221</sup> See Dalton Conley, *The Black-White Wealth Gap*, THE NATION, Mar. 26, 2001, at 20, available at <http://www.thenation.com/doc/20010326/conley> (discussing the disparities in wealth between whites and blacks).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 21.

of housing and occupational opportunities.<sup>224</sup> Regardless of the primary cause or causes of the racial gap in wealth, these differences "are bound to be exacerbated across generations if most wealth is inherited."<sup>225</sup>

Inequalities such as these are a result, at least in part, of the "head start" whites enjoyed in accumulating and passing on assets for centuries while blacks were oppressed and enslaved, and their labor exploited to produce wealth for whites. Wealth provides direct financial benefits, as well as other advantages, such as home ownership, investment opportunities, and emergency saving.<sup>226</sup> The majority of wealth accumulation results from gifts from previous generations.<sup>227</sup> Yet blacks, facing constant obstacles and discrimination that prevents them from accumulating wealth, have historically been unable to pass on such wealth.<sup>228</sup> Upon emancipation, blacks found themselves without assets with which to begin their free lives. Many were forced into sharecropping, which afforded them a minimal income and no assets.<sup>229</sup> Escape from this institution was barred by "black codes," astronomical licensing fees designed to keep blacks from acquiring land or setting up businesses.<sup>230</sup> Such barriers to the acquisition of property persisted in the twentieth century, as black homeowners were denied loans during the Great Depression (while the government freely provided such loans for white homeowners), and Social Security systematically excluded blacks, by exempting the service and agricultural sectors.<sup>231</sup>

Even after the Depression and World War II, blacks were systematically excluded from home ownership programs established by the Federal Housing Authority because the loans distributed by the programs

<sup>224</sup> See Keister & Moller, *supra* note 67, at 73 (attempting to explain the differences in wealth between white and black households).

<sup>225</sup> *Id.* at 76 (citing R.P. Clignet, *Ethnicity and Inheritance*, in *INHERITANCE AND WEALTH IN AMERICA* 119 (J. Robert, K. Miller, S.J. McNamee, ed., 1998); M.L. OLIVER & T.M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH* 152–56 (1995)); see also Overton, *supra* note 59, at 1006 ("Intergenerational transfers of wealth have carried forward past racial disparities in wealth that arose directly from state-sponsored discrimination.").

<sup>226</sup> See Keister, *supra* note 78, at 44–45 (showing that wealth can be beneficial beyond simple financial benefits).

<sup>227</sup> See Repetti, *supra* note 63, at 856 ("Bequests and gifts account for approximately fifty percent of all wealth accumulations in the United States.") (citing William G. Gale & John Karl Scholz, *Intergenerational Transfers and the Accumulation of Wealth* 1–2 (Inst. For Res. on Poverty Discussion, Working Paper No. 1019-93, 1993); Laitner, *supra* note 95, at 2; see also Keister, *supra* note 78, at 45 (noting that wealth can be invested so that it generates even more wealth for future generations).

<sup>228</sup> See Overton, *supra* note 59 at 1007 (explaining that wealth is derived from transfers other than the transfer of assets—wealth can come from education, experiences, friendships, and contacts that a parent provides a child); see also OLIVER & SHAPIRO, *supra* note 225, at 51 (stating that "every circumstance of bias and discrimination against blacks has produced a . . . positive gain for whites").

<sup>229</sup> See Conley, *supra* note 221, at 21 (noting potential historical causes for the current racial wealth gap).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

were directed to the suburbs, while the majority of blacks lived in the cities.<sup>232</sup> Eventually efforts to help blacks acquire homes and property were made, but simply providing blacks with the opportunity or even the means to become homeowners has not been enough.<sup>233</sup> "White flight" causes housing values in black neighborhoods to decline.<sup>234</sup> Without the ability to accumulate property and assets, blacks have been, and continue to be, far behind whites in their ability to pass assets from generation to generation, making an estate tax repeal essentially worthless for most minority families.

