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A Declaration of Independence from Death Taxation: A Bipartisan Appeal

POLICY STUDY

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Preamble

Political life in a modern democracy like the United States can be hard. Because we cherish such basic freedoms and liberties as those of speech, religion, conscience, and political association, disagreement abounds. At the same time, the sophisticated modern economy and its legal regulation generate complicated, contentious issues for the electorate. How can a free people, holding to varied political, religious, and moral beliefs, come together and make reasonable decisions about such complex matters as tax and fiscal policies?

One thing seems certain: We the people have to try to give guidance to our nominal leaders. Economic policy is too important to leave to a small group of politicians and technocrats, each with his or her own agenda and set of special interests to appease. Daunting as it seems, the people must educate and empower themselves to take a stand on important issues in tax and fiscal politics.

Fortunately, sometimes the American people actually can come together, cross partisan ideological lines, and do the right thing. Thus it is heartening that Congress has recently responded to strong popular sentiment by passing with significant bipartisan support legislation to end the death tax.[1] After all, this parallels what America's founding fathers, in both the Declaration of Independence and the Constitution, did over two centuries ago. These great thinkers and political leaders held a diversity of personal political, religious, and moral views. Yet they could and did set these aside in the interests of laying down ground rules for a free and independent people. The enduring greatness of America is a tribute to their collective wisdom and sense of justice, as well as to their abilities to see common ground apart from partisan ideological differences.

There is today a growing consensus that the death tax should die. The tax is complicated, costly, inefficient, arbitrary, and unfair. Ordinary citizens of all stripes and economic classes have long opposed grave site taxation. The recent Congressional action indicates that politicians are finally crossing partisan lines to stand up against the death tax. It seems as if only the academy has not fully seen the light. Inside ivy-covered walls, opposition to taxation still seems divided. Conservatives and libertarians stand on one side, opposing the death tax — along with all or most taxes, and all or most forms of economic redistribution. Progressives and liberals line up on the other side, clinging to the last signs of life in the death tax — along with all or most taxes, and all or most forms of economic redistribution.

Can intellectuals holding diverse viewpoints agree when it comes to death taxation? The question is important, because academics may be in the best position to offer wisdom to the common people. After all, politicians of all stripes might be more concerned with the campaign contributions they get for opposing death taxes than with getting to the "right" answer, and the ordinary citizen may be confused or relatively indifferent in voicing his or her opinion. Public intellectuals stand in a unique position to offer informed and detached advice.

Fortunately — and perhaps surprisingly — it is indeed possible for intellectuals holding almost diametrically opposed general views about the role of taxation and government to come together and find common ground in opposing death taxation. Just as James Madison and Alexander Hamilton could each support and help draft the Constitution, so too can libertarians and liberals, conservatives and progressives, republicans and democrats all support repeal of the dreaded death tax. It's simply a bad tax, from any perspective, and it should die.

To help prove this point, span the intellectual divide inside the academy, and set the case against death taxation a little bit straighter, we two authors have set down our opinions. Professor Wagner teaches economics and

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tends towards the conservative, libertarian end of the political spectrum: he believes for example in a minimum of government and taxation, and in a maximum of private property.[2] Professor McCaffery is a tax law professor and a self-acknowledged liberal (in the modern sense of the term), who believes that it is appropriate for the government to distribute or redistribute resources from rich to poor, and who is not generally opposed to the current level of taxation in America.[3] Both Professors are experts on taxation as an academic subject. And each Professor believes that it is high time to kill the death tax.

In this brief manifesto, Professors Wagner and McCaffery jointly dispel six common misperceptions to which supporters of the death tax cling. We maintain that on a proper understanding of the facts, there is no compelling reason to continue to have a death tax. Sometimes, our diverse perspectives lead us to different reasons to oppose the common misperceptions; sometimes they do not. But in all cases, our reasoning leads us to the same place — a declaration of the social need for independence from death taxation.

The Deadly Facts

We begin with a simple statement of the facts about death taxation. America has had a death tax of some form since 1916, the first year that the modern personal income tax was put in place. Before then, there were scattered periods where federal taxes were imposed on the receipt, rather than the transfer, of property. In 1894, for example, gifts, bequests, and inheritances were included in taxable income. One year later, in *Pollock v. Farmer's Loan & Trust Co.*,[4] the Supreme Court invalidated the income tax as unconstitutional under Article I, Section 9 of the Constitution, which prohibits any "direct" tax without apportionment among the citizens of the various states. After the Sixteenth Amendment became effective in 1913, Congress reinstated the federal income tax, but chose to exclude gifts, bequests, and inheritances from taxable income, hence the perceived need for a separate death tax. The constitutionality of the tax was upheld in *New York Trust Co. v. Eisner*,[5] where the Court held that the death tax was a tax on the transfer of property, not on its ownership, and so was an "indirect" tax that need not be apportioned under the Constitution.

A federal gift tax was first enacted in 1924. This tax was designed to complement the income and death taxes by taxing transfers that would reduce either or both the donor's taxable estate or future taxable income. It was thought especially important to prevent a wealthy person from avoiding the death tax by making gifts on his or her deathbed — a situation awkwardly policed by rules governing gifts in anticipation of death. As originally enacted, the gift tax was ineffective because it was computed on an annual basis, without regard to gifts made in prior years. As such a donor's first gift each year was subject to the bottom rate bracket in the progressive system. That gift tax was repealed in 1926 and then permanently revived in 1932, with the tax rates based on the donor's cumulative taxable gifts rather than just those made in the particular year.

Rates were increased under both the gift and death tax fairly frequently through 1941, when the top rate bracket reached 77 percent under the death tax. From 1942 to 1976, there was very little change in the gift or death taxes. Death taxes were imposed on transfers occurring at death; gift taxes were imposed on transfers made during a taxpayer's life. Under the Tax Reform Act of 1976, the estate and gift tax structures were combined into a single unified gift and estate tax system, which can be seen as a wealth transfer tax. It applies to the cumulative taxable transfers made by a taxpayer during life or at death.

There are several large exceptions and exclusions to the federal death tax that mean that most Americans never have to worry much about it. Only 1 to 2 percent of people who die in this country each year leave enough wealth behind to generate any death tax at all. The tax contributes a rather small part — about 1 percent — of all federal revenues. At least since World War II, when both the income tax and the federal payroll tax system began to gather steam, the death tax has never been a significant revenue-raiser, rarely accounting for more than 2 percent of total federal receipts. Its significance has remained extremely limited in recent times, generally around the 1 percent level.

Nonetheless, for people wealthy enough to be concerned about it, the death tax can be a steep tax indeed. It starts in — after the exemption or "zero bracket" level, to be discussed below — at an effective rate of 37 percent and quickly reaches a flat 55 percent rate. A small percentage of taxable estates end up paying a large percentage of the total taxes collected.

There are three major exceptions and exclusions to the death tax that go a fair way towards explaining its limited yield.

