

Indiana Law Review

Volume 45

2011

Number 1

NOTES

THE FEDERAL ESTATE TAX AND THE NATIONAL DEBT: WHY THE DEBT FORCES A DEFENSE OF THE TAX

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“No pecuniary consideration is more urgent than the regular redemption and discharge of the public debt: on none can delay be more injurious, or an economy of the time more valuable.”

—President George Washington, Message to the House of Representatives, 1793¹

INTRODUCTION

For some time the federal estate tax has been a major tax issue in the United States.² Conversations about the estate tax reverberate across the country from quaint farmhouses in Indiana to elegant lofts in Manhattan. The first years of the twenty-first century were no exception to estate tax dialogue.³ President George W. Bush made estate tax repeal a crucial component of his first term domestic goals,⁴ arguing this was necessary to save family farms.⁵ Opponents of the estate

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1. *The 18th Century*, BUREAU OF PUB. DEBT, <http://www.publicdebt.treas.gov/history/1700.htm> (last visited Feb. 10, 2011). This quote and the following by President Washington in his Farewell Address present a good summary of the principal argument of this Note. “[I]t is essential that you should practically bear in mind, that towards the payment of debts there must be Revenue; that to have Revenue there must be taxes; that no taxes can be devised which are not more or less inconvenient and unpleasant . . .” *Rediscovering George Washington*, PBS, http://www.pbs.org/georgewashington/collection/other_1796sep19.html (last visited Oct. 6, 2011).

2. *See, e.g.*, Grayson M.P. McCouch, *The Empty Promise of Estate Tax Repeal*, 28 VA. TAX REV. 369, 373 (2008) (stating, “Estate tax repeal figured as a prominent issue in the 2000 presidential campaign . . .”).

3. *See, e.g., id.*

4. *See, e.g.*, Mitch Frank & Andrew Goldstein, *Campaign 2000: TIME Issues Briefing: The Four Big Differences*, TIME, Nov. 6, 2000, <http://www.time.com/time/magazine/article/0,9171,998392,00.html>; Richard W. Stevenson, *The 2000 Campaign: The Tax Plan; Bush Tax Plan: The Debate Takes Shape*, N.Y. TIMES, Aug. 26, 2000, <http://www.nytimes.com/2000/08/26/>

tax claimed, “[I]t is inappropriate to impose a tax by reason of the death of a taxpayer.”⁶ They managed to displace the phrase “estate tax” from American discourse and insert in its place the expression “death tax.”⁷

Supporters of the tax responded with their own arguments. In early 2001, the organization Responsible Wealth authored an advertisement in the *New York Times*, essentially declaring everyday Americans would pay for estate tax repeal.⁸ Warren Buffet entered the debate and claimed the estate tax was crucial “in ‘helping create a society in which success is based on merit rather than inheritance.’”⁹ Apparently, these counterarguments were no match.

In President Bush’s first year in office, Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA).¹⁰ Notably, EGTRRA affected the estate tax, steadily lowering estate tax rates, while increasing the exemption amounts.¹¹ In 2010, EGTRRA entirely eliminated the estate tax.¹² Nevertheless, all was not lost for the supporters of the estate tax. A sunset provision scheduled the estate tax to resurface in 2011.¹³ This reemerged estate tax would have had the same provisions as the 2001 estate tax.¹⁴ However, Congress preempted this reemergence in December 2010,¹⁵ as it passed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (2010 Tax Relief Act).¹⁶ The 2010 Tax Relief Act did bring back the estate tax, but it changed its terms, setting the exemption at \$5 million and fixing the rate at thirty-five percent.¹⁷

us/the-2000-campaign-the-tax-plan-bush-tax-plan-the-debate-takes-shape.html.

5. See Daniel W. Matthews, *A Fight to the Death: Slaying the Estate Tax Repeal Hydra*, 28 WHITTIER L. REV. 663, 677 (2006).

6. Reginald Mombrun, *Let's Protect Our Economy and Democracy from Paris Hilton: The Case for Keeping the Estate Tax*, 33 OHIO N.U. L. REV. 61, 77 (2007) (citation omitted).

7. See, e.g., Matthews, *supra* note 5, at 671-74.

8. See *id.* at 690.

9. *Id.* (quoting David Cay Johnston, *Dozens of Rich Americans Join In Fight to Retain the Estate Tax: Buffet, Soros and Gate's Father Call It Only Fair*, N.Y. TIMES, Feb. 14, 2001, at A1).

10. Pub. L. No. 107-16, 115 Stat. 38 (2001) (codified in scattered sections of 26 U.S.C.); see Sergio Pareja, *Estate Tax Repeal Under EGTRRA: A Proposal for Simplification*, 38 REAL PROP. PROB. & TR. J. 73, 74 (2003).

11. See Kay Bell, *Estate Tax Lies in Limbo, But For How Long?*, FOX BUS. (Oct. 4, 2010), <http://www.foxbusiness.com/personal-finance/2010/10/04/estate-tax-lies-limbo-long/>.

12. See *id.*

13. See *id.* This provision was inserted by Congress “to comply with congressional budget rules.” Matthews, *supra* note 5, at 665 n.13. Specifically, Congress had to conform to the Byrd Rule. See Mombrun, *supra* note 6, at 69.

14. See Matthews, *supra* note 5, at 665.

15. See Julia Steinway, *Tax Relief Act of 2010: Estate, Gift and GST Tax Changes*, MARTINDALE.COM (Dec. 27, 2010), http://www.martindale.com/taxation-law/article_Much-Shelst-Denenberg-Ament-Rubenstein_1210438.htm.

16. Pub. L. No. 111-312, 124 Stat. 3296 (2010) (codified in scattered sections of 26 U.S.C.).

17. See Paul Sullivan, *Estate Tax Will Return Next Year, But Few Will Pay It*, N.Y. TIMES,

The 2010 Tax Relief Act is “set to expire in two years,” setting up another crucial estate tax debate.¹⁸ Eventually a decision should be made whether to permanently repeal the estate tax or to retain it, perhaps with some modifications. This Note addresses that decision. Part I discusses the history of the death-time taxation in America and Europe. Part II summarizes the arguments for and against the estate tax. Part III briefly balances these arguments and concludes that the adverse consequences of a massive national debt compel estate tax preservation (at least for the time being). Part IV says that if estate tax supporters want to increase support for the tax, they should focus their arguments on exclusively using the tax to reduce, or at least hold off, the growing national debt.

I. THE HISTORY OF DEATH-TIME AND ESTATE TAXATION

The history of estate taxation is vast and detailed. It stretches back thousands of years.¹⁹ It is a history filled with kings,²⁰ churches,²¹ wars,²² and evasions.²³ This part of the Note attempts to succinctly display this history. Having some knowledge of this history should enable the reader to better understand present day arguments.

A. *The Ancient World*

Estate or death-time “taxes are ancient taxes.”²⁴ Archaeologists and historians have proven that these taxes appeared first in Ancient Egypt during the reign of Psametichus I (654-616 B.C.).²⁵ Psametichus I forced “a ten percent tax”

Dec. 18, 2010, at B1, *available at* <http://www.nytimes.com/2010/12/18/your-money/taxes/18wealth.html>. It should be noted that the new law gives options to those heirs who had decedents die in 2010. *See id.* One option is “to treat the estate by the tax laws in place in 2010, . . . calculat[ing] the capital gains on all assets in the estate to determine if the value is above a level the Internal Revenue Service is allowing.” *Id.* The other choice is to simply use the new estate tax provisions. *Id.*

18. *See id.*

19. *See* Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX. L. REV. 223, 223 (1956).

20. *See, e.g.*, GARY ROBBINS, THE HERITAGE FOUND., ESTATE TAXES: AN HISTORICAL PERSPECTIVE 1 (2004), *available at* http://s3.amazonaws.com/thf_media/2004/pdf/bg1719.pdf.

21. *See, e.g.*, Barbara R. Hauser, *Death Duties and Immorality: Why Civilization Needs Inheritances*, 34 REAL PROP. PROB. & TR. J. 363, 369-70 (1999).

22. *See, e.g.*, Eddie Metrejean & Cheryl Metrejean, *Death Taxes in the United States: A Brief History*, 7 J. BUS. & ECON. RES. 33, 34-35 (2009), *available at* <http://journals.cluteonline.com/index.php/JBER/article/view/2246/2294>; ROBBINS, *supra* note 20, at 2.

23. *See, e.g.*, Hauser, *supra* note 21, at 367. Archaeologists have found a papyrus presumably depicting ancient Egyptian death-time tax evasion. Mary R. Wampler, Note, *Repealing the Federal Estate Tax: Death to the Death Tax, or Will Reform Save the Day?*, 25 SETON HALL LEGIS. J. 525, 528 n.13 (2001).

24. Eisenstein, *supra* note 19, at 223.

25. Hauser, *supra* note 21, at 366.

upon death-time land conveyances.²⁶ He justified the tax as a “redemption fee,”²⁷ because in ancient Egypt “full title rested only in the ruler.”²⁸ The tax even applied to “[c]lose family members,”²⁹ unlike some other ancient death-time taxes.³⁰

The ancient Greeks had a form of death-time taxation that they seemed to have copied from the Egyptians.³¹ Evidently this tax created a significant amount of government income in addition to generating protest and fraud.³²

The Romans, like the Greeks, looked to the ancient Egyptians for inspiration for death-time taxation.³³ During the first century A.D., “the *Vicesima Hereditatum*, a tax on successions and legacies to all but close relatives,”³⁴ financed Roman army pensions.³⁵ The tax applied exclusively to Roman citizens,³⁶ and it had a “rate of [five] per cent [sic] on all of the excess over the specified minimum.”³⁷ Emperor Augustus established the tax by using cunning political strategy, vowing to restore a “direct land tax” if his tax plan was not approved.³⁸ Augustus’s successors tinkered with his original law.³⁹ Trajan, for example, commanded “almost all close relatives” be excused from the tax.⁴⁰ Pliny the Younger applauded this reform.⁴¹ He claimed that “a father who had just lost his son should not be called upon in his bereavement to take an inventory of what had been left him; to tax him at such a time would be to add to his burden

26. *Id.*

27. *Id.*

28. *Id.* (quoting WILLIAM J. SHULTZ, *THE TAXATION OF INHERITANCE* 3 (1926)).

29. *Id.*

30. *See, e.g., id.* at 367.

31. *Id.*

32. *Id.*

33. *See* James Hagerman, Jr., *The Federal Estate Tax: Grounds for Adoption of This Method of Taxation in America, Brief Comment on U.S. Supreme Court Decisions on the Subject, and Suggestion of Certain Inequities in Operation That Might be Removed*, 8 A.B.A. J. 92, 93 (1922).

34. Darien B. Jacobson et al., *The Estate Tax: Ninety Years and Counting*, in 27 INTERNAL REVENUE SERV., SOI BULL., no. 1, at 118 (2007), available at <http://www.irs.gov/pub/irs-soi/07sumbul.pdf>.

35. Hauser, *supra* note 21, at 367. This fact, that nations instituted death-time taxation generally to raise revenue, appears throughout history. *See, e.g.,* Kristine S. Knaplund, *Charity for the “Death Tax”: The Impact of Legislation on Charitable Bequests*, 45 GONZ. L. REV. 713, 721 (2010) (referring to the fact that the United States government used a death-time tax to help finance the Civil War).

36. J. F. Gilliam, *The Minimum Subject to the Vicesima Hereditatum*, 73 AM. J. PHILOLOGY 397, 397 (1952).

37. Frank J. Maguire, *Problems in Estate Planning*, 30 CORNELL L.Q. 271, 272 (1945).

38. Hauser, *supra* note 21, at 367.

39. *See id.* at 367-68.