Studies have consistently shown a strong correlation between wealth and education: those who are raised in poor households are more likely to have fewer years of education and to perform worse on tests.<sup>235</sup> Further, these trends are likely to perpetuate through generations.<sup>236</sup> The reasons for this are obvious and widespread: money can buy better tutoring, teachers, SAT courses, and higher education.<sup>237</sup> Without the capital to pay for these resources, blacks will face much greater difficulties in attaining higher levels of education and the accompanying wealth.<sup>238</sup> Blacks are more likely to receive financial aid than whites and are awarded larger grants than their white counterparts.<sup>239</sup> Scholarships and grants are one of the primary ways

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* In 2002, 71.8% of whites owned their own homes, while only 47.3% of blacks were homeowners. U.S. Census Bureau, *Moving to America – Moving to Homeownership: 1994 to 2002*, Table 7, Sept. 2003, <http://www.census.gov/hhes/www/housing/hvs/movingtoamerica2002/tab7.html>.

<sup>234</sup> Conley, *supra* note 221, at 22.

<sup>235</sup> See Repetti, *supra* note 63, at 838 (noting studies that show correlations between wealth and education) (citing BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 160 (1999)).

<sup>236</sup> *Id.* at 838–39; see also Keister & Moller, *supra* note 67, at 75 ("Early studies of mobility concluded that poverty, and thus wealth as well, was transmitted from parents to their children, typically via education." (citing PETER F.D. BLAU & OTIS D. DUNCAN, *THE AMERICAN OCCUPATIONAL STRUCTURE* (1967); J.W. Graham, *Black-White Differences in Wealth and Asset Composition*, 105 Q.J. ECON. 321–39 (1990)).

<sup>237</sup> See Repetti, *supra* note 63, at 838 (positing reasons for the results of studies on wealth and education) (citing BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 160 (1999)); see also Keister, *supra* note 78, at 45 ("[A]ll wealth expands the educational and occupational advantages of the next generation.").

<sup>238</sup> See Peter Tolsdorf, *If Separate, Then at Least Equal: Rethinking Brown v. Board of Education and De Facto Public School Segregation*, 73 GEO. WASH. L. REV. 668, 680 (2005) (finding that despite similar graduation rates between whites and blacks, large educational performance disparities exist). While states no longer segregate schools, other factors, including wealth create the same result, preventing blacks from attaining the same educational experience and benefits as whites. *Id.* at 668. "Inequality in American public education is pervasive. Suburban white children generally attend the best schools, while inner-city minorities attend the worst." *Id.* at 680.

<sup>239</sup> U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, 1999–2000 NATIONAL POSTSECONDARY STUDENT AID STUDY: PERCENT OF UNDERGRADUATES RECEIVING PELL GRANTS AND AVERAGE PELL GRANT TOTAL FOR THOSE WHO RECEIVED, BY RACE/ETHNICITY AND SECTOR:  

	1999–2000	(2000),	available
<i>at</i>			

[http://nces.ed.gov/das/library/tables\\_listings/show\\_nedrc.asp?rt=p&tableID=319](http://nces.ed.gov/das/library/tables_listings/show_nedrc.asp?rt=p&tableID=319). Data indicates that at public four-year institutions, 45.3% of blacks receive Pell Grants, averaged at \$2245 each, while 17.9% of whites receive grants averaging \$1891. At private four-year institutions, 37.4% of blacks receive Pell Grants, averaged at \$2046 each, while 16.8% of whites receive grants averaging \$1807.

in which blacks can beat the disadvantages they face in education. However, if charitable giving is reduced by repeal of the estate tax, universities will receive less money to create scholarships and provide financial aid. Therefore, estate tax repeal will not only increase wealth inequality directly, but also indirectly by decreasing education funds that could help close the gap.