- One, gifts or bequests left to a spouse are typically not taxable, under the so-called marital deduction.[6] There are numerous complexities in this spousal deduction, nearly all of them unfortunate. But the bottom line is that most married couples do not pay any death tax until both of them have died.
- Two, each person has a cumulative lifetime exemption level before any tax is due — this is the "zero bracket" of the death tax. The unified credit amount, as it is called, became $600,000 in 1981; Congress agreed to raise it to $1,000,000 over a series of years, beginning in 1997 and ending in 2006. A husband and wife, with careful planning, can combine their lifetime exemption amounts so that a married couple can leave $2,000,000 to their children, tax-free.
- Three, in addition to this $1,000,000 benefit, there is an "annual exclusion amount" of $10,000.[7] This can be given per donor, per donee, per year — all without counting against the $1,000,000 lifetime exemption. Once again a husband and wife can combine their amounts. So a married couple can give $20,000 to each of their children each year, without incurring any tax or subtracting from their lifetime exemption amounts. The popular "*Crummey*" trust device, among others, allows this annual exclusion amount to be used even for transfers into trust.[8]

The basic operation of the death tax is easy enough to state. When a person dies, the government adds up all of the assets in her estate at their then fair market value. It next adds in the value of any taxable gifts she made during her life — that is gifts over and above the annual exclusion amounts. Finally, the government subtracts debts. If all of that comes out to less than $1 million (using the fully phased-in 2006 values) — as it would for the vast majority of American decedents — there are no further questions. If the decedent's estate is worth more than $1 million, the government next subtracts out any qualified transfers to a surviving spouse. Then and only then would a death tax be paid, at the steep rates noted above.

There are many other special provisions that relate to such things as charitable contributions; payments for tuition and medical expenses; the taxation of trusts; ownership of farms and small family-held businesses; life insurance, and so on. The death tax system is enormously complicated. It has fueled a well-paid cottage industry of death tax lawyers and planners. But we know enough now to get a sense of what is basically wrong with this death tax, especially since outright repeal turns out to be by far the best option for fixing it.

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Six Deadly Misperceptions about Death Taxation

Death taxes are widely unpopular among ordinary citizens, who possess an intuitive aversion to taxation at the grave site. But several recurrent arguments and beliefs stand in the way of a more universal academic, intellectual condemnation of death taxation. We believe that these common ideas are wrong, for one reason or another, and that an intellectually bipartisan approach can help to set aside most of the common errors.

Throughout the rest of this manifesto, we respond to six common misperceptions about death taxation that impede the ultimate elimination of this terrible tax. In some cases, Professor Wagner, as a libertarian, questions the asserted end or goal behind the argument, while Professor McCaffery, as an avowed liberal, questions the death tax as a means to the end; in other cases, Professors Wagner and McCaffery both find the asserted argument in support of death taxation wrong for the same reason. But in all cases the two intellectuals agree — the most common arguments given for death taxes are not compelling. Here then, in quick summary form, are these common misperceptions and our responses to them.

1. The death tax affects only the wealthy, and so the rest of us shouldn't care about it.

From any intellectual perspective, this is just wrong. The negative effects of the death tax are not confined to a few wealthy people. For every decedent whose estate generates an actual death tax, countless more have taken steps to avoid the tax — and these steps are typically costly, complicated, and inefficient. All of society pays a price for the resources devoted to death tax avoidance, including the price of having some of our best and brightest minds dedicated to these byzantine planning tasks.

Further, almost all economists who have thought about the matter have concluded that death taxation reduces the total pool of social savings. Anyone who owns a family business or works as or with death tax practitioners also knows that the tax creates major hurdles for small, family-owned enterprises. Whatever deleterious effects the death tax has on capital formation or family business structure are felt widely throughout local communities and the nation as a whole.

Beyond this, libertarians would point out that much of economic progress throughout history has resulted from inheritance, and that it is destructive to attempt to collectivize wealth at the grave site. Liberals should think that a death tax encourages behaviors that a liberal society ought not to like — high-end leisure, encrusted forms of ownership, aggressive *inter vivos* giving — while discouraging the socially beneficial behaviors of work, savings, and thrift. Under any light, the death tax tolls for us all.

2. The death tax adds money to the government's coffers for important social purposes.

This argument is a poor one, again from any ideological perspective. The death tax actually raises relatively little net revenue. While the direct impact of the tax is to collect around $20-25 billion annually for the federal government,[9] the indirect impact reduces other forms of tax revenue by a similar amount. This results both because the death tax encourages income-tax minimizing planning techniques and transactions and because the tax lowers the base for income and payroll taxes. The death tax is penny-wise and pound foolish.

3. The death tax furthers important social goals in breaking up large concentrations of wealth.

Here we disagree with the argument, but for different reasons. To a libertarian like Professor Wagner, breaking up large concentrations of wealth is a dubious and illegitimate goal; to a liberal like Professor McCaffery, a death tax is a woefully inadequate tool for the task, and quite possibly counter-productive on its own terms.

A libertarian sees that death taxation seeks to make the state and not individuals the recipients of estates. This effort to collectivize the ownership of wealth, even if pursued only incompletely, reduces the pace of economic progress.

A liberal should think that a death tax is a limited, porous, and ultimately counter-productive way to address even legitimate concerns about the concentrations of wealth and power in America today.

4. The death tax fosters the important democratic goal of equal opportunity.

Again the libertarian Professor Wagner questions this end, while the liberal Professor McCaffery questions the death tax as a means. But both think the argument is flawed. To a libertarian, the moral intuitions behind a claim for equal opportunity have dubious validity and rest on even more dubious factual assumptions.

A liberal who believes in equal opportunity as a norm, in contrast, should find the death tax a poorly chosen means to it. For instance, because the easiest way to avoid the death tax bite is to spend it all before one dies, death taxation rewards spendthrifts and punishes frugal, entrepreneurial conduct. This all can make life seem less equal for those who cannot keep up with the high spenders while denying opportunity to those who would otherwise benefit from greater productive activity.

5. The death tax promotes wealth and income equality.

If not equal *opportunity*, perhaps a death tax promotes equal *wealth*. Once again, a libertarian will question this as a legitimate state goal, and a liberal ought to question whether the death tax is an effective means to it, even if she accepts the goal.

To a libertarian, equal wealth as of any one moment in time is a sterile, static way of characterizing a society. An alternative, dynamic characterization would conceive a good society not as one where no one receives an inheritance — which is where the logic of death taxation leads — but as one where everyone does. To move in this direction, however, the emphasis within a society must be placed on promoting the spread of thrift and entrepreneurship more fully, and not upon retarding it where it is now found.

A liberal should see that the death tax is a poor means to equality, because it leads to more unequal consumption and less savings by the rich: what a liberal should want the wealthy to do is to save their good fortune, which is what a death tax encourages them not to do.

6. The death tax benefits private philanthropy, because the death tax exemption for charitable bequests[10] encourages such giving.

Here libertarian and liberal agree: the death tax is at best a costly, coercive, inefficient, and unfair way to subsidize charitable giving. Beyond this, both belief systems have some questions as to both the end and the means — as to the general idea of inducing one good activity (philanthropy) by penalizing other good activity (thrift, intergenerational altruism, entrepeneurship). In the remainder of this essay, we develop these six basic arguments at greater length.

Misperception Number 1: For Whom the Death Tax Tolls

Perhaps the most common misperception about death taxation is that it only affects a handful of the very richest citizens, so that the rest of us shouldn't care much about its inequities or inefficiencies. This simply isn't true.

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Americans, so that the rest of us — who have plenty to worry about as is — can safely ignore it. It's easy to think this, but it isn't right. While only about 2 percent of decedents leave an estate large enough to generate an actual tax paid, many more have planned their way around the tax. All of society pays for the lost opportunities and transaction costs associated with this planning. With ever-growing numbers of high-saving, productive Americans, there will only be more and more people living under the shadows of the death tax in the years to come, unless we take steps to kill the death tax.