40. *Id.* at 367.

41. *See id.*; MAX WEST, *THE INHERITANCE TAX* 189 (Faculty of Political Sci. of Columbia Univ. eds., 2d rev. ed. 1908).

of sorrow”⁴²

The Roman death-time tax became a prolific revenue supply.⁴³ Emperor Caracalla decided to raise “the tax rate,” eliminate the family exclusions, and increase the tax base by conferring “Roman citizenship” upon “all the free inhabitants of the whole Empire.”⁴⁴ The deterioration of the death-time tax, however, accompanied the fading of the Empire.⁴⁵ The tax vanished entirely “by the time [the eastern Roman] Emperor Justinian . . . compiled the Justinian Code in 533 A.D.”⁴⁶

B. The Middle Ages and Early Modern Europe

Death-time taxes were present in Europe during the Middle Ages.⁴⁷ It became rather ordinary for a tax to be imposed after the passing of an individual.⁴⁸ The taxes, which were generally “annual property rent,”⁴⁹ developed from “the fact that the sovereign or the state owned all assets.”⁵⁰ Genoa, inspired by Roman law, “adopted a two percent death tax with no exemptions for close family” in 1395.⁵¹ In England, the king would confer real property “to certain individuals during their lifetimes.”⁵² After death, the estate could keep this “property upon payment of an estate tax.”⁵³ Many communes in the Canton of Glarus in Switzerland “had a *Todesfallsteuer* or death tax for the benefit of their churches or schools.”⁵⁴

The church also involved itself in death-time taxes.⁵⁵ Pope Innocent IV recommended that individuals give one-third of their possessions to the church upon death.⁵⁶ The church in England would regularly demand “the second-best beast, which the family brought with them to the burial.”⁵⁷ To help “support the war with France,” the English church courts introduced a “stamp duty” applicable to probate actions.⁵⁸ Needless to say, the church took these matters very

42. WEST, *supra* note 41, at 189-90 (citation omitted).

43. See Hauser, *supra* note 21, at 367-68.

44. *Id.* (citation omitted).

45. See *id.* at 368.

46. *Id.*

47. See *id.*; Jacobson et al., *supra* note 34, at 118.

48. Jacobson et al., *supra* note 34, at 118.

49. *Id.*

50. ROBBINS, *supra* note 20, at 1.

51. Hauser, *supra* note 21, at 371.

52. ROBBINS, *supra* note 20, at 1.

53. *Id.*

54. WEST, *supra* note 41, at 39.

55. See Hauser, *supra* note 21, at 369-70.

56. See *id.* at 370.

57. *Id.* at 369-70.

58. *Id.* at 370.

seriously, castigating to Hell those bequeathing no inheritance to the church.⁵⁹

Other European nations began adding death-time taxes as the centuries progressed.⁶⁰ Germany and the Dutch provinces, for example, established inheritance taxes.⁶¹ “By the eighteenth century, many countries had adopted some form of duties, fees, or taxes on transfers of property at death.”⁶²

C. *The Early United States*

Europeans carried the notion of death-time taxation to America as they crossed the Atlantic Ocean.⁶³ These taxes appeared early in American history during crises when the country needed more revenue.⁶⁴

1. *The Stamp Act of 1797*.⁶⁵—Near the close of the eighteenth century, President John Adams and the United States faced a military threat from France.⁶⁶ An undeclared naval war existed between the two nations, with France ordering “seizure of American merchant ships,” primarily in response to America’s recently signed treaty with Great Britain.⁶⁷ A special envoy to France, consisting of Elbridge Gerry, Charles Cotesworth Pinckney, and John Marshall (the legendary jurist), failed to elicit peace.⁶⁸ President Adams and Congress prepared the nation for war by strengthening the navy.⁶⁹ Congress passed the Stamp Act of 1797 to help finance this buildup.⁷⁰ The Act required a stamp “on wills offered for probate, as well as on inventories and letters of administration. Stamps also

59. *See id.*

60. *See id.* at 372.

61. *Id.*

62. Wampler, *supra* note 23, at 529.

63. *See* Mombrun, *supra* note 6, at 67.

64. *See* ROBBINS, *supra* note 20, at 2 (arguing, “[E]state taxes were used as a sporadic, and temporary, way to finance wars”); *see also* David Frederick, *Historical Lessons From the Life and Death of the Federal Estate Tax*, 49 AM. J. LEGAL HIST. 197, 214 (2007) (saying, “Throughout the nineteenth century Congress used death taxes as an effective financial tool to quickly, and with relatively little resistance, raise substantial sums of money in the face of economic crises.”); Jacobson et al., *supra* note 34, at 119 (discussing how a death-time tax was used to raise revenue during a naval crisis with France in 1797); Knaplund, *supra* note 35, at 721 (mentioning that a death-time tax was instituted to help finance the Civil War).

65. Ch. XI, 1 Stat. 527 (1797) (repealed 1802).

66. *See* Jacobson et al., *supra* note 34, at 119.

67. *The XYZ Affair and the Quasi-War with France, 1798-1800*, U.S. DEP’T OF STATE OFF. OF THE HISTORIAN, <http://history.state.gov/milestones/1784-1800/XYZ> (last visited Feb. 11, 2011).

68. *See id.*

69. *See* Jacobson et al., *supra* note 34, at 119; *see also* John Adams, NAVAL HIST. & HERITAGE COMMAND, http://www.history.navy.mil/danfs/j3/john_adams-i.htm (last visited Feb. 11, 2011) (saying, “Difficulties with France during . . . [President Adams’s] administration prompted him to push vigorously for construction of the Navy which had been neglected after the treaty of Paris.”).

70. *See* Jacobson et al., *supra* note 34, at 119.

were required on receipts and discharges from legacies and intestate distributions of property.”⁷¹ Congress repealed the Act once the emergency ended.⁷² During the War of 1812, Treasury Secretary Alexander Dallas advocated for the restoration of death-time taxation.⁷³ The House Ways and Means Committee, however, repudiated the Secretary’s proposal.⁷⁴ The war concluded soon after, making the tax unessential.⁷⁵

2. *The Tax Act of 1862.*⁷⁶—A death-time tax returned to the United States with the onset of the Civil War when Congress passed the Tax Act of 1862 to produce revenue.⁷⁷ The Tax Act of 1862 “not only taxed probated wills, but taxed the privilege of inheritance as well.”⁷⁸ The *Congressional Globe* extolled the Act “as a ‘large source of revenue which could be most conveniently collected.’”⁷⁹ The Internal Revenue Law of 1864,⁸⁰ which reinstated and adjusted the tax, came about as war costs increased.⁸¹ The new amendments included a “succession tax,” along with “the nation’s first gift tax.”⁸² Once the war ended the need for extra revenue abated, and Congress dismantled the tax.⁸³

3. *The War Revenue Act of 1898.*⁸⁴—With the outbreak of the Spanish-American War, Congress again turned to death-time taxation to raise revenue.⁸⁵ The War Revenue Act of 1898 raised a substantial amount of disagreement and debate.⁸⁶ Populists backed the tax, claiming it forced the affluent to pay a just allocation of taxes.⁸⁷ Congressman Oscar Underwood of Alabama stated that the tax “is levied on a class of wealth, a class of property, and a class of citizens that do not otherwise pay their fair share of the burdens of the Government.”⁸⁸ Others replied that the tax would create “a disincentive to accumulate wealth” and

71. *Id.*

72. *See id.*

73. *See* Metrejean & Metrejean, *supra* note 22, at 34.

74. *Id.*

75. *See id.*

76. Ch. CXIX, 12 Stat. 432 (1862) (modified 1864).

77. *See* Knaplund, *supra* note 35, at 721; ROBBINS, *supra* note 20, at 2.

78. Wampler, *supra* note 23, at 530.

79. Barry W. Johnson & Martha Britton Eller, *Federal Taxation of Inheritance and Wealth Transfers*, in *INHERITANCE AND WEALTH IN AMERICA* 61, 65 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998) (quoting Office of Tax Analysis, *Legislative History of Death Taxes in the United States* 2 (1963) (unpublished manuscript)).

80. Ch. CLXXIII, 13 Stat. 223 (1864) (repealed 1870, 1872).

81. *See* Johnson & Eller, *supra* note 79, at 65.

82. *Id.*; Jacobson et al., *supra* note 34, at 119.

83. ROBBINS, *supra* note 20, at 2.

84. Ch. 448, 30 Stat. 448 (1898) (repealed 1902).

85. Metrejean & Metrejean, *supra* note 22, at 35.

86. *See* Wampler, *supra* note 23, at 530-31.

87. *Id.*

88. Eisenstein, *supra* note 19, at 228 (citation omitted).

compel “small businesses” to close.⁸⁹ In *Knowlton v. Moore*, the Supreme Court upheld the tax against a constitutional challenge.⁹⁰ The Act brought in \$14.1 million, though it only bound “personal property” to taxation.⁹¹ Congress repealed the Act when the war concluded in 1902.⁹²

D. The Modern United States

In the early twentieth century, America was deep into the Progressive Era.⁹³ Progressives began clamoring for a death-time tax to more equitably distribute wealth.⁹⁴ President Theodore Roosevelt, a supporter of such a tax, claimed that immense fortunes “are needless and useless, for they make no one really happy and increase no one’s usefulness, and furthermore they do infinite harm and they contain the threat of far greater harm.”⁹⁵ Congress generally did not agree with the progressives, as it rejected death-time taxes in 1909 and 1913.⁹⁶

As World War I approached, “military appropriations” forced Congress to find means to generate revenue.⁹⁷ Congress responded by enacting an estate tax in 1916, in addition to “the modern-day income tax.”⁹⁸ The estate tax portion had similar characteristics of today’s estate tax,⁹⁹ and “[i]t applied to net estates, defined as the total property owned by a decedent, the gross estate, less deductions.”¹⁰⁰ Residents received a \$50,000 exemption, with no exemption going to non-residents.¹⁰¹ Following the initial exemption, the rates began at one percent on smaller estates and increased to ten percent on estates valued above \$5 million.¹⁰² The estate owed taxes “[one] year after the decedent’s death” with a five percent markdown applied to estates paying before this deadline.¹⁰³ A six percent delayed payment fine applied “unless the delay was deemed

89. Wampler, *supra* note 23, at 531.

90. *Knowlton v. Moore*, 178 U.S. 41 (1900).

91. Jacobson et al., *supra* note 34, at 120.

92. *Id.*

93. See *Progressive Era (1890-1913)*, AMERICA’S LIBRARY, http://www.americaslibrary.gov/jb/progress/jb_progress_subj.html (last visited Feb. 12, 2011) (citing the Progressive Era as being 1890-1913).

94. See, e.g., Eisenstein, *supra* note 19, at 228-29. The Progressive Party supported “a graduated inheritance tax as a national means of equalizing the holders of property.” *Id.* at 229 (citation omitted).

95. *Id.* at 228 (citation omitted).

96. *Id.* at 229.