The estate tax is misunderstood to have large effects on small businesses and farms owned by blacks. In fact, very few small businesses or farmers are even subject to the tax in the first place, and an even smaller amount of those are owned by black taxpayers.<sup>240</sup> Further, the tax code was amended in 1997 to protect farms and small businesses. Therefore, the argument of those who oppose the estate tax because of claims that it destroys farms and small businesses is unfounded.<sup>241</sup>

Repealing the estate tax will only benefit those very few minority individuals who are already rich. Even if these individuals contribute large amounts of their own earnings and assets to help other less fortunate members of their race, it cannot possibly make up for the billions in charitable donations that will be lost with repeal. Nor is it proven that individuals in this category, such as Bob Johnson and Oprah Winfrey, would continue to give to poorer individuals of their race if the incentive to give were eliminated by estate tax repeal. Admittedly, it is highly unlikely that they would cease or decrease their giving to these individuals, but it is an open possibility.

Some may argue that wealthy individuals tend to make charitable contributions to organizations like private educational institutions, museums, and public television, and therefore their contributions do not help blacks.<sup>242</sup> While this may be true, it is not enough to justify the effects that will occur with permanent repeal. The effect of the repeal on government revenues will have larger repercussions for poor individuals, and thus many minority

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<sup>240</sup> See Green, *supra* note 9, at 16 ("As a result, only 2 percent of estate-tax revenue collected [in 2000] came from these sources, a tiny fraction of which came from blacks."); see also GRAETZ & SHAPIRO, *supra* note 5, at 215 (pointing out that the majority of estates have enough liquid assets to pay the estate tax, and small businesses and farms are only a small part of the tax's financial contributors); GRAVELLE & MAGUIRE, *supra* note 15, at 13 (stating that estates whose farm assets accounted for half of the gross estate accounted for only 1.4% of taxable estates, while returns with business assets equal to half of the estate accounted for only 1.6% of taxable estates).

<sup>241</sup> See GRAVELLE & MAGUIRE, *supra* note 15, at 14 (concluding that studies indicate that no more than a percent of heirs or business owners would be at risk of losing the business or farm in order to pay estate taxes).

<sup>242</sup> See Todd Izzo, *A Full Spectrum of Light: Rethinking the Charitable Contribution Deduction*, 141 U. PA. L. REV. 2371, 2391 (1993) (discussing studies that reported the recipients of wealthy charitable giving).



individuals. Because most charities rely heavily on government money,<sup>243</sup> cuts in revenue will have a large effect on the programs such charities will be able to support. In addition, many will argue that, regardless of the charitable contributions made by the wealthy, middle and lower class individuals tend to support charities that are more likely to aid them.<sup>244</sup> Since their contributions are not driven by estate tax created incentives, permanent repeal will not affect the charitable contributions to the charities that most benefit low- and middle-income blacks. This argument, however, fails to recognize that the government revenues that will be lost if the estate tax repeal is made permanent will probably be made up by the imposition of other taxes, most likely taxes that will affect all Americans.<sup>245</sup> Therefore, with repeal, these individuals will have less income with which to give charitable contributions, and their charitable giving will decrease simultaneously with the decrease in incentive for the wealthy to contribute.

If the goal is to provide opportunity for blacks, it would be more efficient to provide funds to allow blacks to start their own businesses, or to help them gain the schooling and resources they need to advance in society. The repeal of the estate tax will only eliminate funds that could further these causes. Instead of relieving the wealthy of taxes they can afford to pay, the government should use these funds for programs designed to target the asset-poor, which would inevitably favor blacks.<sup>246</sup> Such action will further the policy behind the estate tax, breaking up concentrated wealth, and filtering it down to the lower classes in society.

### *B. Current Support for Repeal by Blacks is Based on Misinformation*

As supporters of the estate tax repeal began to seek groups to rally behind them and press for repeal, an unlikely group came to the forefront, shocking political analysts, economists, and politicians. Black minority

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<sup>243</sup> See Alice Gresham Bullock, *Taxes, Social Policy and Philanthropy: The Untapped Potential of Middle- and Low-Income Generosity*, 6 CORNELL J.L. & PUB. POL'Y 325, 328 (1997) ("Charitable organizations deliver a significant amount of governmentally funded social benefits.").

<sup>244</sup> See *id.* at 344 (stating that a majority of low-income taxpayers donate to mutual aid associations). For example, many poor blacks tend to give to religious groups and small churches. This type of reciprocal giving is such that "low-income taxpayers donate to religious institutions and social-welfare organizations because they view those organizations as more likely to respond to their needs." Izzo, *supra* note 242, at 2391.