The numbers of affected Americans extend even more broadly when we consider not only the harms to family-owned business, a traditional focus of the anti-death tax crowd, but also the more general harms to patterns of work, savings, and capital formation. A death tax tells the wealthiest Americans to slow down in their work and savings, give away whatever they can while they can, and spend the rest so as to die broke. If the death tax were to succeed on its own terms — if even a fraction of the wealthiest Americans were to heed this advice — we would all suffer. Although the death tax falls on a relative few, this is precisely the few whose work and savings habits matter most to our free and democratic culture. Telling the rich to spend now and die broke is quite simply foolish. The death tax tolls on us all.

Misperception Number 2: The Costs of Killing the Death Tax

A common misperception is that the death tax raises money for the government for valuable social purposes. The perfectly simple — and perfectly bipartisan — response to this common argument is that it isn't true. By any light, the death tax raises a small amount of revenue: \$20-25 billion in a \$2 trillion budget. But beyond that, the various costs of the death tax subtract from its benefits, and a good many economists of all political stripes feel that the tax actually *loses* money for the federal government.

Many who believe in death taxation take a static view of fiscal matters, looking at them only at a given, single point in time. These death tax addicts are concerned more with income or revenue flows to the government, not the common pool of social capital. Such true believers feel that the \$20-25 billion or so that the death tax generates every year is critical to the government's lifeblood.

But a deeper reality undermines this surface appeal of the death tax. The negative economic impact of death taxation has significant budgetary implications — the death tax will raise considerably less revenue than it appears to raise. In judging the amount of revenue that a death tax generates, we must distinguish between the amount of revenue that is collected from the filing of death tax returns and the indirect impact of the death tax on other forms of tax revenue, even on an annual cash flow basis.

The executors of estates write checks to the IRS. The total of these checks less the considerable costs of government collection and compliance efforts is the direct revenue impact of the death tax. But the death tax also exerts significant indirect impacts on tax revenue, due to its negative impact on the economy. The death tax most likely restricts saving and capital formation, it hampers the creation and growth of new, often family-owned enterprises, and it lowers the demand for labor. Personal income would be lower than it could have been, so the government collects less from the personal income tax than it could have collected had there been no death tax. It is the same for the tax on corporation income. With less employment, the amount of revenue generated through the payroll tax is also less than it could have been. All of these instances where the actual revenues collected through these taxes is less than would have been collected had there been no death tax constitute the indirect tax impact of the death tax.

Many studies, with varying results, have shown that death taxation involves cutting off our collective nose to spite our collective face. For example, Gary and Aldona Robbins have recently presented a careful examination of the impact of death taxes on capital formation and wealth creation.[11] They used their well-known and widely respected Fiscal Associates tax model to project the economic effects of an abolition of the federal death tax at the start of 1999. Their estimates from 1999 through 2008 are displayed in Table 1. The abolition of death taxation would increase the net return to saving and capital formation. People would invest more capital in business enterprises. As shown in the last column of Table 1, the stock of capital, an indication of the entrepreneurial investment in enterprises, would increase by $562 billion above baseline in 1999, and that relative entrepreneurial expansion would balloon to $1.5 trillion capital expansion by 2008.[12] This expansion in the amount of capital invested in commercial enterprises would boost national output and the demand for labor. Table 1 shows that real GDP would be $34 billion higher than what it is currently forecasted to be in 1999, and by 2008 would be $117.3 billion higher as the cumulative effects of the superior incentives took hold. Table 1 also shows that employment would increase by 15,144 from the current baseline in 1999, and by 235,850 from the current baseline in 2008.

The Robbins study also made an effort to account for the full impact of death taxation on federal tax revenues. Those results are reported in Table 2, starting with 1999 and running through 2008. The column labeled "direct tax loss," shows the reduction in collections from the death tax that would be caused by an abolition of the death tax. This amount was estimated to be $16.4 billion in 1999, and to be $22.6 billion in 2008. This is the reduction in federal revenues that would result because executors no longer write checks to the IRS. The next column shows the estimated increase in other sources of federal tax revenue, due to the higher income and employment that resulted from the economic stimulus created by the abolition of death taxation. That gain was projected to start at $6.9 billion in 1999, and to rise to $22.8 billion by 2008. The column labeled "percentage indirect recapture" shows the gain in other federal tax revenues as a percentage of the loss of death tax revenues. In the first year after the abolition of the death tax, Robbins and Robbins project that the additional

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Table 1. Forecasted Effects of Federal Death Tax Elimination in 1999

Year	Increased GDP ($billions)	Increased jobs	Increased stock of capital ($billions)
1999	34.0	15,144	562.6
2000	37.5	45,243	694.3
2001	37.5	23,002	796.9
2002	50.9	24,189	920.7
2003	59.4	39,789	1,034.7
2004	73.2	102,897	1,121.8
2005	87.6	179,214	1,219.5
2006	100.0	229,288	1,314.3
2007	106.4	229,911	1,404.8
2008	117.3	235,850	1,485.0

Source: Gary Robbins and Aldona Robbins, *The Case for Burying the Estate Tax*, Policy Report No. 150 (Lewisville, TX: Institute for Policy Innovation, 1999), p. 19.

tax revenues yielded by the economic expansion stimulated by elimination of the death tax would replace about 42 percent of the loss of death tax revenues. From 2006 on, there was *no* projected loss in federal revenues, as the direct loss in death tax revenues was offset by the indirect gain in other federal revenues.

One interesting feature of this table is that the bulk of the total revenue losses are concentrated in the first three or four years after repeal of the death tax. After about four years, there is no perceptible revenue loss, as the direct loss of revenue from repeal of the death tax is roughly offset by the indirect gain that is attributable to the increased prosperity that repeal brings about. Another interesting feature resides in the last column. The next-to-last column shows that in the first four years the federal government experiences a significant loss of revenue, with that loss roughly vanishing in subsequent years. The last column takes into account the impact of the enhanced prosperity on state and local governments. Only in the first year of abolition are total tax revenues lower throughout the land. Thereafter, total tax collections by all governments rise strongly in the aftermath of the abolition of the death tax.

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Suppose it were to be agreed that repeal of the death tax would have no impact on total tax revenues. Some people might still argue that death taxation is warranted as a means of filling some gaps in the coverage of the personal income tax, due to the ability of much capital appreciation to avoid tax. These claims are often backed up by making reference to the Haig-Simons approach to the definition of income.[13] Under this approach, annual income is the sum of consumption and any change in net worth. This approach would clearly treat the receipt of an inheritance as income to the recipient.

But a death tax is a poor way to fix or "back up" the income tax, and the income tax is probably not the right tax to have in the first place. In terms of the former, a death tax is a back-ended wealth tax — a tax on what is left over after a taxpayer's life. Once again, the easiest way to avoid a death tax is to spend it all, while alive, and die broke — and then there is no "backstop" to the holes in the income tax at all. On the other hand, the death tax falls without regard to whether or not the decedent has indeed benefitted from income tax loopholes or not — and it falls at a very high rate indeed. Many savers

Table 2. Estate Tax Elimination and Federal Tax Revenues

Year	Direct tax loss ($billions)	Indirect tax gain ($billions)	% in-direct recapture	Net change in federal revenue	Net change all govt. revenue
1999	-16.4	6.9	42	-9.4	-1.8
2000	-16.9	8.9	53	-7.9	2.3
2001	-18.1	8.0	44	-10.2	0.9
2002	-18.7	10.5	56	-8.2	5.1
2003	-20.1	18.4	92	-1.6	15.1
2004	-19.0	14.8	78	-4.3	12.9
2005	-18.9	17.6	93	-1.3	18.0
2006	-19.7	20.0	102	0.3	21.6
2007	-21.1	20.8	98	-0.3	22.3
2008	-22.6	22.8	101	0.2	24.5

Source: Gary Robbins and Aldona Robbins, *The Case for Burying the Estate Tax*, Policy Report No. 150 (Lewisville, TX: Institute for Policy Innovation, 1999), p. 20.

are already doubly taxed under an income tax — first, on the initial receipt of wealth, and then again, on the return to unspent wealth — as scholars since at least John Stuart Mill in 1848, pointed out.[14] A death tax only adds a third injury to the insult of doubly taxing savers, not spenders — it is precisely backwards.