97. See *id.* at 230.

98. ROBBINS, *supra* note 20, at 2.

99. *Id.*

100. Jacobson et al., *supra* note 34, at 120.

101. *Id.*

102. ROBBINS, *supra* note 20, at 2.

103. Jacobson et al., *supra* note 34, at 120-21.

‘unavoidable.’”¹⁰⁴ Like the War Revenue Act of 1898, the Supreme Court upheld the constitutionality of the 1916 estate tax in *New York Trust Co. v. Eisner*.¹⁰⁵

The United States’ entry into World War I prompted Congress to raise the rates of the estate tax in 1917,¹⁰⁶ as the country needed more revenue.¹⁰⁷ A two percent tax applied to estates under \$50,000, with the highest estates taxed at twenty-five percent.¹⁰⁸ The estate tax did not apply to military deaths.¹⁰⁹ After the war, the tax did not disappear like previous death-time taxes in the United States.¹¹⁰

For the next five decades, other than some slight alterations especially in exemptions and rates, the estate tax stayed fairly stable.¹¹¹ In the 1920s, Treasury Secretary Andrew Mellon sought rate reduction, if not outright repeal of the estate tax.¹¹² He argued there was no “social necessity for breaking up large fortunes in” America.¹¹³ Eventually, the rates were reduced, but the estate tax survived.¹¹⁴ The onset of the Great Depression forced an increase in the rates of the estate tax to combat the growing deficit.¹¹⁵ Secretary Mellon, “[t]orn between a dislike for deficits and a dislike for the tax,” supported the rate increase.¹¹⁶

President Franklin Roosevelt’s Administration, however, shifted the primary purpose of the estate tax away from revenue generation and towards wealth redistribution when it made “[t]he levelling of hereditary fortunes . . . one of its objectives.”¹¹⁷ The Senate at one point increased the highest rate to sixty percent with the aid of Senator LaFollette of Wisconsin.¹¹⁸ This rate applied only to estates greater than \$10 million.¹¹⁹

President Roosevelt continued to support wealth redistribution through the estate tax saying, “The transmission from generation to generation of vast fortunes by will, inheritance, or gift is not consistent with the ideals and

104. *Id.* at 121.

105. 256 U.S. 345 (1921).

106. ROBBINS, *supra* note 20, at 2.

107. JOHN R. LUCKEY, CONG. RESEARCH SERV., A HISTORY OF THE FEDERAL ESTATE, GIFT AND GENERATION-SKIPPING TAXES 7 (2003), available at http://assets.opencrs.com/rpts/95-444_20030409.pdf.

108. *Id.*

109. *Id.*

110. ROBBINS, *supra* note 20, at 2.

111. Metrejean & Metrejean, *supra* note 22, at 36.

112. See Eisenstein, *supra* note 19, at 232.

113. *Id.* at 232.

114. See *id.* at 232-33. An increase in rates, however, preceded this reduction. See *id.* at 232.

115. See *id.* at 234.

116. *Id.* at 234. This sentiment expressed by Secretary Mellon is similar to a basic premise of this Note. Essentially, as the title indicates, the current national debt compels a defense of the estate tax.

117. *Id.* at 235.

118. *Id.*

119. *Id.*

sentiments of the American people.”¹²⁰ The importance of evening out estates and equitable distribution began to fade after 1935.¹²¹ Rates rose again in 1941, but this was arguably based on the need for revenue to fund the military buildup for World War II.¹²²

A considerable change in the estate tax occurred in 1976 when Congress merged “the estate tax and the gift tax into a single graduated rate.”¹²³ Congress also joined the exemptions of the two taxes, creating a “unified estate and gift tax credit.”¹²⁴ In 1981, Congress increased the exemption amount to \$600,000.¹²⁵ Congress gave smaller estates more relief in 1997, boosting the exemption to \$1 million.¹²⁶ However, Congress scheduled the exemption to be introduced gradually, with the full effect not occurring until 2006.¹²⁷ Congress ratified EGTRRA in 2001, steadily reducing the estate tax rates and wholly eliminating the tax in 2010.¹²⁸ Then Congress passed the 2010 Tax Relief Act, keeping the estate tax for at least two more years.¹²⁹

This brief history of the death-time and estate taxation demonstrates three overriding principles: (1) death-time taxation has a long history both in the United States and abroad;¹³⁰ (2) death-time taxation, throughout much of its history, was generally used to produce revenue;¹³¹ and (3) in America, death-time taxes were first used mainly in times of war or national crisis.¹³² With those points in mind, the next section of this Note considers in greater detail the primary arguments both in support of, and in opposition of, permanent repeal of the estate tax.

II. ARGUMENTS IN FAVOR OF AND AGAINST PERMANENT REPEAL OF THE ESTATE TAX

Politicians, academics, tax attorneys, economists and others have asserted various arguments in support of, or in opposition to, permanent repeal of the

120. *Id.*

121. *See id.* at 236.

122. *See id.* Congress simply merged a short-term 1940 defense tax into the estate tax and made it permanent. *Id.*

123. Mombrun, *supra* note 6, at 68.

124. ROBBINS, *supra* note 20, at 3.

125. *Id.*

126. LUCKEY, *supra* note 107, at 23.

127. *Id.*

128. *See* Bell, *supra* note 11.

129. *See* Sullivan, *supra* note 17.

130. *See, e.g.,* Hauser, *supra* note 21, at 367 (mentioning a Roman death-time tax); Jacobson et al., *supra* note 34, at 119 (discussing the Stamp Act of 1797, a death-time tax in early America).

131. *See, e.g.,* Frederick, *supra* note 64, at 214; Hauser, *supra* note 21, at 367 (discussing how Emperor Augustus used a Roman death-time tax to finance army pensions); Knaplund, *supra* note 35, at 721 (discussing how the United States used a death-time tax to help finance the Civil War).

132. *See supra* note 64 and accompanying text.

estate tax. This section considers only the primary arguments of each respective side, leaving the marginal arguments out. Knowing the key arguments for both sides allows one to more rationally balance the interests in determining the approach Congress should adopt when deciding whether to permanently keep the estate tax or repeal it.¹³³

A. Arguments Against the Estate Tax

1. *The Estate Tax and Small Businesses.*—Opponents of the estate tax have consistently highlighted the adverse effects the tax has on farmers and small business owners.¹³⁴ On the campaign trail in 2000, George W. Bush claimed, “[T]o keep farms in the family, we are going to get rid of the death tax”¹³⁵ In 2010, Senator Jim DeMint of South Carolina insisted, “Killing the death tax will create jobs and save thousands of family farms and small businesses. It’s time to kill the death tax once and for all”¹³⁶

Opponents generally assert, “Estates that consist largely of family-owned businesses are the most vulnerable to the death tax.”¹³⁷ These businesses typically reinvest earned income “back into the business,” acquiring land or equipment for example.¹³⁸ The estate must incorporate the decedent’s share of these assets in the value of the estate when a business owner dies.¹³⁹ Because these assets are normally “valuable” they can push the decedent’s estate past the estate tax minimum.¹⁴⁰ If the “business’s available cash does not cover” the estate tax when it comes due, these assets may need to be sold.¹⁴¹ The problem, however, is that it is not simple to sell these assets, as they are essential in keeping the business

133. The purpose in this section is not to weigh the sides against each other, but instead to attempt to lay out the arguments of each. Prominent studies that each group uses to evidence its claims will be cited as a means to both further explain each side and to give an example of where each side has drawn some of its proof.

134. See, e.g., Wampler, *supra* note 23, at 536; CURTIS S. DUBAY, THE HERITAGE FOUND., THE ECONOMIC CASE AGAINST THE DEATH TAX 3 (2010), available at http://thf_media.s3.amazonaws.com/2010/pdf/bg2440.pdf; PATRICK F. FAGAN, THE HERITAGE FOUND., HOW THE DEATH TAX KILLS SMALL BUSINESSES, COMMUNITIES—AND CIVIL SOCIETY 1 (2010), available at http://thf_media.s3.amazonaws.com/2010/pdf/bg2438.pdf; Douglas Holtz-Eakin, *Kill the “Death Tax,”* L.A. TIMES, May 6, 2009, <http://articles.latimes.com/2009/may/06/opinion/oe-holtz-eakin6>.

135. Matthews, *supra* note 5, at 677 (citation omitted).

136. *DeMint to Force Vote to Kill Death Tax Permanently*, JIM DEMINT: U.S. SENATOR, SOUTH CAROLINA, http://demint.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=bd148757-fd1b-4f32-82b5-ab0e71a9a3f3&ContentType_id=a2165b4b-3970-4d37-97e5-4832fcc68398&Group_id=9ee606ce-9200-47af-90a5-024143e9974c&MonthDisplay=7&YearDisplay=2010 (last visited Nov. 06, 2010).

137. DUBAY, *supra* note 134, at 3.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

running.¹⁴² Opponents say that if the estate must sell these assets the business will likely lose some “income-generating capability” and need to lay off employees.¹⁴³ The worst case scenario would be complete liquidation of the business, which some say may and does happen.¹⁴⁴

Additionally, these businesses must spend money on accountants and lawyers for estate tax planning, further increasing costs.¹⁴⁵ A 1998 Congressional Report stated that family businesses spend on “average \$16,113 on lawyers, \$14,632 on accountants, and \$2,392 on other financial advisers.”¹⁴⁶

Opponents contend that the estate tax unfavorably affects more than just affluent Americans.¹⁴⁷ A “congressional Joint Economic Committee” report remarked that “more than 37,000 ‘closely-held businesses,’ as well as 24,000 farms” paid the estate tax from 1995 to 2004.¹⁴⁸ The Committee concluded “that the estate tax has broad and significant costs for thousands of family businesses.”¹⁴⁹

Opponents of the estate tax draw on personal estate tax “horror stories” to drive home their point.¹⁵⁰ In 1995 opponents of the tax brought Chester Thigpen, an African American tree farmer and “grandson of slaves,” to Washington, D.C. to testify to Congress.¹⁵¹ Thigpen testified that under the estate tax his family may have to sell his farm because of the high value of his property and trees, even though according to him, he was not rich.¹⁵² More recently, Victor Mavar, a businessman, testified that he had declined to invest in new businesses in hurricane-ravaged Biloxi because of the estate tax.¹⁵³ He said he did not want to

142. *See id.*

143. *Id.*

144. *See* Joseph H. Astrachan & Roger Tutterow, *The Effect of Estate Taxes on Family Business: Survey Results*, 9 FAM. BUS. REV. 303, 303 (1996) (saying, “Estate taxes are a crucial issue facing our country, causing family-owned businesses to downsize and liquidate”); *see also* Daniel Kadlec, *Why These Guys are Dead Wrong*, TIME, Feb. 26, 2001, <http://www.time.com/time/magazine/article/0,9171,999309,00.html> (arguing the estate “tax may even force the sale or partial liquidation of a farm or family business”).

145. *See* Stephanie A. Weber, Note, *Re-Thinking the Estate Tax: Should Farmers Bear the Burden of a Wealth Tax?*, 9 ELDER L.J. 109, 118 (2001).

146. *Id.*

147. *See, e.g.*, Jeff Jacoby, Op-Ed., *Let’s Keep the Death Tax Dead*, BOS. GLOBE, Jan. 3, 2010, http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/01/03/lets_keep_the_death_tax_dead (arguing, “[T]he nation’s wealthiest citizens aren’t the ones the estate tax hurts.”).

148. *Id.*

149. *Id.*

150. Matthews, *supra* note 5, at 674-77; *see also* FAGAN, *supra* note 134, at 2-6 (discussing these types of stories).