<sup>245</sup> See *supra* notes 212, 2134 and accompanying text (stating that it is likely that tax increases to compensate for lost revenue will affect all Americans, rich and poor alike).

<sup>246</sup> See Conley, *supra* note 221 (noting that blacks have disproportionately less wealth than whites); see also Keister, *supra* note 78, at 46 ("Disparities in wealth ownership among racial groups are among the most extreme and persistent forms of inequality in the United States.").

individuals have been encouraged to support the proposal for repeal.<sup>247</sup> Why, many questioned, would black minorities—those least affected by the estate tax and most likely to be severely affected by its repeal—rally for permanent elimination? The answer lay in the manner in which politicians in favor of repeal framed the issue for presentation to the public.

When the movement for estate tax repeal began, a single man took the stage and united poor and wealthy minorities alike. His name was Charles Thigpen, and he was an eighty-three year old black tree farmer from Montrose, Mississippi, the grandchild of slaves. Testifying before the Ways and Means Committee, he spoke about the tree farm he had spent his life building, the legacy he wanted to pass on to his children.<sup>248</sup> He claimed that his desire was threatened, a dream that the estate tax would make impossible. All his assets were tied up in the farm, and when he died, he claimed, his estate would have to sell the farm in order to pay his estate taxes. As a result, his dream, his lifework, would die.

Repeal advocates grabbed hold of this testimony, the heart-wrenching story of a hard-working and self-made man, relating his story to the media and using it to rally unlikely minority support behind the repeal. However, the Thigpen story was highly exaggerated.<sup>249</sup> In fact, the Thigpen estate would not be subject to taxation, as the value of its assets would not exceed the tax exemption amount. Indeed, as scholars Michael J. Graetz and Ian Shapiro suspect, "[I]t [was] far more likely that an astute Washingtonian hand penned Chester's testimony. . . . [He] was a perfect poster child for the campaign [against repeal.] . . . a front for the wealthy white families who were financing the repeal machine."<sup>250</sup> It worked nonetheless. Not only did black small business and farm owners rally behind the repeal movement with full support and encouragement from the Black Chamber of Commerce, but poor blacks did as well. These hopeful minority members followed the lead of those who had achieved what every poor black American hopes to one day achieve, living out the American Dream, and these minority success stories claimed that the estate tax threatened to take it all away. It is of little surprise that the poor and hopeful members of the black minority jumped on the bandwagon. The repeal campaign "successfully spread the message that the death tax was a key issue for minority voters,"<sup>251</sup> even though in reality it

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<sup>247</sup> See, e.g., Alford, *supra* note 9 (discussing why, as President of the NBCC, he backs the move for repeal and encourages other blacks to join in his support); see also Green, *supra* note 9 (noting the advertisements run by estate tax supporters in newspapers, claiming the tax discriminates against blacks and urging its repeal).

<sup>248</sup> See GRAETZ & SHAPIRO, *supra* note 5, at 62–63 (relaying Chester Thigpen's testimony before the House Ways and Means Committee).

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 71.

would never affect those who heard the message. As one member of Congress put it, "Where I am from, no one will ever be subject to the estate tax, but [when] I say, 'I'll get rid of the death tax to protect you, your families, your farms' . . . I get cheers."<sup>252</sup>

Wealthy black individuals, like Black Entertainment Television (BET) CEO Robert Johnson,<sup>253</sup> have been strong advocates for the repeal of the estate tax, claiming that as black millionaires they have had to work especially hard for the money they have earned and should not be required to give it to the government upon their death. The National Black Chamber of Commerce has argued that "[g]etting rid of the 'death tax' will start to create a needed legacy and begin a cycle of wealth-building for Blacks in this country."<sup>254</sup> What these individuals fail to consider is the vast implications of their protests. While wealthy black individuals make up a small percentage of the those who must pay estate taxes (less than one-half of one percent),<sup>255</sup> all Americans will feel the effect of repeal in some manner or another, and the majority of the black population will be faced with additional hurdles to attaining the status of their millionaire counterparts.