To the extent we are worried about gaps in the income tax, principally caused by the so-called realization requirement,[15] there are far better, fairer means to fix them — as in the "carryover basis" rule featured in the recent House Bill, H.R. 8.[16] A far better and more systematic plan is to drop the foolish and unfair attempt to tax savers at all, by moving to a consistent consumption tax, as economists such as Irving Fisher have long argued.[17]

Misperception Number 3: Death Taxation and the Concentration of Wealth

The most persistent arguments for death taxation go beyond dollars and cents alone. This isn't all that surprising, because narrowly economic arguments almost universally cut *against* the dreaded tax. Thus supporters say that even if death taxation doesn't raise much money and indeed even if it costs the nation real dollars, we still need some form of death tax for important democratic goals. These arguments — explored here under misperceptions 3, 4, and 5 — tend to fall into certain predictable patterns. Death taxes are needed for the negative reason of breaking up large concentrations of wealth, or for the affirmative goals of "leveling the playing field" and generating more equal opportunity, and/or equalizing the ownership of material resources in society over time.

For these three "fairness" or "social justice" arguments, that stand apart from more narrow economic concerns — note that each argument could maintain that *even if* a death tax cost overall social wealth, it would be worth it for these alternative goals — the libertarian and the liberal have different responses.

Professor Wagner, generally believing in the foundational value of liberty and deeply skeptical of government attempts to collectivize wealth, questions the articulation of the goals or the use of the tax system to achieve them. It is better, a libertarian argues, to allow private citizens and private property to flourish — over time, this will indeed lead to the best of all possible worlds. The experience of the twentieth century, with the failed socialist experiments in Russia and Eastern Europe, has certainly buttressed this long-standing libertarian perspective.

Professor McCaffery, as a self-acknowledged liberal, has developed a more nuanced and in many ways more counter-intuitive argument against these common misperceptions. Even if one does accept these non-economic goals, and even if one is prepared to exalt equality, of opportunity or of resources, above liberty — as Professor McCaffery himself is willing to do — still a conscientious liberal must conclude that all real world death taxes have been failures, on their own intended terms. That is, the death tax does *not* promote equality or effectively break up large concentrations of wealth; indeed, in many ways, it does just the *opposite*. Consistently throughout his work, Professor McCaffery has urged liberals to go back to the drawing board and to design a tax system that will serve their own stated ends.[18] When they do, liberals will find that a death tax is no part of the best possible or ideal tax system.

In any event, because our arguments against the next three common misperceptions are different, we have separately stated them, with Professor Wagner's set out under the libertarian headings, and Professor McCaffery's under the liberal ones.

A. From a Libertarian Point of View

A believer in individual liberty will go beyond the basic case that the death tax is penny wise and pound foolish. All economic progress results

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"There can no longer be any doubt that a society that embraces private property will be wealthier than one that collectivizes ownership,..."

from inheritance. Receiving wealth from one's predecessors is how members of subsequent generations become materially better off than their forebears. The difference across generations reflects the cumulative impact of inheritance. A good deal of that inheritance cannot be prevented even by wrong-headed government policies, because it takes place through the accumulation of knowledge. Someone who discovers a new chemical compound and makes knowledge of it public cannot subsequently make that knowledge disappear: Knowledge has a quality of permanence about it that physical assets do not have.

But society can — and does — mess up the transmission of much capital. How well physical capital will be maintained, as well as the extent to which it will be created, depends on the costs and gains of ownership. Similarly, the extent to which people will develop and spread knowledge depends on the costs and gains that they face. Whatever increases the gains, whether from the creation of physical assets or from the development of knowledge, will increase the amount of those things that people will generate within a society. In contrast, whatever increases the costs will decrease the amount that they will generate.

The standard of living in a society varies directly with the amount of assets and knowledge that exists within that society. As time passes, people die and are replaced by their descendants. The rate at which the standard of living rises as this happens will depend on the extent to which assets and knowledge are transmitted from one generation to the next. It will also depend on the extent to which assets and knowledge are generated within a generation in the first place.

There can no longer be any doubt that a society that embraces private property will be wealthier than one that collectivizes ownership, in whole or in part. With collective ownership, there is, of course, no question of inheritance — because the state already owns everything. With private ownership, however, a question of inheritance does arise: who gets to gain possession of a decedent's assets?

There are two polar regimes in this regard, free inheritance and collective inheritance. Under free inheritance, an owner of assets would have the same right to dispose of his assets on death as she had during life. State involvement at the grave site would be minimal, involving only such clerical matters as the usual recordation fees charged when certain asset titles are transferred. Under collective inheritance, in contrast, an owner of assets would have the full use of her assets only during her lifetime, and those assets would become state property on her death. Collective inheritance means imposing a 100 percent tax on all assets that were held by a decedent at the time of death.

Now a pure regime of collective inheritance is almost surely impossible in modern societies, for several reasons. The effort to impose such a tax would induce people who had accumulated wealth during their lifetimes to dissipate it before their deaths, as by doing such things as converting that wealth into annuities and consuming the would-be estate's corpus. Confiscatory death taxes would also induce wealthy people to transfer more of their wealth while they were alive. This very prospect has led the state to tax gifts in an effort to foreclose or at least restrict this simple route of escape. But this in turn simply induces prospective donors and donees to seek out alternate methods of evasion or avoidance. For example, heirs typically know about a death before tax officials do. Collective inheritance would surely induce heirs to scavenge quickly among the decedent's assets, particularly among those assets for which titles are not recorded publicly, before officers of the state even arrive on the scene to press their claims: anecdotal evidence already suggests that many wealthy Americans already buy diamonds as a simple way to avoid the death tax's sting. For all these reasons and more, a regime of collective inheritance would bring into the state's possession only a portion of the assets that would have been transferred from decedents to heirs under a regime of free inheritance. For the same reason, the effective rate of any real-world death tax will have to be something less than 100 percent; even a revenue-maximizing state would have to pull up far short of a confiscatory tax. This is not to claim that such a revenue-maximizing tax would be desirable, but only to say that there is a pragmatic limit to the extent to which inheritance can be collectivized.

How far towards collective inheritance should we go? Two of the primary institutions of civil society are private property and the family. Free inheritance supports both of these institutions, while collective inheritance subverts both — and with the degree of subversion varying directly with the tax rate.

The attack on private property and the family that collective inheritance represents resonates with the famous controversy between Plato and Aristotle regarding the rearing of children. In *The Republic*, Plato advocated that children be taken away from their parents and raised in common in the name of equal opportunity. If children were raised by their own parents, Plato thought, some children would be advantaged relative to others because of differences in family settings. Plato presumed that if all children were raised in common, in contrast, the advantages that particular children derived from being raised in particular families would be abolished, because under the Platonic system all parents would treat all children equally.