151. Matthews, *supra* note 5, at 681-82.

152. *Id.*

153. FAGAN, *supra* note 134, at 5.

encumber his children with a possible tax after his death.¹⁵⁴ Mr. Mavar continued, saying the estate “tax has encouraged a ‘wealth-redistribution,’ not from the rich to the poor, but from the local community to the national corporations.”¹⁵⁵ Kevin Hancock, president of Maine-based Hancock Lumber, stated the estate “tax has been a leading cause of green-space and forest loss in Maine, as multiple private forests have been sold in order to pay the death tax.”¹⁵⁶ These stories add a personal dimension to the usually abstract debate about the estate tax. They are “an easy sell to most Americans even though most do not own businesses or farms.”¹⁵⁷

2. *The Estate Tax and the Revenue It Generates.*—Opponents of the estate tax generally argue the estate tax does not raise a sufficient amount of revenue.¹⁵⁸ The estate tax generated “less than [one percent] of federal revenue” in 2008.¹⁵⁹ Opponents “simply dismiss the revenue yield [of the estate tax] as insignificant.”¹⁶⁰ In fact, opponents have said the estate tax may actually lose income.¹⁶¹

3. *The Estate Tax and Investment and Savings.*—Opponents of the estate tax say the tax dampens “savings and investment” by incentivizing spending to avoid paying the tax.¹⁶² The theory is the estate tax conveys the following message to Americans:

If you work hard, save thriftily and accumulate a fortune, you’ll be taxed constantly and then see up to one-half of your savings go to your distant Uncle Sam instead of the heirs that you choose. Why not stop building up your net wealth, spend what you have and die poor?¹⁶³

The “excessive spending” by those trying to avoid the tax divides “the wealthy from the non-wealthy” still more.¹⁶⁴ Additionally, opponents say the estate “tax slows economic growth, destroys jobs, and suppresses wages because it is a tax on capital and on entrepreneurship.”¹⁶⁵ William Beach of the Heritage Foundation says “that the federal estate tax alone is responsible for the loss of

154. *Id.*

155. *Id.* (citation omitted).

156. *Id.* at 4.

157. Matthews, *supra* note 5, at 675.

158. *See, e.g., id.* at 696.

159. Michael J. Graetz, *It’s Fair, and We Need the Revenue*, WALL ST. J., Sept. 20, 2010, <http://online.wsj.com/article/SB10001424052748704358904575477593075638722.html>.

160. Matthews, *supra* note 5, at 696.

161. *See, e.g.,* J.D. Foster, *Is the Estate Tax A (Revenue) Loser?*, TAX FOUND., Dec. 20, 1999, <http://www.taxfoundation.org/news/show/187.html>.

162. *See, e.g.,* DUBAY, *supra* note 134, at 2.

163. Ed McCaffery, *It’s Unfair, and There’s a Better Way*, WALL ST. J., Sept. 20, 2010, <http://online.wsj.com/article/SB10001424052748704206804575467920711270954.html>.

164. Wampler, *supra* note 23, at 537.

165. DUBAY, *supra* note 134, at 2.

between 170,000 and 250,000 potential jobs each year.”¹⁶⁶

Opponents say the estate tax restrains entrepreneurs themselves from investing in and creating their own businesses.¹⁶⁷ When an entrepreneur assesses whether to start a business, he considers all potential costs to figure his possible gain.¹⁶⁸ The estate tax is one such potential cost.¹⁶⁹ Opponents say this cost prospect “causes many entrepreneurs to refrain from starting a business,” affecting economic and employment growth.¹⁷⁰

Generally, opponents of the estate tax argue that the estate tax creates resource apportionment inefficiency.¹⁷¹ Capital owners are induced “to shift resources from their most productive uses into less efficient (though more tax-friendly) uses.”¹⁷² These less efficient investment options decrease output.¹⁷³ Opponents of the estate tax say there would have been \$850 billion more “of capital in the economy” had there been no estate tax in the previous decades.¹⁷⁴ Thus, the contention is “that the estate tax results in a net economic loss for the United States economy.”¹⁷⁵

4. *The Compliance Cost of the Estate Tax.*—Opponents of the estate tax cite, in their view, high compliance costs and inefficiency as a reason to eliminate the tax.¹⁷⁶ Opponents say the estate tax can be circumvented (at least somewhat) by employing attorneys and estate planners.¹⁷⁷ This is “economically wasteful.”¹⁷⁸ A 1992 report “estimated the cost of complying with estate taxes to be [one dollar] for every dollar of revenue raised—nearly five times more costly per dollar of revenue than the notoriously complex federal income tax.”¹⁷⁹ The report goes on to say, “[T]he ratio of excess burden to revenue of wealth transfer

166. WILLIAM W. BEACH, THE HERITAGE FOUND., SEVEN REASONS WHY CONGRESS SHOULD REPEAL, NOT FIX, THE DEATH TAX 1 (2009), available at http://thf_media.s3.amazonaws.com/2009/pdf/wm2688.pdf.

167. See DUBAY, *supra* note 134, at 2-3.

168. See *id.* at 2.

169. See *id.* (maintaining the estate tax “raises the costs an entrepreneur will pay because it promises to confiscate a portion of his business upon his death”).

170. *Id.*

171. See, e.g., JOINT ECON. COMM., 105TH CONG., THE ECONOMICS OF THE ESTATE TAX at iii (Comm. Print 1998), available at <http://www.house.gov/jec/fiscal/tx-grwth/estattax/estattax.htm> (claiming, “The distortionary incentives in the estate tax result in the inefficient allocation of resources, discouraging saving and investment and lowering the after-tax return on investments.”).

172. *Id.* at 18.

173. See *id.*

174. Matthews, *supra* note 5, at 694.

175. *Id.*

176. See, e.g., ANDREW CHAMBERLAIN ET AL., TAX FOUND., DEATH AND TAXES: THE ECONOMICS OF THE FEDERAL ESTATE TAX 3-4, 8 (2006), available at <http://www.taxfoundation.org/files/sr142.pdf>.

177. See *id.* at 3.

178. *Id.*

179. *Id.*

taxes is among the highest of all taxes.”¹⁸⁰ Opponents have claimed that the estate tax’s “administrative costs” to the IRS are too great when balanced against the revenue generated.¹⁸¹ Advertisements in newspapers have put administrative costs of the estate as high as “sixty-five cents on the dollar.”¹⁸²

5. *Traditionally Disadvantaged Groups.*—According to opponents of the estate tax, the tax excessively harms traditionally disadvantaged groups, like minorities, disabled persons, and women.¹⁸³ Opponents frequently cite examples where the businesses of black owners may not survive the owner’s death because of the estate tax.¹⁸⁴ Congressional Black Caucus member Sanford Bishop said, “Employees of family businesses, many of whom are minorities, are at risk of losing their jobs because their employers are forced to pay the unfair and exorbitant death taxes levied on them”¹⁸⁵ President Bush communicated a story of a Hispanic “taco-shop owner” who told him “to get rid of the death tax so I can pass my business from one generation to the next.”¹⁸⁶

A group named the Disabled Americans for Death Tax Repeal inserted an anti-estate tax advertisement in major newspapers.¹⁸⁷ One opponent of the estate tax asserted that there were over two million disabled “family members of millionaires” who required their inheritances to counteract increasing medical expenses.¹⁸⁸ Patricia Soldano, an anti-estate tax advocate and an original member of Women Impacting Public Policy (WIPP), warned women that many of them would be saddled with the weight of estate tax preparation, as the majority of wives live longer than their husbands.¹⁸⁹ WIPP has come out against the estate tax and now circulates “estate tax horror stories” involving women.¹⁹⁰

180. *Id.* at 3-4.

181. Matthews, *supra* note 5, at 691.

182. *Id.* at 691-92.

183. *Id.* at 681-86.

184. *See, e.g., id.* at 681-82; FAGAN, *supra* note 134, at 6. Patrick Fagan, Ph.D., an opponent of the estate tax, has cited Black Entertainment Television as a company that “will not survive its founder’s death under current [estate] tax law.” *Id.* Mr. Fagan goes on to report that “*The Chicago Daily Defender*, the oldest black-owned daily newspaper in the United States, was already forced into bankruptcy by the death tax in 2003.” *Id.*

185. Deroy Murdock, *How Death Tax Shafts Black Americans*, HUM. EVENTS (July 6, 2006), <http://www.humanevents.com/article.php?id=15927>.

186. Rosie Hunter & Chuck Collins, “*Death Tax*” *Deception: Who’s Behind the Movement to Repeal the Nation’s Only Tax on Inherited Wealth?*, DOLLARS & SENSE, <http://www.dollarsandsense.org/archives/2003/0103hunter.html> (last visited Feb. 14, 2011).

187. Matthews, *supra* note 5, at 682-83. The text stated, “In order to live a full life, these [disabled] Americans may require medical help, nursing and living assistance far beyond that which is covered by medical insurance. Warren Buffett, Bill Gates, Sr. and George Soros believe that these people should be denied full financial help from their parents.” Hunter & Collins, *supra* note 186.

188. Matthews, *supra* note 5, at 683; Hunter & Collins, *supra* note 186.

189. *See* Matthews, *supra* note 5, at 684.

190. *Id.*

6. *The Morality and Double Taxation of the Estate Tax.*—Estate tax opponents argue, “Death [s]hould [n]ot [b]e a [t]axable [e]vent.”¹⁹¹ Naming the estate tax the “death tax” solidifies this point.¹⁹² Opponents also say that the estate tax results in double taxation.¹⁹³ President Bush said the estate tax should be repealed “because people shouldn’t be taxed twice on their assets.”¹⁹⁴ Oprah Winfrey expressed a similar sentiment on her show.¹⁹⁵ Robert Johnson, the creator of Black Entertainment Television, and others put an advertisement in well-known newspapers stating, “[T]he ‘estate tax is unfair double taxation since taxpayers are taxed twice—once when the money is earned and again when you die.’”¹⁹⁶

B. Arguments in Support of the Estate Tax

1. *The Revenue of the Estate Tax and the Cost of Repeal.*—Supporters of the estate tax argue that it raises an important amount of revenue.¹⁹⁷ In 2008 the estate tax generated around \$29 billion.¹⁹⁸ Professor Michael Graetz argues that this amount can roughly cover three-quarters of the Department of Homeland Security’s costs.¹⁹⁹ Professor Daniel Matthews has said the revenue of the estate and gift tax combined “is more than the government currently spends on education.”²⁰⁰

Supporters contend that repeal of the estate tax is economically reckless, saying it will greatly increase future deficits.²⁰¹ One report supporting the estate

191. Mombrun, *supra* note 6, at 77; see also Phil Kerpen, *Bury This Death-Tax Compromise: Estate-Tax Repeal Advocates Need to Liven Up the Battle*, NAT. REV. ONLINE (July 6, 2006), <http://www.nationalreview.com/articles/218142/bury-death-tax-compromise/phil-kerpen> (stating, “The death tax is first and foremost a moral issue. Americans do not believe that death should be a taxable event.”); Bloomberg News, *Buffet Says No Estate Tax Would be a Gift to the Rich*, N.Y. TIMES, Nov. 15, 2007, <http://www.nytimes.com/2007/11/15/business/15buffett.html> (quoting Senator Charles Grassley of Iowa as saying, “[D]eath should not be a taxable event.”).

192. See Mombrun, *supra* note 6, at 77.

193. See, e.g., Carl Hulse, *Fate of Estate Tax Imperils Obama’s Ambitions*, N.Y. TIMES, Apr. 11, 2009, <http://www.nytimes.com/2009/04/12/us/politics/12hill.html> (stating, “Republicans and other critics consider the estate tax to be fundamentally unfair, saying it represents double taxation since those who accumulated the assets had already paid taxes throughout their lifetime.”).

194. Matthews, *supra* note 5, at 704 (citation omitted).

195. See *id.*

196. *Id.* (quoting MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* 174 (2005)).

197. See, e.g., Matthews, *supra* note 5, at 696-97; Graetz, *supra* note 159.

198. Graetz, *supra* note 159.

199. *Id.*

200. Matthews, *supra* note 5, at 696. It should be noted, however, that Professor Matthews’s article is somewhat dated, as it was published in 2006.