The politicians who will make the ultimate decision regarding repeal are also misinformed about where the public stands on the issue. "About a hundred members of Congress are multimillionaires, people who move in wealthy circles. . . . [T]hey have a slanted perspective. Whom they talk to and what they hear greatly exaggerates the intensity of public opinion on the issue."<sup>256</sup> Congressmen, as discussed above, are at the mercy of the wealthy. The wealthy fund their campaigns and throw their political weight behind politicians when needed.<sup>257</sup> Congressmen can be viewed as puppets, with the wealthy holding the strings, and these elite puppeteers have clamored for repeal. Politicians have no choice but to listen. In addition, the voices of the wealthy are joined by black minorities, whose support is misinformed. Misinformation may cause politicians to see support for repeal as a win-win situation.

<sup>252</sup> See *id.* at 78 (quoting a "member of Congress").

<sup>253</sup> See *BET's Black Billionaire Trojan Horse: "Democrat" Bob Johnson Fronts for GOP*, THE BLACK COMMENTATOR, Oct. 3, 2003, [http://www.blackcommentator.com/13\\_thw.html](http://www.blackcommentator.com/13_thw.html) [hereinafter *The Black Commentator*] (citing Bob Johnson as one of the forerunners of the move for estate tax repeal by blacks). Bob Johnson represents one-half of America's black billionaires. Oprah Winfrey is the only other black billionaire to date. *Id.*

<sup>254</sup> Alford, *supra* note 9.

<sup>255</sup> See THE BLACK COMMENTATOR, *supra* note 253 (arguing that Bob Johnson has abandoned his race, angling to relieve a few tens of thousands of blacks from the estate tax, while providing the same service to over two million whites in the process).

<sup>256</sup> GRAETZ & SHAPIRO, *supra* note 5, at 241.

<sup>257</sup> See Alexander, *supra* note 83, at 244 (stating that "the wealthy have special access and influence; power is concentrated in the hands of the few who control money. After the campaigns, the wealthy wield inordinate power, enjoying access to elected officials that others do not.").

### V. What Should Be Done?

The primary argument against the estate tax is that it punishes those who have worked hard to attain the American dream. These individuals have strived to achieve, and they have amassed enough wealth to exceed the estate tax exemption, even if by a small amount, meaning the government will take away a large part of what they have spent their lives accumulating. The estate tax, they argue, prevents new individuals from ever breaking into the wealthiest class of society by collecting so much of the estate in taxes that only a small proportion of the estate, if any, can be passed on. This argument is especially strong from the point of view of small but successful business and farm owners. These individuals claim that because all of their assets are tied up in their property, their heirs are forced to liquidate these assets by selling the business or farm in order to have the funds to pay for the estate tax, preventing the decedent from passing on his farm or business.

There is, however, a medium ground that will continue to tax the wealthy who can afford to and should pay the tax, while exempting those who really cannot pay it without ruining their ability to pass assets to the next generation. This compromise will still generate enough revenue for the government to prevent the decrease in funding of programs and benefits to the poor.

This Note proposes that the estate tax be retained, but with a high exemption amount. Under this structure, the estate tax would exempt most taxpayers, but would continue to tax those few ultra-wealthy individuals who contribute the most to the estate tax revenue. As previously stated, by the time the exemption reaches the \$3.5 million mark in 2009, only 3 in 1000 decedents will be subject to the tax.<sup>258</sup> Similarly, of the estate taxes collected, approximately two-thirds come from liquid assets rather than businesses and farms.<sup>259</sup> At this level, small business and farm owners, as well as others who strived to make their assets reach the million dollar mark in assets, and the minorities who are only beginning to accumulate wealth will be exempt from the tax. However, since the majority of estate tax revenues are derived from those whose estates are far above the exemption

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<sup>258</sup> Burman et al., *supra* note 104, at 3; *see also* INDEPENDENT SECTOR, *supra* note 135 ("[I]f the estate tax is retained at its 2009 levels, only 0.3 percent of all persons who die that year would be subject to the tax..").