The problem with this alternative, as Plato's student Aristotle noted in his *Politics*, is that all parents would indeed treat all children equally — with equal indifference, that is. As Aristotle summarized, "it is better to be cousin to a man than to be his son after the Platonic fashion."[19] For children to be raised with parental interest and not indifference, it is necessary to call on the natural partiality of parents for their own children.

If one were to compare two nations that initially were identical in all respects, save that one allowed free inheritance and the other enforced collective inheritance, we would expect the levels of material well-being to diverge as time passed — just as we observed that societies that chose free property prospered while those that chose collective ownership have crashed and burned. A future de Tocqueville who traveled through the two lands with opposing inheritance rules would surely remark on the higher standard of living in the nation that practiced free inheritance. To be sure, no one proposes the full collectivization of the wealth that a person owns when he dies. Principles of and respect for private property are too deeply embedded in American values for that. There is, however, a good deal of collectivization attempted when it comes to larger estates. The Tax Code introduces a 37 percent rate of collectivization when estates reach a value of $675,000.[20] That rate of collectivization, moreover, jumps to 55 percent for estate value in excess of $3 million. To be sure, the effective rate of collectivization is less than what these nominal tax rates would indicate, because prospective decedents can reorganize their affairs to soften the extent of collectivization, as Martin Sullivan has recently shown.[21] (These evasion efforts involve their own form of waste: according to a 1998 estimate of the Joint Economic Committee of Congress, people spend approximately the same amount of money in estate planning to reduce the force of collectivization as the state collects through the tax.[22]) Death taxation thus represents only an incomplete collectivization of property, but it is collectivization nonetheless, and must be analyzed as such. And a basic lesson of history is that collectivization leads to less to be shared in the first place.

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"People spend approximately the same amount of money in estate planning to reduce the force of collectivization as the state collects through the tax."[22]

B. From a Liberal Point of View

Professor McCaffery does not share Professor Wagner's libertarian views; he believes for example that some redistribution from rich to poor is an appropriate activity in a complex modern democracy, and that determining what is "private" and what is "public" property in the first instance is a complicated philosophical task. He nonetheless agrees that a confiscatory death tax would be counter-productive, because it would lead to less work and savings and even more bizarre avoidance behavior than we now observe. But most simply, as a liberal, Professor McCaffery thinks that the death tax has its fundamental policy goals exactly backwards: what a liberal society should *want* its wealthiest citizens to do is to save, even across generations; what it should *not* want them to do is to spend everything and die broke. McCaffery has consistently argued for a progressive consumption tax, one which would fall on spending, not work or savings. Such a tax — a progressive national sales tax — would tax heirs when and as they spend, not wealthy savers as they die. Further, a consistent cash-flow consumption tax, along the lines say of the "USA" (for "unlimited savings accounts") tax plan put forth by then Senators Nunn and Domenici in the mid 1990s, would afford a far better mechanism for monitoring the private concentration of capital than any we now have under our badly flawed income-plus-death tax system.[23]

Misperception Number 4: Equal Opportunity and Death Taxes

A. From a Libertarian Point of View

Much of the support for death taxation has been based on some claim of fairness joined with claims about the characteristics of a good society. Through its ability to magnify and transmit material inequality across generations, a regime of free inheritance is alleged to inject elements of a caste system into society. People become wealthy not because of what they have accomplished but because their parents were wealthy. Others become poor not so much because of failings on their part but because the posts of accomplishment in society will have been foreclosed to them by the transmission of material position through inheritance. The claim in this respect is that free inheritance simultaneously prevents the children of rich families from failing and the children of poor families from succeeding. It is as if there are only so many corporate chief executive positions in a society, and for every such position that is filled through inheritance, an opportunity to attain such a position is closed to those without inheritances.

By reducing the advantages that parents can transmit to their children, some collectivization of inheritance through taxation is argued to be a means of promoting some measure of equality of opportunity within a society. To be sure, more than material wealth is transmitted from parents to children, so the ability of collective inheritance to promote equal opportunity will be similarly limited.[24] Nonetheless, it would be easy for proponents of collective inheritance to argue that some effort to promote equal opportunity, at least along those dimensions that are susceptible to such promotion, is surely better than no effort.

In a commonly used analogy, the receipt of an inheritance is treated as being similar to the receipt of a head start in a footrace. The collectivization of inheritance is construed as a means of helping to promote equality of opportunity, which in turn is construed as a situation where everyone starts the race from the same position. The allure of this popular analogy would seem to lie in its simplicity. It surely seems unfair to let some racers start ahead of others, and if economic life is thought of as a race, it might seem axiomatic to claim that the bequeathing of estates should be disallowed, at least to individuals.

This simple analogy, however, is at least as erroneous as it is alluring,

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"A confiscatory death tax would be counter-productive, because it would lead to less work and savings and even more bizarre avoidance behavior than we now observe."

as it is both economically incoherent and situationally inapt. Equal starting positions in a race may indicate some modicum of fairness and equality of opportunity to the participants. This, however, is only because those participants have arrived at that starting line through a lengthy social process of open competition, where many one-time competitors dropped out along the way because they were not fast enough. Those who dropped out were those who were naturally not so fast as those who remained. When some people happen to be quicker than others by virtue of birth, those who were born naturally slow would not face an equal opportunity of winning the race should they be made to start at the same place as those who were naturally fast. Fairness would seem to require a set of handicaps where those who were naturally quicker would start further back. How much further back? So long as those who were handicapped by starting in the rear still finished in the front, it would seem as though the handicap was not sufficient to provide equal opportunity. When the footrace analogy is applied in a context where people differ in their talents, equality of opportunity becomes indistinguishable from equality of results.

The very simplicity of the footrace analogy seems often to overshadow its dubious relevance. A footrace is a zero sum game. Whatever increases the odds that one particular racer will win must necessarily decrease the odds that other racers will win. Placing a handicap on a projected winner increases the odds that someone else will win. Increased odds of success for some racers come at the expense of reduced odds of success for other racers. This zero sum character, where one person's gain is another person's loss, surely characterizes footraces.

Equally surely, economic life is not zero sum in character. The increased wealth that accrues to the inventor of a new industrial process does not come at the expense of everyone else, but rather is a genuinely new creation of something that did not previously exist and which, moreover, generates increased wealth elsewhere in society as well. For example, an Isaac Singer becomes wealthy by developing a sewing machine: at the same time, however, millions of other people became better clothed, and also healthier because they now could afford new clothes, whereas before they had to wear used clothes, which were often sources of disease. The footrace analogy construes economic life as fundamentally a matter of wealth redistribution, whereas in fact it is wealth creation (and dissipation) that is centrally important to the quality of economic well-being. There are not a fixed number of CEO positions available in a society because the number of such positions will depend on a variety of considerations that govern the creation and success of enterprises. If taxes that impinge heavily upon the successful creation of enterprises diminish such efforts within a society, there will be shrinkage in the observed number of CEO positions.