201. See *The Estate Tax: Myths and Realities*, CTR. ON BUDGET & POLICY PRIORITIES, 1 (Feb. 23, 2009), available at <http://www.cbpp.org/files/estatetaxmyths.pdf> [hereinafter *Myths and*

tax shows permanent repeal of the tax “would cost almost \$1.3 trillion” during only the first decade of its absence.²⁰² The number is broken down into roughly \$1 trillion in vanished revenue “and \$277 billion in increased interest payments on the national debt.”²⁰³ Interest payments are included because repeal costs would likely be supported by borrowing more money instead of enlarged taxes or budget balancing.²⁰⁴ Supporters also say abolishing the estate tax will decrease “income and gift tax revenue.”²⁰⁵ Specifically, “[T]he Joint Tax Committee expects repeal of the estate tax to *reduce* capital gains revenue by increasing the ‘lock-in effect,’ whereby people choose to hold appreciated assets until they die rather than to sell the assets while they are alive and pay the capital gains tax.”²⁰⁶

2. *The Estate Tax and Investment and Savings.*—Supporters typically take issue with the argument that the estate tax decreases private savings and that repeal would increase private savings.²⁰⁷ The Congressional Research Service has said that “virtually no empirical evidence about the effect of estate and gift taxes [on saving behavior] exists.”²⁰⁸ Supporters disagree with opponents’ use of “dubious assumptions” when making their arguments about the estate tax and savings.²⁰⁹ Supporters highlight the fact that there are many unknowns about the estate tax and savings.²¹⁰ The argument is estate tax repeal may incentivize one person to save, but another to spend.²¹¹ For example, assume a person only wanted to leave his heirs a specific inheritance.²¹² Here, “[H]e would save less if the estate tax were repealed, because he could provide the target inheritance without accumulating as much wealth (since no tax would have to be paid on the estate).”²¹³ Supporters also claim estate tax repeal may give heirs money to save, but it may also incentivize them to spend.²¹⁴ If an heir inherits a large sum of money, he may feel that he has more time and “less need to save for the future,” thus increasing his spending now.²¹⁵

Realities].

202. *Id.*

203. *Id.*

204. Chye-Ching Huang, *The High Cost of Estate Tax Repeal*, CTR. ON BUDGET & POLICY PRIORITIES, 2 (Jan. 28, 2009), available at <http://www.cbpp.org/files/6-5-06tax.pdf>.

205. *Id.* (emphasis omitted).

206. *Id.*

207. See, e.g., Aviva Aron-Dine, *Estate Tax Repeal Would Decrease National Saving: Long-Run Impact on Economy Negligible and Possibly Negative*, CTR. ON BUDGET & POLICY PRIORITIES, 1 (June 8, 2006), available at <http://www.cbpp.org/files/6-8-06tax.pdf>; *Myths and Realities*, *supra* note 201, at 4-5.

208. Aron-Dine, *supra* note 207, at 2 (citation omitted).

209. *Id.* at 1.

210. See, e.g., *id.* at 2.

211. See *id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

3. *The Estate Tax and Small Businesses.*—Supporters of the estate tax argue the estate tax does *not* actually hurt a substantial amount of farms and small businesses.²¹⁶ Around one point three percent of estates subjected to the estate tax “are small business or farm estates.”²¹⁷

One fact estate tax supporters cite is that the American Farm Bureau Federation indicated in 2001 it could name not one situation where the estate tax forced a farm to liquidate.²¹⁸ The year is significant here, because it “was *before* the estate tax exemption level was more than tripled and the top rate was reduced.”²¹⁹ Professor Neil Harl, an economist, conducted an exhaustive search and said he never discovered a situation where the estate tax drove a farm to liquidate.²²⁰

The IRS has published data showing “that most estates do not have liquidity problems.”²²¹ The study demonstrated, “[L]iquid assets are more than eight times greater in value than illiquid business and farm assets in taxable estates.”²²² A Congressional Budget Office (CBO) study using numbers for 2009 showed only a small number of farm estates would have to sell some of the farm to cover the estate tax.²²³ Moreover, the CBO clarified that it might have overvalued these liquidity limitations “because it was unable to include certain assets held in trusts (such as life insurance trusts) in calculating the liquid assets available to help pay the tax.”²²⁴

4. *The Estate Tax and Charitable Contributions.*—Supporters of the estate tax say charitable contributions will considerably diminish if the estate tax is repealed.²²⁵ The basis for this claim is the estate tax induces people to donate to

216. See, e.g., Matthews, *supra* note 5, at 674-81; *Myths and Realities*, *supra* note 201, at 2-3 (asserting, “The number of small, family-owned farms and businesses that owe any estate tax at all is tiny, and virtually no such farms and businesses have to be liquidated to pay the tax.”).

217. *Myths and Realities*, *supra* note 201, at 2-3.

218. See Gillian Brunet & Chye-Ching Huang, *Unlimited Estate Tax Exemption For Farm Estates Is Unnecessary and Likely Harmful*, CTR. ON BUDGET & POLICY PRIORITIES, 2 (June 29, 2010), available at <http://www.cbpp.org/files/6-29-10tax.pdf>; see also Chye-Ching Huang, *Impact of Estate Tax on Small Businesses and Farms is Minimal: Almost No Small Business and Farm Estates Owe the Tax; Those That Do Only Owe Modest Amounts*, CTR. ON BUDGET & POLICY PRIORITIES, 3 (Feb. 23, 2009), available at <http://www.cbpp.org/files/2-23-09tax.pdf>; David Cay Johnston, *Talk of Lost Farms Reflects Muddle of Estate Tax Debate*, N.Y. TIMES, Apr. 8, 2001, <http://www.nytimes.com/2001/04/08/us/talk-of-lost-farms-reflects-muddle-of-estate-tax-debate.html>. It does seem, though, that American Farm Bureau did present one case, as apparently a widow “had to mortgage a California grape vineyard she inherited from her husband to pay taxes on his estate.” Matthews, *supra* note 5, at 677-78. This event, however, took place before the “unlimited marital exclusion,” which Congress introduced in 1981. *Id.* at 678.

219. Brunet & Huang, *supra* note 218, at 2.

220. See Matthews, *supra* note 5, at 678.

221. *Id.* at 676.

222. *Id.* at 676-77.

223. See Brunet & Huang, *supra* note 218, at 2.

224. *Id.* at 2-3.

225. See, e.g., Matthews, *supra* note 5, at 698-700; Aviva Aron-Dine, *Estate Tax Repeal—or*

charitable organizations “during life *and* at death.”²²⁶ This is because these contributions shrink the amount of a person’s estate, thus decreasing the total estate tax.²²⁷ One-sixth of decedents who paid the estate tax in 2001 had charitable contributions.²²⁸ These charitable contributions are an enormous amount, clustered amongst the most affluent Americans.²²⁹ For example, 301 decedents, possessing estates of at least \$20 million, donated “\$6.8 billion to charity” in 2001.²³⁰ A 2004 CBO report that is cited to support the estate tax showed if “the estate tax [had] been repealed in 2000” then charitable donations would have dropped by \$13 billion up to \$25 billion.²³¹ The CBO also “concluded that repealing the estate tax would reduce charitable bequests by sixteen to twenty-eight percent and charitable giving during life by six percent to eleven percent.”²³² Another study has had “charitable contributions” decreasing by as much as “twenty-four to forty-four percent” without the estate tax.²³³

5. *The Voluntary Nature of the Estate Tax.*—Supporters of the estate tax rebut the claims of opponents and say that the tax is *not* voluntary.²³⁴ Essentially, they argue the estate tax is not easily avoided and that it can only be wholly avoided by (1) leaving “one’s entire estate to one’s surviving spouse”; (2) donating to charity “one’s entire estate”; and (3) spending “one’s wealth during one’s lifetime.”²³⁵ A 2009 article by Professors Paul Caron and James Repetti presents evidence to demonstrate that the estate tax is a considerable weight to wealthy Americans.²³⁶ The article concludes “that the estate tax is clearly not voluntary today, unless one wishes to actually reduce the real value of assets transferred to heirs.”²³⁷

6. *The Estate Tax and an Obligation “Owed to the Government.”*²³⁸—Supporters of the estate tax say the wealthiest Americans owe something to a

Slashing the Estate Tax Rate—Would Substantially Reduce Charitable Giving, CTR. ON BUDGET & POLICY PRIORITIES, 1 (June 7, 2006), available at <http://www.cbpp.org/files/6-7-06tax.pdf>; JON M. BAKIJA & WILLIAM G. GALE, EFFECTS OF ESTATE TAX REFORM ON CHARITABLE GIVING, URBAN-BROOKINGS TAX POLICY CTR. 1 (2003), available at http://www.taxpolicycenter.org/UploadedPDF/310810_TaxPolicy_6.pdf.

226. Matthews, *supra* note 5, at 698 (emphasis added).

227. *Id.*

228. BAKIJA & GALE, *supra* note 225, at 1-2.

229. *See id.* at 2 (claiming, “[C]haritable bequests are heavily concentrated among the wealthiest estates.”).

230. *Id.*

231. Matthews, *supra* note 5, at 698.

232. *Id.*

233. *Id.*

234. *See, e.g., id.* at 702-03.

235. *Id.* at 703.

236. Paul L. Caron & James R. Repetti, *The Estate Tax Non-Gap: Why Repeal a “Voluntary” Tax?*, 20 STAN. L. & POL’Y REV. 153, 154 (2009).

237. *Id.* at 169.

238. Mombrun, *supra* note 6, at 89.

government that enabled them to be so prosperous.²³⁹ Basically, the argument is that the wealthy receive a substantial amount of benefits from the government.²⁴⁰ Supporters say the wealthy even depend on and receive more security and benefits from “the government’s protection of individual property rights” than the less affluent.²⁴¹ Thus, according to at least some supporters of the estate tax, “It seems fair that people who have prospered the most in this society help to preserve it for future generations through tax revenues that derive from their estates.”²⁴² Bill Gates, Sr. has summed up this argument nicely:

The reason the estate tax makes so much sense is that there is a direct relationship between the net worth people have when they pass on and where they live. The government that protects their business activities, the traditions that enable them to rely on certain things happening, that’s what creates capital and enables net worth to increase.²⁴³

7. *The Compliance Costs of the Estate Tax.*—Proponents of the estate tax refute the claim that compliance costs of the tax are excessively high, diminishing any positive aspect of the tax.²⁴⁴ They claim that compliance costs of the estate tax are no more burdening than other taxes.²⁴⁵ Some studies supporting this position show “estate tax compliance” and administrative costs are around “[seven] percent of estate tax revenues.”²⁴⁶ By comparison, “administrative and compliance costs equal about 14.5 percent of the revenue raised by the individual and corporate income taxes”²⁴⁷ Estate tax opponents often cite a piece economist Henry Aaron co-wrote in 1992 claiming the tax has substantial compliance costs.²⁴⁸ Mr. Aaron, however, now disassociates himself from this work and has come out “against estate tax repeal.”²⁴⁹ Finally, supporters maintain that sometimes estate tax compliance costs are exaggerated by incorporating costs in the calculation, such as preparing a will and other documents, that would be

239. See, e.g., *id.* at 89-91; *Myths and Realities*, *supra* note 201, at 5.

240. See *Myths and Realities*, *supra* note 201, at 5. These benefits include “defense, education, health care, scientific research, environmental protection, and infrastructure.” *Id.*

241. *Id.*

242. *Id.*

243. *Id.* (citation omitted).

244. See, e.g., Matthews, *supra* note 5, at 691-94; *Myths and Realities*, *supra* note 201, at 6; see also Joel Friedman & Ruth Carlitz, *Cost of Estate Tax Compliance Does Not Approach the Total Level of Estate Tax Revenue*, CTR. ON BUDGET & POLICY PRIORITIES, 1 (June 9, 2006), available at <http://www.cbpp.org/files/6-14-05tax.pdf> (asserting, “[T]here is no credible evidence that compliance costs — including the IRS’ costs of administering the estate tax and the cost taxpayers bear in terms of estate planning and administering an estate when a person dies — carry a cost anywhere near the estate tax revenue yield.”).