<sup>259</sup> *See* GRAETZ & SHAPIRO, *supra* note 5, at 215 (pointing out that the majority of estates have enough liquid assets to pay the estate tax, and small businesses and farms are only a small part of the tax's financial contributors); *see also* GRAVELLE & MAGUIRE, *supra* note 15, at 16 (stating that estates whose farm assets accounted for half of the gross estate accounted for only 1.4% of taxable estates, while returns with business assets equal to half of the estate accounted for only 1.6% of taxable estates).

amount,<sup>260</sup> even when set at \$3.5 million, government revenues, charitable bequests, and programs funding benefits for the poor will suffer far less than with permanent repeal.<sup>261</sup> Setting the exemption amount at \$3.5 million will sharply curtail the number of estates subject to the estate tax by 84 percent, but would maintain 44 percent of the revenue, as opposed to 0 percent if the estate tax were repealed.<sup>262</sup> In short, only those who are really rich, those who have the most ability to contribute, 3 out of 1000 decedents, will be subject to the estate tax.

Empirical evidence supports this proposal on various grounds. In 2000, the Congressional Budget Office conducted a study to determine the effect of simply raising the estate tax exemption by looking at how households in 2000 would have changed their charitable bequests if the estate tax exemption were set at \$3.5 million instead of the scheduled level of \$625,000 for that year.<sup>263</sup> The results indicate that charitable contributions and bequests would have decreased by less than 3 percent.<sup>264</sup> Further, in 2000, only 5.3 percent of taxable estate tax returns filed contained farm assets, a total of 2765 out of 52,000 total returns.<sup>265</sup> The exemption that year was \$625,000; if it had been higher, \$5 million for example, only 0.5 percent of estate tax returns would have been composed of farm assets.<sup>266</sup> A similar result would have been reached for small businesses. In 2001, small businesses composed approximately 12 percent of total taxable returns, but the large majority of small business owners would not have been liable for the tax if the exemption amount were set at \$5 million, taxing only 1663 out of 6186 estates.<sup>267</sup> Overall, exempting farms and small businesses completely from the estate tax would cost only a small percentage of the revenues lost with full repeal.<sup>268</sup>

Theodore Roosevelt's call for equality of opportunity, the progressivity of the tax system, and the distribution, rather than concentration, of wealth<sup>269</sup> can all be realized without cutting into the hard-

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<sup>260</sup> Burman et al., *supra* note 104, at 2; *see also* GRAVELLE & MAGUIRE, *supra* note 15, at 106 (noting that estates over \$5 million accounted for 51% of estate tax revenues in 2004).

<sup>261</sup> JOEL FRIEDMAN & RUTH CARLITZ, CTR. ON BUDGET AND POLICY PRIORITIES, ESTATE TAX REFORM COULD RAISE MUCH NEEDED REVENUE: SOME REFORM OPTIONS WITH LOW TAX RATES RAISE VERY LITTLE REVENUE (2005), <http://www.cbpp.org/3-16-05tax.htm>.

<sup>262</sup> *Id.*

<sup>263</sup> MCCLELLAND & GREENE, *supra* note 163, at 9.5.

<sup>264</sup> *See id.* at 8. This is as compared to a decrease of 6 to 12% if the estate tax were repealed entirely in 2000.

<sup>265</sup> GRAETZ & SHAPIRO, *supra* note 5, at 215.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *See id.* (concluding that if the exemption amount were set at a high level, opposition to the estate tax based on its effects on small businesses and farms would diminish).

<sup>269</sup> *See* Waldeck, *supra* note 72, at 676–77 (citing RONALD CHESTER, INHERITANCE, WEALTH AND SOCIETY 60 (1982) (quoting Theodore Roosevelt's speech at the House of Representatives Office Site on

earned assets of those who manage to accumulate a significant estate through hard work and exertion. Setting a high exemption amount will continue to tax the exceptionally wealthy individuals who simply pass wealth from generation to generation. It will help to reduce concentrations of wealth and decrease the disparities that exist between economic classes. The nation's democratic ideal will be furthered without sacrificing the aid the poorer classes so desperately need.