There can be no doubt that a person's family situation exerts an influence in many ways over a person's prospects and opportunities in life. At the same time, that family situation is far from being absolutely controlling. There is a great deal of fluidity in the transmission of economic positions across generations. While children whose parents were of above-average wealth tend to have above-average wealth themselves, they also fare less well then their parents on average. Similarly, children whose parents were of below-average wealth also tend, on average, to be of below-average wealth, but yet also wealthier than their parents. Some process of regression toward the mean seems clearly to characterize relative economic positions across generations, as well as within the same set of people followed over a number of years.[25]

This is not to deny the existence of serial correlation in economic position. Indeed, a world without such correlation would be unrecogniz-

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"Economic life is not zero sum in character."

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"Inherited wealth cannot perpetuate itself without effort."

able, as, among other things, it would require the operation of different principles of biology and genetics than those to which we are subject. It would also mean that parents were totally ineffective in raising their children. What the evidence does deny, however, is the applicability of any kind of reasoning based on analogies with compound interest applied to different initial starting points. Competitive market economies are far removed from caste societies. Material inheritance is not a dominant influence over one's economic position. Lawrence Lindsay reports that less than half of the top one percent of American wealth holders received any inheritances at all, and in the aggregate for those people inheritances were less than ten percent of their reported wealth.[26]

Arguments about equality of opportunity are often joined by arguments about the moral superiority of earned over unearned wealth. By making it possible for people to live on the unearned incomes that have been bequeathed to them, and which substitute for what would otherwise have to be efforts to earn their own way, inheritance promotes slothfulness and indulgence. It is noteworthy in this respect that the widely-cited Rignano program for inheritance taxation would apply only a 50 percent rate to the first generation of inheritance, while confiscating the inheritance that remains for the second generation.[27] The Rignano program represents one effort to institutionalize the belief that inheritance is a normatively inferior form of wealth, and with the degree of inferiority rising with the passing of time.

There is no doubt that a large fortune can support a lot of slothfulness and indulgence. But it is also the case that such a fortune will be a fortune that is on its way to dissipation. Inherited wealth cannot perpetuate itself without effort. Someone may inherit a company that manufacturers breakfast cereals. Regardless of the company's value at the time of inheritance, if it simply rests on past accomplishments and fails to develop new products and adapt to such things as changing consumer concerns and beliefs about such things as nutrition, it will lose out to competitors. In a competitive market economy, all asset positions are open to continual challenge, whereby wealth, once earned, must be re-earned continually or else it will be lost. Wealth earned by age 50 will not perpetuate itself automatically until age 80, regardless of whether that wealth was created by the holder or was received through inheritance.

Taxes send messages, and in several ways. They affect the costs and returns to different kinds of activity, thereby influencing patterns of use of capital and labor. They also make statements about the relative desirability of different types of activity and patterns of conduct. Conduct that carries a low tax induces people to emulate that conduct. Conduct that carries a high tax discourages such conduct. What kind of conduct does death taxation discourage? What kind of conduct does it encourage? People become wealthy by investing their savings in business enterprises. Creativity, enterprise, and frugality are the traits of a progressive society. The death tax is a direct attack on those traits. By taxing enterprise and frugality, the death tax promotes prodigality. After all, glutinous expenditure on lavish consumption is a way of escaping the death tax. Such forms of escape, however, undermine the progressive character of our society, and thus work to our detriment.[28]

B. From a Liberal Point of View

Once again, as a liberal, Professor McCaffery does not so much question the goal of equal opportunity or the state's role in fostering it as does Professor Wagner. But Professor McCaffery very much does question whether the death tax is a sensible means to more equal opportunity. At best, the death tax applies once a generation — at the end of one's life.

The badly flawed income-plus-death tax allows and even encourages large stores of unequal capital to build up before then. The death tax encourages spending among the rich and discourages their savings. But this is perverse: it is the spending, and not the savings, of the wealthy that ought to trouble liberals, for it is high-end, luxurious living that makes the lower classes feel bad about their lots in life. Savings, in contrast, helps one and all — middle class consumers, homeowners, students borrowing for their education, workers generally. By encouraging the rich to spend while discouraging them to save, the death tax is suppressing opportunities for all, *especially* the non-rich.

Further, the very existence of the tax and the death tax practitioners that it has spawned encourages aggressive *inter vivos* wealth transfers. Using the unified credit and annual exclusion gifts (of $10,000 per donor per donee per year), large stores of capital can pass from first to subsequent generations without *any* tax. The heirs will never pay a tax on this passed wealth if they invest it prudently. These can be large sums indeed.[29] Currently, death tax practitioners are engaged in getting states to repeal their "rules against perpetuities," so that private citizens can set up *infinitely lived* trusts that will come, over time, to possess massive amounts of wealth to dole out to subsequent generations.[30] The very death tax system supported in the name of equal opportunity has generated these strange capitalist beasts.

Once again, Professor McCaffery would exhort liberals to think through their ends and not get wedded to the death tax as a means. A consistent progressive consumption tax would tax people — of first and later generations — when and as they spend, not as they work or save. This gets the morality of taxes down right.

Misperception Number 5: Equal Resources and Death Taxation

If not equal opportunity, perhaps a death tax fosters equality per se: perhaps, that is, the death tax is a good way to redistribute from the haves to the have nots. But once again, while libertarians such as Professor Wagner will question this goal as a legitimate one for the state to pursue, liberals like Professor McCaffery will see a death tax as a poor choice of obtaining it.

A. From a Libertarian Point of View

Professor Wagner sees that death taxation strikes at two of the primary institutions of civil society: property and the family. Death taxation is a limitation on rights of property beyond those contained in broad-based taxes during life. It imposes an additional tax on the mere transfer of an asset from one person to another, thereby transforming private property into collective property. Death taxation seeks to impose penalties upon families that are successful in accumulating wealth, in the name of promoting fairness for everyone else. Without doubt, many people start life with what amount to negative legacies. But what is the appropriate response to the presence of such negative legacies? Inheritance taxation, and its attack on property and the family, seeks to scale down the positive legacies that are bequeathed, much as Plato sought to scale back what he regarded as positive parental legacies.

An alternative approach would look to the elimination of negative legacies as an important element in a positive program for a flourishing society. Rather than seeking to penalize those who were successful in creating positive legacies, it would seek to cultivate conditions that were less conducive to the persistence of negative legacies. Such a program for a flourishing society would seek to reform those institutions that restrict opportunity, rather than to curtail those institutions, like private property and freedom of inheritance, that foster it. The precise characteristics of such an approach are outside the scope of this essay, and point in part to territory that is now under examina-

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"By encouraging the rich to spend while discouraging them to save, the death tax is suppressing opportunities for all, especially *the non-rich."*

tion in the widespread rethinking of the welfare state that is well underway.[31]

One of the main negative impacts of the estate tax is its damage to small, family business. While family businesses do not dominate attention in the media, they are the source of the majority of new jobs that are created within our economy. Some of the reasons why a family business might not survive the death of the creator include an absence of heirs, a disinterest in business among the heirs, and a lack of commercial talent among the heirs. Another reason is the press of liquidity problems created by the death tax.[32] These liquidity problems are easy to see. For instance, the federal tax on a taxable estate of $2 million is $588,000. Of this estate, $1.5 million might be the value placed on the business. The annual net income of the business itself might have been on the order of $300,000. Faced with such obstacles, many heirs will sell their business to raise the cash to pay the tax. Those who try to maintain the business will take on debt and scale back their operations to provide for the servicing of that debt. Even in this case, the competitive capacity of the business is weakened by the estate tax.