245. See *Myths and Realities*, *supra* note 201, at 6.

246. *Id.*

247. *Id.*

248. See Matthews, *supra* note 5, at 692-93.

249. *Id.* at 693-94.

included in estate planning even if the estate tax did not exist.²⁵⁰

8. *The Estate Tax and Enormous Wealth*.—Professor Mombrun has said that “it may be un-American to transfer . . . [large] fortune[s] from generation to generation and choke off opportunities for others.”²⁵¹ These types of transfers could result in wealth concentration, possibly creating “poor economic performance in the long run.”²⁵² President Theodore Roosevelt supported the estate tax by saying, “No advantage comes either to the country as a whole or to the individuals inheriting the money by permitting the transmission in their entirety of the enormous fortunes which would be affected by such a[n estate] tax”²⁵³ Finally, supporters note repeal of the estate tax would convey roughly \$1 trillion to the most affluent Americans over the next decade, further increasing the wealth disparity in the country.²⁵⁴

III. BALANCING OF THE ARGUMENTS

Weighing the arguments of whether the estate tax must be repealed or retained proves difficult. Both sides make convincing claims. The estate tax does seem to negatively affect some small business owners and farmers.²⁵⁵ If they do not actually pay the tax, they surely contemplate paying it, forcing them to take actions and make decisions they otherwise would not desire.²⁵⁶ However, as estate tax proponents declare and demonstrate, the number of businesses and farms that pay the tax is rather little.²⁵⁷

On many claims the sides entirely disagree. Opponents maintain that the estate tax readily incentivizes people to spend money.²⁵⁸ Proponents argue that the incentives of the estate tax are much more nuanced.²⁵⁹ Opponents assert that the estate tax is voluntary.²⁶⁰ Proponents retort that it is actually quite involuntary.²⁶¹

On some aspects of the estate tax, the two sides present competing evidence. For example, opponents of the estate tax display evidence showing the compliance costs of the tax make it ineffective.²⁶² Supporters of the tax respond with their own evidence demonstrating the compliance costs are analogous to

250. See *Myths and Realities*, *supra* note 201, at 6.

251. Mombrun, *supra* note 6, at 91.

252. *Id.* (citation omitted).

253. Eisenstein, *supra* note 19, at 229 (citation omitted).

254. See Mombrun, *supra* note 6, at 92.

255. See *supra* notes 134-57 and accompanying text.

256. See *supra* notes 150-56 and accompanying text.

257. See, e.g., *Myths and Realities*, *supra* note 201, at 2-3.

258. See *supra* notes 162-63 and accompanying text.

259. See *supra* notes 207-15 and accompanying text.

260. See, e.g., Matthews, *supra* note 5, at 702-03.

261. See, e.g., *id.*

262. See *supra* notes 176-80 and accompanying text.

other taxes.²⁶³

Therefore, on the whole, this is a close issue, with valid arguments presented by both groups. If the estate tax is repealed it might increase savings and investment,²⁶⁴ and small business owners who pay the tax would get relief from hardships the tax may impose.²⁶⁵ Yet, scrapping the estate tax will likely decrease charitable contributions,²⁶⁶ and retaining it will probably generate upwards of \$20 billion in revenue.²⁶⁷ However, there is *one* factor *alone* that forces a defense of the estate tax at this time in the United States. This factor is the national debt.

This part of the Note explains the national debt and articulates five reasons why having a large national debt can be labeled a crisis.²⁶⁸ It then ties the original purpose of death-time taxation in the United States (generation of revenue during a national emergency)²⁶⁹ with the current debt situation. The Note then argues that though the estate tax has some adverse consequences, the national debt crisis compels the imposition of the estate tax.²⁷⁰ In other words, the enormity of the national debt balances the debate in favor of estate tax preservation, even though the estate tax does have some negative aspects.²⁷¹

A. *The National Debt*

The national debt currently stands at over \$14 trillion dollars, equating to around \$47,000 per American citizen.²⁷² In March of 2010 the CBO released its analysis of President Obama's budget proposals for fiscal year 2011.²⁷³ The CBO concluded, "If the President's proposals were enacted, the federal government would record deficits of \$1.5 trillion in 2010 and \$1.3 trillion in 2011."²⁷⁴ In fact, it is argued that President Obama's proposed "budget more than doubles the national debt held by the public, adding more to the debt than all previous

263. See *supra* notes 245-47 and accompanying text.

264. See *supra* notes 162-63 and accompanying text.

265. See *supra* notes 134-57 and accompanying text.

266. See *supra* notes 225-33 and accompanying text.

267. See, e.g., Graetz, *supra* note 159 (giving some data on estate tax revenue for 2008).

268. The national debt can surely cause more harms than those communicated here. This Note simply mentions some common problems that emanate from a too large national debt.

269. See *supra* note 64 and accompanying text.

270. For a Wall Street Journal article arguing that the revenue of the estate tax is one of the reasons why the estate tax should be preserved, even though the estate tax has some negative aspects, see Graetz, *supra* note 159.

271. See, e.g., *id.* (commenting that the estate tax should be preserved even though it does have some negative aspects).

272. U.S. DEBT CLOCK.ORG, <http://www.usdebtclock.org> (last visited Oct. 20, 2011) (giving the total national debt figure as well as the national debt per person figure).

273. See CONG. BUDGET OFF., AN ANALYSIS OF THE PRESIDENT'S BUDGETARY PROPOSALS FOR FISCAL YEAR 2011, at 1 (2010), available at <http://www.cbo.gov/ftpdocs/112xx/doc11280/03-24-apb.pdf>.

274. *Id.* at vii.

presidents—from George Washington to George W. Bush—combined.”²⁷⁵ There is no argument that the debt is not substantial.

Reasonable people do disagree about the necessity of spending (that adds to the national debt) in times of a recession.²⁷⁶ However, there is little doubt that a continuous and sustained massive national debt will lead to economic problems.²⁷⁷ Some make a claim that a national debt “over roughly [ninety] percent of GDP” reduces economic growth.²⁷⁸ The United States is not at that point now.²⁷⁹ Current policies, though, are likely to take the country there by decade’s end.²⁸⁰ This Note now presents the problems of such a large national debt in more detail, showing fiscal changes should be made in order to deter disaster. This lays the foundation for this Note’s central argument: that the estate tax must be retained *solely* as a device to reduce the national debt or at least thwart the growth of the debt.

1. Economic Growth.—Broadly speaking, a massive federal debt to GDP ratio equates to slower economic growth.²⁸¹ Interestingly, this argument holds whether the country is an “advanced econom[y]” or an “emerging” economy.²⁸² As mentioned above, economic growth decelerates when the national debt

275. Michael J. Boskin, *Obama’s Radicalism is Killing the Dow: A Financial Crisis is the Worst Time to Change the Foundations of American Capitalism*, WALL ST. J., Mar. 6, 2009, at A15, available at <http://online.wsj.com/article/SB123629969453946717.html>.

276. Some argue that the government must spend money with the onset of a recession. This argument is as follows: “It begins with the idea that an economic shock has left demand persistently and significantly below potential supply. As people stop spending money, businesses pull back production, and the ensuing vicious circle of falling demand and production shrinks the economy. Keynesians believe that government spending can make up this shortfall in private demand.” BRIAN M. RIEDL, THE HERITAGE FOUND., WHY GOVERNMENT SPENDING DOES NOT STIMULATE ECONOMIC GROWTH: ANSWERING THE CRITICS 2 (2010), available at http://s3.amazonaws.com/thf_media/2010/pdf/bg_2354.pdf. However, others generally have the opposite view. *See, e.g., id.* at 1 (arguing, “The idea that government spending stimulates the economy has a long history of failure” and “[t]he only way to increase economic growth is by increasing productivity and the labor supply.”).

277. *See, e.g., CBO Report: Debt Will Rise to 90% of GDP*, WASH. TIMES, Mar. 26, 2010, <http://www.washingtontimes.com/news/2010/mar/26/cbos-2020-vision-debt-will-rise-to-90-of-gdp/>; Mark Whitehouse, *Reinhart and Rogoff: Higher Debt May Stunt Economic Growth*, WALL ST. J. (Jan. 4, 2010, 3:32 PM), <http://blogs.wsj.com/economics/2010/01/04/reinhart-and-rogoff-higher-debt-may-stunt-economic-growth/>.

278. Carmen M. Reinhart & Kenneth S. Rogoff, *Growth in a Time of Debt*, 100 AM. ECON. REV. 573, 573 (2010).

279. *See CBO Report: Debt Will Rise to 90% of GDP*, *supra* note 277.

280. *See id.*

281. *See, e.g., Reinhart & Rogoff, supra* note 278, at 573 (concluding, “[W]hereas the link between growth and debt seems relatively weak at ‘normal’ debt levels, median growth rates for countries with public debt over roughly [ninety] percent of GDP are about one percent lower than otherwise; average (mean) growth rates are several percent lower.”).

282. *Id.*

exceeds “[ninety] percent of GDP.”²⁸³ Thus, “High levels of debt and growth don’t go hand in hand.”²⁸⁴

Slow economic growth can lead to countless problems. For example, in 1980s Latin America and 1990s Japan, “mounting debt led to roughly a decade of stagnant and sub-par growth.”²⁸⁵ Government revenue typically declines with slow economic growth.²⁸⁶ The United States may generate \$50 billion less in revenue in 2011 because of slow economic growth.²⁸⁷ When sluggish economic growth is coupled with rising prices, stagflation can appear.²⁸⁸ Stagflation happened in the 1970s in the United States, wreaking havoc on American business.²⁸⁹ In 2005, Alan Greenspan, then Chairman of the Federal Reserve, opined, “[R]ising interest rates and a rising federal budget deficit, if left unchecked, ‘would cause the economy to stagnate or worse.’”²⁹⁰

Generally, there is evidence of deflation when “slow economic growth” combines with “high unemployment” and sinking prices.²⁹¹ Deflation (as well as inflation) “lead[s] to withering investment environments and tough markets when it comes to finding work.”²⁹² Finally, sluggish economic growth means a lower family income.²⁹³ It is estimated, “By 2014, the average family’s income will be . . . \$1,800 lower because of the slower income growth that results when government competes with the private sector for a limited pool of savings or borrows more from abroad.”²⁹⁴

2. *Financial Disaster*.—A mounting national debt enhances the possibility of a fiscal disaster.²⁹⁵ Normally a crisis begins by the government announcing it

283. *Id.*

284. Kevin G. Hall, *High U.S. Debt Means Slower Growth, History Suggests*, McCLATCHY (Jan. 11, 2010), <http://www.mcclatchydc.com/2010/01/11/81969/high-us-debt-means-slower-growth.html>.

285. *Id.*

286. See *What the IMF’s Slow-Growth Forecast Means for Bulky U.S. Fiscal Deficit*, WASH. EXAMINER, Oct. 7, 2010, <http://www.washingtonexaminer.com/opinion/blogs/examiner-opinion-zone/what-the-imfs-slow-growth-forecast-means-for-bulky-us-fiscal-deficit>.

287. See *id.*

288. See *Stagflation, a Powerful Cocktail of Economic Risks, Threatens Spain*, UNIVERSIA KNOWLEDGE @ WHARTON (Feb. 6, 2008), <http://www.wharton.universia.net/index.cfm?fa=viewArticle&id=1463&language=english>.