### VI. Conclusion

Empirical evidence has conclusively shown the repeal of the estate tax has very few pros and many cons. Repeal of the estate tax will create a domino effect that will lead to greater wealth inequality between whites and blacks. Repeal will create a result that is the polar opposite of what our nation strives for; it is a direct assault on equality. Federal and state government revenues will fall, decreasing the funding available to the poor, a group that is largely composed of black minority members of society. Other taxes will have to be raised to account for the lost revenue, most likely taxes that will fall on all Americans, not just the wealthy as does the estate tax. Additional taxes for lower-income individuals, who are disproportionately black, will mean less available income and fewer charitable contributions to organizations designed to directly benefit their population. Wealthy charitable bequests will plummet, leaving less money for programs that have the ability to help close the gap between whites and blacks that has persisted for centuries. The progressivity of the nation's tax system will be dealt a powerful blow, relieving the rich of the estate tax while putting the burden on the poor to make up for the decrease in tax revenues. All of these effects will increase the widening wealth difference between the wealthy and the poor, and ultimately white and black.

Only those who can actually afford to pay the tax in the first place—no easy task with a current exemption amount of \$2 million—will benefit from a repeal of the estate tax. So why has the repeal become such a hot button issue, with surprising support from black minority individuals, those most likely to be negatively affected by repeal? Because taxes are considered to be inherently evil by the average taxpayer.<sup>270</sup> A tax that is imposed when a person dies and can no longer benefit from the government

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Apr. 14, 1906 and discussing Roosevelt's first suggestion of an inheritance tax in 1906 "so framed as to put it out of the power of the owner of one of these enormous fortunes to hand more than certain amount to any one individual").

<sup>270</sup> See MOODY ET AL., *supra* note 4 (noting that the increasing complexity of the tax code has made the cost of compliance increase); see also SHLAES, *supra* note 4 (discussing public opinion regarding taxes in the context of withholding).

seems especially unfair. Simply put, the American public has been provided misinformation, with the largest effect on the black population receiving it. In their case, the misunderstanding of the estate tax and the effects of repeal has led them to support a measure that will hurt them. "Death is the great leveler. Everyone knows they could be struck down tomorrow. By calling the tax the 'death tax' and placing the undertaker and the tax collector side-by-side, the [estate tax supporters] made the IRS look like the avaricious beneficiary of personal tragedy. Even the travails of the very wealthy [take] on a universal hue."<sup>271</sup> The American ideal encourages both white and black individuals of all income levels to believe that they can attain wealthy status if they work hard. Thousands of books like *The Millionaire Next Door* provide detailed instructions for accumulating wealth and assert that anyone can become a millionaire.<sup>272</sup> In short, like others in lower income brackets, by opposing the estate tax, blacks are protecting the possibility that they too may have wealth to preserve at their deaths. What is overlooked, however, is that repeal of the estate tax now will only make it disproportionately harder for them to achieve such a status in the future, as the governmental aid and private programs designed to help them will likely be eliminated.

The issue has been framed to garner support it should not possess, deceptively implying that society is behind the move for repeal. If the truth were widely known, the issue would never have hit the agenda. Equality of economic opportunity is central to this nation's democratic ideal. The government should not provide benefits to the rich at the expense of the poor. As Supreme Court Justice Louis Brandeis said in 1941, "We can have a democratic society or we can have great concentrated wealth in the hands of a few. We cannot have both."<sup>273</sup> Because the black minority makes up a disproportionate percentage of the nation's poor, a repeal that will place disadvantages on the poor will disproportionately affect black minorities. The recent rhetoric in support of repeal, urging blacks to take a stand against the estate tax, fails to warn them of the realistic and damaging consequences of repeal. Instead of saying, "Kill the death tax," blacks should be crying, "Long live the estate tax!"

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<sup>271</sup> GRAETZ & SHAPIRO, *supra* note 5, at 232.

<sup>272</sup> THOMAS J. STANLEY & WILLIAM D. DANKO, *THE MILLIONAIRE NEXT DOOR* (1996).

<sup>273</sup> Keister, *supra* note 78, at 45.