To be sure, people can buy large amounts of life insurance to try to provide liquidity to maintain their businesses intact after their death. And many people do this. But notice that such life insurance purchases are but tax payments in advance. Life insurance can soften the liquidity problems that the estate tax creates, but it cannot undo the damage to the creation of new enterprises that the estate tax creates. All life insurance can do is replace one big payment at death with an actuarially equivalent set of individually smaller payments during life. A business that spends $100,000 annually on life insurance is a business that has $100,000 less to invest in its operations.

Among other things, this amount could have employed five people working at $10 per hour, which in turn would have allowed the business to grow according to the productivity of those employees.

While perhaps most of the glamour and glory associated with commercial life resides at the level of our largest corporations, small, family businesses are a vital contributor to our commercial and civic life. They are vehicles of creativity and experimentation. They are robust sources of employment. And they nurture a wide variety of forms of participation in our civic life that supports such virtues as diligence, devotion, enterprise, and care that are essential for the maintenance of our liberty and our prosperity.

B. From a Liberal Point of View

As a liberal, Professor McCaffery believes that equality of resources is a perfectly noble aspiration for a modern democratic state. As an economist, he understands that real world problems with incentives, such as those discussed by Professor Wagner, prevent any state from achieving perfect equality and significant prosperity at the same time: this is one of the lessons in the fall of communism. But in any event, yet once again, Professor McCaffery maintains that death tax is a very poorly chosen means even to the attractive goal of greater equality.

To put the case most simply, any effective death tax could get some greater equality of ownership but only at the expense of more unequal consumption. Imagine that we could have a truly confiscatory death tax, one with no loopholes or gaps at all. The clear incentive under such a tax would be to spend it all and die broke. But then we would only see the rich living better lives, while depriving us all of the benefits that their greater savings would generate: we would be cutting off our nose to spite our face.

The material equality that a liberal should care about is precisely equality in consumption or lifestyle. What we should all want our wealthiest, most economically productive citizens to do is to continue to work and save, not spend it all on them-

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"All life insurance can do is replace one big payment at death with an actuarially equivalent set of individually smaller payments during life."

selves or stop working and consume leisure time. Yet once again a death tax is precisely backwards on this — liberal — score. It is time for well-meaning liberals, progressives, and democrats to wake up and smell the roses: death taxes don't help anyone except perhaps for a handful of death-tax practitioners, who, from a social point of view, ought to have (or be given!) something better to do.

Misperception Number 6: Wealth, Death, and Charitable Bequests

One final misperception haunts efforts to kill the death tax at last: the thought that the dreaded tax is needed to encourage charitable giving. It is true that the most complicated tax planning involves philanthropic giving. But do we really need a death tax with all of its costs, complexities, inefficiencies, and distortions to get people to do good?

Here the libertarian Professor Wagner and the liberal Professor McCaffery agree: the answer is a resounding "no." There are some deep and troubling questions about whether or not we want to very highly subsidize the charitable giving of our wealthiest citizens. But be that as it may, the inducements provided to philanthropy by the death tax by its supporters seem certain to be wildly overstated and, in any event, are *logically distinct from the form of taxation*. If we were to repeal the death tax lock, stock, and barrel — as we recommend — we can introduce some form of matching credit under the income tax to generate more charitable giving. Of course we may not want to do that. But this reluctance just shows the more general reluctance to use the tax system to induce charitable giving any more than we are doing already.

Professor Wagner adds some more thoughts against this common misperception. Among the organizations and institutions that contribute to a flourishing society are a variety of charitable organizations: museums, hospitals, educational establishments, and foundations. Many claims are advanced that high death taxes are an important source of support for various philanthropic organizations, because of the tax-exempt status of charitable bequests. Indeed, many philanthropic organizations have opposed the reduction of tax rates on these grounds. These claims are mistaken. There is both cogent argument and strong evidence to support the reverse claim, namely that high tax rates reduce private support, with state support thereby crowding-out private sources of support.

The claim that death taxation in conjunction with a charitable exemption promotes charitable bequests is based on the presumption that the tax works as a subsidy to charitable bequests. If this claim were accurate, it would point to the apparent paradox that those mediating institutions that are an important part of the framework of a flourishing society become supported more strongly as property and family are weakened through death taxation. That paradox, however, is fictive, because the death tax in conjunction with a charitable exemption does not work to subsidize charitable bequests. It is easy, though, to see how that claim might have gained currency. An increase in the tax rate does lower the price of leaving charitable bequests, when those bequests are exempt from tax. If the tax rate is 40 percent, it requires $1.67 million to leave $1 million for heirs. If the tax rate is 60 percent, it requires $2.5 million to leave $1 million. The higher the rate of tax, the greater the amount of tax reduction provided by a charitable bequest as compared with a personal bequest. It is this feature of the charitable deduction that leads to its being characterized as a subsidy for charitable bequests.

It is eminently understandable that the tax reduces the volume of wealth that decedents bequeath to heirs. Indeed, it is this feature of death taxation that generates its negative economic impact. It does not follow, however, that the charitable deduction operates as a subsidy to stimulate charitable bequests. The

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cost of one dollar of charitable bequest is always one dollar, whatever the tax rate on personal bequests. It costs a donor $1 to leave $1 of charitable bequest whether there is no death taxation at all or whether death is taxed at 100 percent, but with an unlimited charitable deduction. It is the same for intermediate cases, where death is taxed at less than 100 percent, and where charitable bequests are exempt from tax. In no way does the rate of tax affect the cost of leaving charitable bequests. There is no subsidization of charitable bequests that accompanies the death tax. The death tax is neutral toward charitable bequests, provided that those bequests are exempt from tax.

To say this, however, is not to say that philanthropy is unaffected by death taxation. To the contrary, philanthropy is surely harmed by death taxation. That harm emerges out of the negative impact of death taxation upon wealth creation. There is both reason and evidence to support the claim that charitable bequests have relatively high wealth elasticity.[33] This means that a ten percent rise in wealth will typically be accompanied by an even larger increase in charitable bequests. The decrease in wealth that is induced by the death tax will thus bring about a disproportionately larger decrease on charitable bequests.[34]

Conclusion

At the dawn of a new millennium, a new century, it is high time to free ourselves from one of the worst policy mistakes of the last century. Ordinary citizens across America are calling for freedom from death taxation. It is time for the rest of us — scholars and politicians in particular — to listen.

Scholars seem to squabble, as they so often do, to a standstill over death taxation: some say it raises much needed money, others say it doesn't; some say that whether or not it raises money, it's a bad idea, others say that whether or not it raises money, it's a good one. To help bring some order to this intellectual chaos, we two academics, from different intellectual perspectives, have sat down to parse through some of the most common arguments ventured forth in support of the death tax. We have shown that liberal and libertarian, conservative and progressive, can agree: the death tax is a bad tax, in any light, and it should die. The tax does not raise money or promote the collective well-being; it stands in the way of a major force of human progress; it encourages petty and foolish planning and waste all around; it does not serve any plausible goal of equality and in fact stands in the way of more sensible tax reform for any political purpose. It is high time to declare our independence from the vestige of wrong-headed policy and to at long last kill the death tax. Then we can finally have a grave worth dancing on.

Endnotes:

[1] On June 9, 2000, the House of Representatives voted 279-136 in support of H.R. 8, the Death Tax Elimination Act. See Ryan J. Donmoyer, "'Death Tax' Death Warrant Signed by House," 87 Tax Notes 1431 (June 12, 2000).