289. See Paul R. La Monica, *A Not-So-Fun ‘Stag’ Party?*, CNN MONEY (Apr. 21, 2005, 4:15 PM), <http://money.cnn.com/2005/04/21/news/economy/stagflation/index.htm>.

290. *Id.*

291. John Tamny, *Inflation vs. Deflation*, FORBES.COM (Oct. 19, 2009, 12:00 AM), <http://www.forbes.com/2009/10/18/inflation-deflation-dollar-opinions-columnists-john-tamny.html>.

292. *Id.*

293. See THE BROOKINGS INST., *RESTORING FISCAL SECURITY: HOW TO BALANCE THE BUDGET I*, at 9 (Alice M. Rivlin & Isabel V. Sawhill eds., 2004), available at <http://www.brookings.edu/es/research/projects/budget/fiscalsanity/full.pdf>.

294. *Id.* at i.

295. See *Economic and Budget Issue Brief: Federal Debt and the Risk of a Fiscal Crisis*,

must borrow a great sum of money.²⁹⁶ “In such a crisis, investors become unwilling to finance all of a government’s borrowing needs unless they are compensated with very high interest rates; as a result, the interest rates on government debt rise suddenly and sharply relative to rates of return on other assets.”²⁹⁷ This makes borrowing tougher, compelling the government to raise taxes and decrease spending, hoping to comfort investors.²⁹⁸ The government may also “renege on the terms of its existing debt” or enlarge the quantity of money, increasing inflation.²⁹⁹ In effect, there is a possibility of default if the national debt becomes too high.³⁰⁰ Global leaders have contemplated this, as the Prime Minister of China “publicly questioned the safety of U.S. Treasury debt.”³⁰¹

Essentially, the United States faces the possibility of a having a fiscal crisis similar to Greece in 2009 and 2010.³⁰² In 2008, Greece “owed its creditors” around 110% “of the country’s GDP.”³⁰³ When the world-wide recession occurred, this percentage grew, increasing the interest rate on Greek bonds by two “percentage points over rates on comparable German bonds.”³⁰⁴ “Investors’ confidence” worsened.³⁰⁵ The interest rates on Greek bonds continued to rise.³⁰⁶ Eventually, the International Monetary Fund and some European countries vowed to loan Greece billions of Euros to help remedy the crisis.³⁰⁷ The Greek example is simply one of many demonstrating the calamitous effect an inflated national debt can have on a country.³⁰⁸

3. *National Security and Sovereignty.*—An increasing and massive federal debt can negatively affect the national security and sovereignty of the United States.³⁰⁹ With a national debt, America is constrained.³¹⁰ Government

CONGR. BUDGET OFF., 4 (July 27, 2010), available at http://www.cbo.gov/ftpdocs/116xx/doc11659/07-27_Debt_FiscalCrisis_Brief.pdf [hereinafter *Economic and Budget Issue Brief*].

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. See, e.g., Alan J. Auerbach & William G. Gale, *Here Comes the Next Fiscal Crisis*, L.A. TIMES, July 8, 2009, <http://articles.latimes.com/2009/jul/08/opinion/oe-auerbach8>.

301. *Id.*

302. See *Economic and Budget Issue Brief*, supra note 295, at 6 (discussing the fiscal crisis in Greece).

303. *Id.*

304. *Id.*

305. *Id.*

306. See *id.*

307. *Id.*

308. Argentina and Ireland are other countries who have faced disasters at least in part because of an enormous national debt. See *id.* at 5-6.

309. See, e.g., *Clinton: National Debt Holding America Back*, FOXNEWS.COM (Sept. 8, 2010), <http://www.foxnews.com/politics/2010/09/08/clinton-calls-diplomatic-strategy-best-hope-dangerous-world>; *Mullen: Debt is Top National Security Threat*, CNN U.S. (Aug. 27, 2010), http://articles.cnn.com/2010-08-27/us/debt.security.mullen_1_pentagon-budget-national-debt-

borrowing “from foreign countries,” at least in part to finance spending and the national debt, “weakens America’s standing and its freedom to act.”³¹¹ As Secretary of State Hillary Clinton has said, the national debt has “eroded America’s ability to ‘chart our own destiny.’”³¹² It slowly chips away at America’s sovereignty and freedom.³¹³ When one person is indebted to another, he loses some of his personal freedom and choices. He becomes obligated to another. He may no longer be able to afford to purchase those fifty acres of farmland that he has always dreamed about. That new truck he wanted becomes unattainable. He must restrict his budget, cutting down on spending and only purchasing that which is absolutely necessary. The interest alone sometimes becomes unbearable. A country is no different. When the United States borrows an extensive amount of money to finance its national debt, it becomes “beholden to interests outside . . . [its] borders.”³¹⁴

The national debt is causing a noteworthy amount of economic leverage to be lost.³¹⁵ America’s power decreases and China’s power increases.³¹⁶ This is because the Chinese fund much of the United States’ debt.³¹⁷ China sells a large amount of “manufactured goods” to the United States and then loans the amassed income generated “back to the U. S.”³¹⁸ All of these effects of the national debt show that “[t]he American model is being undermined before the rest of the world.”³¹⁹

4. *Private Investment.*—An enormous national debt can eventually “crowd out private investment.”³²⁰ Generally, “increased government borrowing tends to crowd out private investment in productive capital, because the portion of people’s savings used to buy government securities is not available to fund such investment.”³²¹ The effect is poorer production and diminished capital.³²² A decrease in capital translates into less capital inheritance “to future

michael-mullen?_s=PM:US (quoting Joint Chiefs of Staff Chairman Admiral Michael Mullen as saying, “The most significant threat to our national security is our debt”); Rep. Ron Paul, *Government Debt—The Greatest Threat to National Security*, LEWROCKWELL.COM (Oct. 26, 2004), <http://www.lewrockwell.com/paul/paul213.html>.

310. See *Clinton: National Debt Holding America Back*, *supra* note 309.

311. Capital Journal, *Deficit Balloons Into National-Security Threat*, WALL ST. J., Feb. 2, 2010, <http://online.wsj.com/article/SB10001424052748703422904575039173633482894.html>.

312. *Clinton: National Debt Holding America Back*, *supra* note 309.

313. See Paul, *supra* note 309 (stating, “Debt destroys U.S. sovereignty, because the American economy now depends on the actions of foreign governments.”).

314. *Id.*

315. See *Clinton: National Debt Holding America Back*, *supra* note 309.

316. See Capital Journal, *supra* note 311.

317. See *id.*

318. *Id.*

319. *Id.*

320. *Economic and Budget Issue Brief*, *supra* note 295, at 3.

321. *Id.*

322. *Id.*

generations.”³²³

5. *Morality*.—It may be immoral to burden future generations with a massive national debt created and sustained by the current generation.³²⁴ President Thomas Jefferson nicely made this case. He said, “[T]he principle of spending money to be paid by posterity, under the name of funding, is but swindling futurity on a large scale.”³²⁵ President Jefferson also stated, “[W]e shall all consider ourselves unauthorized to saddle posterity with our debts, and morally bound to pay them ourselves; and consequently within what may be deemed the period of a generation, or the life of the majority.”³²⁶

B. *Retaining the Estate Tax Because of the National Debt*

Throughout a significant part of American history Congress used the death-time taxes only temporarily.³²⁷ These taxes popped up during national crises and disappeared once the crises relented.³²⁸ Their goal was to generate revenue to finance America’s response to the emergency.³²⁹ Today, if the national debt is not already a crisis, it soon will be.³³⁰ The above analysis certainly indicates that a monstrous and unsustainable national debt is a severe problem. The United

323. MARC LABONTE, CONG. RESEARCH SERV., THE NATIONAL DEBT: WHO BEARS ITS BURDEN? 8 (2005), available at <http://old.concordcoalition.org/doc/crs-debt-burden.pdf>.

324. See, e.g., *Dems Rally Against Social Security Plan*, CNN.COM (Feb. 3, 2005, 5:54 PM), <http://www.cnn.com/2005/ALLPOLITICS/02/03/dems.ss/> (quoting letter from forty-four U.S. Senators to President George W. Bush (Feb. 3, 2005)) (urging the President to not increase the national debt to pay for his social security plan and saying, “[S]hifting financial obligations of this magnitude to future generations is immoral, unacceptable, and unsustainable.”).

325. *Private Banks (Quotation)*, THOMAS JEFFERSON MONTICELLO, [http://wiki.monticello.org/mediawiki/index.php/Private_Banks_\(Quotation\)#_ref-3](http://wiki.monticello.org/mediawiki/index.php/Private_Banks_(Quotation)#_ref-3) (last visited Jan. 3, 2011) (citation omitted).

326. Pete V. Domenici, *Fighting the Good Fight: Washington’s Quest for a Balanced Budget*, 16 ST. LOUIS U. PUB. L. REV. 17, 25 (1996) (citation omitted).

327. See *supra* note 64 and accompanying text.

328. See *supra* note 64 and accompanying text.

329. See *supra* note 64 and accompanying text.

330. See, e.g., *Growing National Debt May Be Next Economic Crisis*, FOXNEWS.COM (July 3, 2009), <http://www.foxnews.com/politics/2009/07/03/growing-national-debt-economic-crisis/> (quoting Peter Orszag, White House Budget Director, as saying, “We are on an utterly unsustainable fiscal course.”); Gary D. Halbert, *CBO: U.S. Debt Crisis on the Horizon*, INVESTORSINSIGHT.COM (Aug. 10, 2010, 6:05 PM), http://www.investorsinsight.com/blogs/forecasts_trends/archive/2010/08/10/cbo-u-s-debt-crisis-on-the-horizon.aspx (discussing a CBO report and saying, the CBO “warns that we will face financial calamity if we do not get our massive budget deficits under control”); *Lieberman Addresses National Debt Crisis*, JOE LIEBERMAN UNITED STATES SENATOR FOR CONNECTICUT (Nov. 10, 2009), <http://lieberman.senate.gov/index.cfm/news-events/speeches-op-eds/2009/11/lieberman-addresses-national-debt-crisis> (quoting Senator Lieberman as saying, “Now more than ever, we must come to terms with the potentially crippling amount of debt on our nation’s books.”).

States is approaching a perilous size of debt,³³¹ and something must be done to better the situation.³³² One possible step is retaining the estate tax.³³³

The estate tax is far from a perfect tax,³³⁴ if there is such a concept. It pops its head up during times of grief. It frightens small business owners and farmers as they contemplate paying it.³³⁵ Yet, it raises revenue,³³⁶ and repealing it will roughly cost upwards of \$1 trillion over a decade.³³⁷ The fact the estate tax has some negative aspects should not automatically condemn it. Instead, the negative aspects must be examined with a view toward the overall goal of the tax, while considering the net effect on the country.³³⁸

President George Washington's words quoted at the beginning of this Note are pertinent here.³³⁹ "The national debt level is one of the most important public policy issues [facing the United States]."³⁴⁰ A large national debt causes substantial economic problems, stifling growth and decreasing private investment.³⁴¹ It hinders national security and diminishes domestic sovereignty.³⁴² Continuing on this path of debt will undoubtedly change America now, but also in the future.³⁴³

331. See, e.g., Timothy R. Homan, *Greenspan Sees Threat U.S. Congress Will Hamper Fed (Update2)*, BLOOMBERG (Sept. 16, 2009, 9:26 AM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ajTHW2dMQ3fM> (citing Alan Greenspan, as advising, "[T]he U.S. must rein in its 'very dangerous' level of [national] debt . . .").

332. See, e.g., *Skyrocketing National Debt is Dangerous*, JOHN THUNE UNITED STATES SENATOR—SOUTH DAKOTA (Aug. 28, 2009), <http://thune.senate.gov/public/index.cfm/oped?id=c77be52d-3cc1-4287-a180-f4b283b71925> (quoting Senator Thune as saying, "We cannot simply continue to increase the dangerous level of debt by passing it along to future generations thinking that it will magically resolve itself.").

333. See Frederick, *supra* note 64, at 214 (saying, "[T]he most effective way to use the estate tax may be as a mechanism to raise revenue during financial crises."); Graetz, *supra* note 159 (arguing, "[W]e need the estate tax, with our nation's financial situation more precarious than it has been in half a century . . .").

334. See *id.* (saying, "[T]he estate tax is not ideal").

335. See, e.g., DUBAY, *supra* note 134, at 8 (saying if the estate tax was repealed, "family businesses" would be "winners" as they "would no longer have to worry about their future survival") (emphasis added); Weber, *supra* note 145, at 118 (mentioning the estate tax and the "anxiety" it gives "small business owners").

336. See Graetz, *supra* note 159.

337. See *Myths and Realities*, *supra* note 201, at 1 (mentioning the cost of repeal).

338. Professor Graetz essentially does this. See Graetz, *supra* note 159 (saying, "Even with its shortcomings, we need the estate tax . . .").

339. See *supra* note 1 and accompanying text.

340. Troy Adkins, *What the National Debt Means to You*, YAHOO! FINANCE (Apr. 22, 2010, 4:50 PM), <http://finance.yahoo.com/news/What-The-National-Debt-Means-investopedia-4099066083.html?x=0>.

341. See *supra* notes 281-84, 320-23 and accompanying text.

342. See *supra* notes 309-19 and accompanying text.

343. See, e.g., LABONTE, *supra* note 323, at 8.

Examining the national debt situation in this light makes preserving the estate tax much more attractive.³⁴⁴ To allow this source of revenue to disappear without it decreasing the national debt or at least hindering the growth of the national debt would most definitely be unwise.³⁴⁵ The estate tax revenue should be used *exclusively* as a tool to help fix the national debt situation.³⁴⁶ Therefore, the estate tax currently is justified *solely* by the fact that it raises revenue which could be used to decrease the national debt.

No tax, however, is attractive to all, and this is understandable. Relatively few, though, in actuality pay the estate tax.³⁴⁷ Senator Bernie Sanders from Vermont, when debating the recent estate tax law, said the following about the estate tax: “Ninety-nine point seven percent of American families will not pay one nickel in an estate tax This is not a tax on the rich. This is a tax on the very, very, very rich.”³⁴⁸ Nevertheless, it is unfortunate that some have to suffer because of taxes. President Washington recognized this. But he also understood in order to pay debts, there must be revenue; and to have revenue requires taxes.³⁴⁹

It is important then to see the estate tax as a tool to help remedy the grim fiscal and economic condition of the United States.³⁵⁰ Doing this leads to the conclusion that the estate tax should be preserved now, and most likely when the current estate tax law expires in two years.³⁵¹ Like Secretary Mellon did during the Great Depression,³⁵² the negative features of the estate tax ought to be temporarily overlooked because of the giant national debt.³⁵³ The calamitous

344. See, e.g., *Myths and Realities*, *supra* note 201, at 2 (saying, “Given the nation’s serious long-term fiscal problems, repealing or further weakening the estate tax would not be fiscally responsible.”).

345. See, e.g., *id.* at 1 (saying, “Repealing the estate tax, or weakening it . . . would add trillions of dollars to future deficits and be fiscally irresponsible.”).

346. This Note in no way intends to argue preservation of the estate tax would fix the debt problem. Keeping the estate tax is only a small part of an overall and massive plan that is needed to remedy the dire debt situation.

347. See Sullivan, *supra* note 17 (discussing how not many individuals will pay the new estate tax).

348. David M. Herszenhorn & Carl Hulse, *Estate Tax Cutoff Draws Special Fire in Congress*, N.Y. TIMES, Dec. 10, 2010, at A14, available at http://www.nytimes.com/2010/12/11/us/politics/11cong.html?_r=2&ref=politics.

349. See *supra* note 1 and accompanying text.

350. See, e.g., *supra* note 333.

351. The main reason why the estate tax almost certainly will need to be kept past the two year timeline is because of the completely dire long-term national debt situation. See generally NICOLA MOORE, THE HERITAGE FOUND., U.S. LONG-TERM DEBT SITUATION IS ONE OF THE WORLD’S WORST (2010), available at http://thf_media.s3.amazonaws.com/2010/pdf/wm2972.pdf.

352. See *supra* notes 115-16 and accompanying text.

353. Again, Professor Graetz makes a somewhat similar argument in that he generally says that the United States needs the estate tax, even though the current estate tax does have some negative aspects. See Graetz, *supra* note 159.

state of the national debt demands this.³⁵⁴

IV. REFRAMING THE ESTATE TAX DEBATE

In 2010, Gallup and *USA Today* conducted a public opinion poll asking about “[p]erceived [t]hreats” towards the United States.³⁵⁵ Forty percent of those questioned deemed the national debt an “[e]xtremely serious” threat, with another thirty-nine percent calling the national debt a “[v]ery serious” threat.³⁵⁶ By comparison, only twenty-six percent named maintaining soldiers in Afghanistan/Iraq an “[e]xtremely serious” threat, while forty percent titled this a “[v]ery serious” threat.³⁵⁷ These numbers are not unique to this one poll.³⁵⁸ In a Fox News Poll, seventy-eight percent said, “[T]he national debt is so large it is hurting the future of the country”³⁵⁹ This number involved “majorities of Democrats (64 percent), Republicans (92 percent) and independents (85 percent).”³⁶⁰ Further, seventy-four percent replied they “worry about ‘leaving the country worse off for future generations.’”³⁶¹ And, though double the amount of those questioned in a Bloomberg National Poll said they believe unemployment is a bigger issue than government debt and spending, the latter category received more than twice as many votes as either healthcare or the War in Afghanistan.³⁶² All of these polls demonstrate Americans are quite troubled by the growing national debt.³⁶³

Those supporting the estate tax should use these opinions about the national debt to garner support for the estate tax. In other words, the estate tax issue should be reframed with an eye towards the national debt. Supporters should link the massive and burgeoning national debt with the estate tax and its revenue, highlighting how the tax revenue should exclusively be used to either reduce the national debt, or offset increased spending. The cost of repeal, perhaps upwards

354. See, e.g., *supra* notes 344-46 and accompanying text.

355. Lydia Saad, *Federal Debt, Terrorism Considered Top Threats to U.S.*, GALLUP (June 4, 2010), <http://www.gallup.com/poll/139385/federal-debt-terrorism-considered-top-threats.aspx>.

356. *Id.*

357. *Id.*

358. See, e.g., Dana Blanton, *Fox News Poll: National Debt Hurting the Country*, FOXNEWS.COM (Oct. 1, 2009), <http://www.foxnews.com/story/0,2933,558700,00.html>.

359. *Id.*

360. *Id.*

361. *Id.*

362. See *Problems and Priorities*, POLLINGREPORT.COM, <http://www.pollingreport.com/prioriti.htm> (last visited Jan. 5, 2011).

363. See, e.g., Bruce Bartlett, *How Much Does the National Debt Matter?*, FORBES.COM (Mar. 5, 2010, 12:01 AM), <http://www.forbes.com/2010/03/04/consumer-debt-deficit-budget-opinions-columnists-bruce-bartlett.html> (contending, “It’s a rare public opinion poll these days that doesn’t show the national debt near the top of Americans’ concerns. Huge budget deficits as far as the eye can see are a source of great worry . . .”).

of \$1 trillion,³⁶⁴ should be emphasized. In the words of Professor Graetz, “We [n]eed the [r]evenue.”³⁶⁵

This reframing is pertinent, considering a recent public opinion poll. A Gallup and *USA Today* poll question from November 2010 asked Americans to comment on whether certain accomplishments were crucial for the “lame duck” Congress to achieve.³⁶⁶ Fifty-six percent said, “[p]assing legislation that would keep the estate tax from increasing significantly next year” was “[v]ery important.”³⁶⁷ Twenty-six percent of those surveyed believed this action to be “[s]omewhat important.”³⁶⁸ Only seventeen percent said this accomplishment was “[n]ot too/[n]ot at all important.”³⁶⁹ Further, a survey conducted by the Tax Foundation in part asked about the fairness of different taxes.³⁷⁰ Those surveyed deemed the estate tax as the most unfair federal tax.³⁷¹ Generally, “Americans don’t like the estate tax.”³⁷²

Therefore, in order to have broad public support, it would likely be effective for proponents of the estate tax to tie estate tax revenue and the national debt together. Proponents might try communicating the goal of the estate tax proposed in this Note (to reduce the national debt and/or offset spending increases). If this is done, estate tax support may quite possibly increase. One survey has indicated, “[G]iven a set [of] limited choices for balancing the national budget, [Americans] would prefer to see taxes increased for the wealthy.”³⁷³ This fact bodes quite well for estate tax proponents, as generally only the wealthiest Americans pay the estate tax.³⁷⁴

CONCLUSION

The United States is on the brink of a crisis, if not already mired in one.³⁷⁵

364. See *Myths and Realities*, *supra* note 201, at 1.

365. See Graetz, *supra* note 159.

366. Jeffrey M. Jones, *In U.S., Tax Issues Rank as Top Priority for Lame-Duck Congress*, GALLUP (Nov. 23, 2010), <http://www.gallup.com/poll/144899/tax-issues-rank-top-priority-lame-duck-congress.aspx>.

367. *Id.*

368. *Id.*

369. *Id.*

370. See *Poll: Tax Code Complex, Federal Income Taxes “Too High,”* TAX FOUND. (Mar. 22, 2007), <http://www.taxfoundation.org/news/show/2281.html>.

371. *Id.*

372. Karlyn Bowman, *The Estate Tax Lives? Dies?*, THE AMERICAN (Dec. 1, 2010, 9:52 AM), <http://blog.american.com/?p=23258>.

373. Stephanie Condon, *Poll: To Reduce Deficit, Most Americans Say Tax the Rich More*, CBS NEWS (Jan. 3, 2011, 3:08 PM), http://www.cbsnews.com/8301-503544_162-20027036-503544.html.

374. See, e.g., Herszenhorn & Hulse, *supra* note 348 (quoting Senator Bernie Sanders as generally saying only the most affluent Americans pay the estate tax).

375. See *supra* notes 330-31 and accompanying text.

The escalating national debt will likely cause a myriad of problems.³⁷⁶ Economic growth is likely to slow,³⁷⁷ and private investment will likely decrease.³⁷⁸ The national debt exposes the United States to the possibility of a fiscal catastrophe,³⁷⁹ and it negatively affects national security and sovereignty.³⁸⁰ Our country's leaders should take steps to stave off disaster.³⁸¹ One initial action should be retaining the estate tax. Using the estate tax during a national crisis to generate revenue is consistent with much of historical death-time taxation in the United States.³⁸²

Therefore, the estate tax should be retained, at least for the foreseeable future, and be used *solely* to reduce the national debt or offset increased spending. This policy likely would help avert the harmful effects of a monstrous federal debt. Estate tax preservation will not by itself fix the national debt problem. Nevertheless, it is one step in the right direction and deserves to be considered when leaders debate how to fix America's debt crisis.

376. *See supra* notes 281-326 and accompanying text.

377. *See supra* notes 281-94 and accompanying text.

378. *See supra* notes 320-23 and accompanying text.

379. *See supra* notes 295-308 and accompanying text.

380. *See supra* notes 309-19 and accompanying text.

381. *See supra* note 332 and accompanying text.

382. *See supra* notes 327-33 and accompanying text.