[2] For representative examples of Professor Wagner's views, see Richard E. Wagner, "Tax Reform through Constitutional Limitation: A Sympathetic Critique," 15 Cumberland Law Review 475 (1985); James D. Gwartney and Richard E. Wagner, "Public Choice and the Conduct of Representative Government," and Richard E. Wagner and James D. Gwartney, "Public Choice and Constitutional Order," in Gwartney and Wagner, editors, Public Choice and Constitutional Economics, (JAI Press: Greenwich, Connecticut, 1988); and Richard E. Wagner, Taxation and the Price of Civilization: An Essay on Federal Tax Reform (Washington: National Legal Center for the Public Interest, 1998).

[3] For representative examples of Professor McCaffery's views, see "The Political Liberal Case against the Estate Tax," 23 Philosophy & Public Affairs 281 (1994); "The Uneasy Case for Wealth Transfer Taxation," 104 Yale Law Journal 283 (1994); "Being the Best We Can Be (A Reply to Critics)," 51 Tax Law Review 615 (1996); "Real Tax Reform: The Case for a Progressive Consumption Tax," The Boston Review, December 1999/January 2000; "Grave Robbers: The Moral Case against the Death Tax," Cato Institute Policy Analysis No. 353, October, 1999, reprinted in Tax Notes, December 20, 1999.

[4] 158 U.S. 601 (1895).

[5] 256 U.S. 345 (1921).

[6] I.R.C. § 2056(b)(7).

[7] I.R.C. § 2503(b)(2).

[8] See Rev. Rule. 73-405, 1973-2 C.B. 321 (original IRS concession to the Crummey case). Generally, the annual donee exclusion is only available for the gift of a present interest in property. A demand trust or a "Crummy Trust" where the beneficiary has the right to withdraw property from a trust, even though not exercised, will enable the donor to claim the annual donee exclusion. As long as the power to exercise a withdrawal right exists, the interest will qualify. See 11 Tax Management Portfolios, Estates, Gifts, and Trusts, Estate Planning, at IV.B.1(c).

[9] See Budget of the United States Government, Historical Tables, Fiscal Year 1999, at Table 2.5; gift and estate taxes raised just under 20 billion dollars in 1997; the government estimates that the total will rise to 25 billion by 2003.

[10] I.R.C. Section 2055.

[11] Gary Robbins and Aldona Robbins, *The Case for Burying the Estate Tax*, Policy Report No. 150 (Lewisville, TX: Institute for Policy Innovation, 1999).

[12] For an alternative effort to gauge the economic impact of a repeal of the federal death tax that generates similar findings, see William W. Beach, "The Case for Repealing the Estate Tax," Backgrounder No. 1091, August 21, 1996 (Washington: Heritage Foundation). For an earlier study in a similar vein, see Richard E. Wagner, *Federal Transfer Taxation: A Study in Social Cost* (Costa Mesa, CA: Center for the Study of Taxation, 1993).

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[13] Henry C. Simons, *Personal Income Taxation* (Chicago: University of Chicago Press, 1938).

[14] Professor McCaffery discusses this in "The Uneasy Case for Wealth Transfer Taxation," Yale Law Journal, supra; see also Edward J. McCaffery, "Tax Policy under a Hybrid Income-Consumption Tax," 70 Texas Law Review 1145 (1992).

[15] See McCaffery, "Hybrid," Texas Law Review, supra; see also McCaffery, "Real Tax Reform," The Boston Review, supra.

[16] See Donmoyer, supra.

[17] Irving Fisher, *The Nature of Capital and Income* (New York: Macmillan, 1912). For a careful examination of these issues, see Arthur P. Hall, *The Concept of Income Revisited: An Investigation into the Double Taxation of Saving* (Washington: Tax Foundation, 1997). Professor McCaffery has consistently supported a progressive consumption tax, which puts him in some tension with conservatives as to the appropriate rate, but not as to the appropriate base, of taxation. See for example, McCaffery, "Real Tax Reform," Boston Review, supra.

[18] Most clearly in "The Uneasy Case for Wealth Transfer Taxes," Yale Law Journal, supra.

[19] Aristotle. *The Politics*, ed. and trans. by E. Barker (Oxford: Oxford University Press, 1946). See also, Plato, *The Republic*, ed. and trans. by B. Jowett (London: Macmillan, 1892).

[20] This exemption is in the process of rising gradually to $1 million in 2006, at which time the initial rate of tax will be 41 percent.

[21] Martin Sullivan, Estate Tax Reform Analysis, 86 Tax Notes 583 (2000).

[22] Joint Economic Committee of the U.S. Congress, The Economics of the Estate Tax, (Washington: Government Printing Office, December 1998).

[23] For related arguments, see Edward J. McCaffery, "Real Tax Reform: The Case for a Progressive Consumption Tax," Boston Review, supra; "Tax Spending — Not Work, Savings," Los Angeles Times, August 23, 1999. Professor McCaffery is at work on a forthcoming book, Time for a Change: A Fair not Flat Cure for America's Ailing Tax System, to be published in 2001, developing these ideas for comprehensive tax reform at much greater length.

[24] The interplay among different dimensions of inheritance is examined in James E. Meade, *The Inheritance of Inequalities: Some Biological, Demographic, Social, and Economic Factors*, Proceedings of the British Academy, vol. 59 (London: Oxford University Press, 1973).

[25] See, for instance, Alan S. Blinder, "Inequality and Mobility in the Distribution of Wealth," *Kyklos* 29 (No. 4, 1976): 607-38; and Bradley R. Schiller, "Relative Earnings Mobility in the United States," *American Economic Review* 67 (December 1977): 926-41.

[26] Lawrence B. Lindsay, "Why the 1980s Were not the 1920s." *Forbes 400* (October 19, 1992): 78 ff.

[27] Eugenio Rignano, *The Social Significance of the Inheritance Tax* (New York: Knopf, 1924).

[28] For an elaboration of this line of argument, see Richard E. Wagner, *Inheritance and the State* (Washington: American Enterprise Institute, 1977), esp. pp. 81-87. See also Edward J. McCaffery, "Grave Robbers: The Moral Case against the Death Tax," Policy Analysis No. 353 (Washington: Cato Institute, 1999).

[29] See the case of Lear and his daughters that I discuss in "Grave Robbers," supra.

[30] See for example Jesse Dukiminier, "Dynasty Trusts: Sheltering Descendants from Transfer Taxes," 23 Estate Planning 417 (1996); Brian Layman, "Perpetual Dynasty Trusts: One of the Most Powerful Tools in the Estate Planner's Arsenal," 32 Akron Law Review 747 (1999).

[31] For a recent collection of relevant essays on this topic, see Richard M. Ebeling, ed., *American Perestroika: The Demise of the Welfare State* (Hillsdale, MI: Hillsdale College Press, 1995).

[32] For a study that attributed 75 percent of those failures to liquidity problems created by the need to pay the death tax upon the unexpected death of the founder, see Small Business Council of America, *Why Successful Family Businesses Fail*.

[33] Gary S Becker, *A Treatise on the Family*, (Cambridge: Harvard University Press, 1981); Gary S. Becker and Nigel Tomes, "Human Capital and the Rise and Fall of Families." *Journal of Labor Economics* 4 (1986, no. 3, pt. 2): s 1-39.

[34] Moreover, there is both good reason and strong evidence to support the claim that state-provided charity crowds out private support. See, for instance, Russell D. Roberts, "A Positive Model of Private Charity and Public Transfers," *Journal of Political Economy* 92 (February 1984): 136-48.

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