

# WHY THE END IS HERE FOR STATE DEATH TRANSFER TAXES AND HOW STATES SHOULD RESPOND

## INTRODUCTION

While state death transfer taxes<sup>1</sup> were once quite common, their prevalence has declined in recent years. When Congress enacted the modern federal estate tax in 1916,<sup>2</sup> all but five states and the District of Columbia already had some sort of death transfer tax.<sup>3</sup> By 1922, the number of states without a death transfer tax dropped to two plus the District of Columbia.<sup>4</sup> However, today only seventeen states and the District of Columbia still impose such taxes.<sup>5</sup> While their prevalence has declined, the impact of state death transfer taxes on those still subject to them has not. Some state death transfer taxes are discriminatory in nature because they apply a higher tax rate on certain death transfers than others, typically based on the heir's relationship to the decedent.<sup>6</sup> Additionally, state death transfer taxes tend to alter individual decision-making and create interstate competition for wealthy residents.<sup>7</sup> Further, state death transfer taxes impose a notable

---

1. State death transfer taxes come in two general forms, which both tax transfers at death: the estate tax and the inheritance tax. An estate tax is levied "upon the privilege of post-mortem disposition by the decedent, the tax being assessed upon the net estate of the decedent as a whole, rather than upon the amount received by each of the beneficiaries." George F. Karch, *The Apportionment of Death Taxes*, 54 HARV. L. REV. 10, 10 (1940). An inheritance tax is levied "against the right or privilege of each beneficiary to receive property passing after death." *Id.* This Note will refer to both the estate tax and inheritance tax when using the term "state death transfer tax."

2. Revenue Act of 1916, Pub. L. No. 64-271, § 200, 39 Stat. 756, 777.

3. Eugene E. Oakes, *Development of American State Death Taxes*, 26 IOWA L. REV. 451, 468 (1941).

4. *Id.* Mississippi enacted an estate tax in 1918 (1918 Miss. Laws 94), New Mexico enacted an inheritance tax in 1919 (1919 N.M. Laws 260), and South Carolina enacted an inheritance tax in 1922 (1922 S.C. Acts 800). Oakes, *supra* note 3. The remaining jurisdictions without a state death transfer tax were the District of Columbia, Florida, and Alabama. *Id.*

5. *See infra* notes 62–64.

6. *See infra* Part II.A. For example, Iowa exempts from its inheritance tax those transfers to spouses and lineal relatives, but imposes an inheritance tax rate of five to fifteen percent on most other transfers. IOWA CODE §§ 450.9, 450.10 (2018).

7. *See infra* Part II.B. Taxpayers may choose to move states in their elderly years or find other ways to avoid state death transfer taxes. *See* Dean L. Surkin, *The Impact of the Decoupling of State Estate Taxes on a Taxpayer's Choice of Domicile*, 101 J. TAX'N 49, 56 (2004); Ashlea Ebeling, *Where Not to Die in 2018*, FORBES (Dec. 21, 2017, 3:00 PM), <https://www.forbes.com/sites/ashleaebeling/2017/12/21/where-not-to-die-in-2018/> [<https://perma.cc/RDU2-HP5T>]; Kay Bell, *Moving to Escape State Estate Taxes*, BANKRATE (July 28, 2015), <https://www.bankrate.com/financing/taxes/moving-to-escape-state-estate-taxes/> [<https://perma.cc/YSQ6-2EDF>]; Julie Garber, *How to Minimize Death Taxes*, BALANCE, <https://www.thebalance.com/how-to-minimize-death-taxes-3505688> [<https://perma.cc/57VJ-8ZZV>] (last updated Dec. 24, 2018).

burden on death transfers without generating a significant amount of revenue.<sup>8</sup>

While there appears to be little justification for the continuance of state death transfer taxes, it is arguable that they serve an important purpose by combatting wealth inequality in society.<sup>9</sup> However, state death transfer taxes do not adequately address wealth inequality.<sup>10</sup> Until all states impose an identical state death transfer tax, which is unlikely and perhaps nearly impossible, problems of interstate competition and taxpayers altering their behavior to avoid death transfer taxes will persist.<sup>11</sup> State death transfer taxes cannot adequately address wealth inequality and provide little remaining benefit. The few remaining state death transfer taxes are at their end. These remaining states should consider a gradual repeal of the death transfer tax, allowing time for taxpayers to make changes to their estate planning.<sup>12</sup>

Part I of this Note discusses the history and evolution of state death transfer taxes, including their rise, recent decline, and interaction with the federal estate tax, all of which are critical to understanding the current state of death transfer taxes and their imminent downfall. Part II examines the discriminatory effect of certain state death transfer taxes and the behavioral and revenue effects of all state death transfer taxes. Part III discusses the state death transfer tax's questionable role in combatting wealth inequality, and its limitations for serving as a workable solution to rising wealth inequality. Part IV of this Note proposes that states consider a gradual repeal of all state death transfer taxes, or at the very least reform those death transfer taxes that are discriminatory in nature. This Note concludes that the remaining death transfer taxes are near their end and should soon be repealed because of their inability to provide any benefit to remaining states with such taxes.

## I. HISTORY AND EVOLUTION OF STATE DEATH TRANSFER TAXES

### A. *History Before 1924*

The federal government instituted its first temporary death transfer tax in 1797.<sup>13</sup> Until the more permanent modern federal estate tax was enacted

---

8. See *infra* Part II.C. States with a death transfer tax typically have approximately one percent of their overall state revenue come from the tax. See *infra* notes 139–142 and accompanying text.

9. See *infra* Part III.

10. See *infra* Part III.

11. See *infra* Part III.

12. See *infra* Part IV. If states are unwilling to completely repeal their state death transfer tax, they should at the very least repeal any discriminatory aspect of their tax and impose a uniform rate on all residents and transfers. See *infra* Part IV.

13. Stamp Act of 1797, ch. 11, 1 Stat. 527.

in 1916,<sup>14</sup> temporary death transfer taxes were imposed several times at the federal level, often in conjunction with wartime efforts.<sup>15</sup> Pennsylvania was the first to enact a state death transfer tax in 1826.<sup>16</sup> Between 1826 and 1885 a few other states also adopted death transfer taxes, but state adoptions were not widespread.<sup>17</sup> That changed in 1885 when New York enacted an inheritance tax on collateral heirs,<sup>18</sup> which led other states to enact similar death transfer taxes modeled on New York's tax.<sup>19</sup> The structure of state death transfer taxes around the end of the nineteenth century and beginning of the twentieth century ranged from a flat rate on collateral heirs to a progressive tax on both lineal and collateral heirs.<sup>20</sup>

When Congress enacted the modern federal estate tax in 1916,<sup>21</sup> all but five states and the District of Columbia had a death transfer tax.<sup>22</sup> By 1922, the number of states without a death transfer tax dropped to two plus the District of Columbia.<sup>23</sup> In 1922, state death transfer taxes comprised roughly seven percent of total state tax revenues.<sup>24</sup> However, between 1916 and 1924, the few remaining states that did not have death transfer taxes began to try to lure residents with their favorable tax rates, creating interstate competition for wealthy residents.<sup>25</sup> States became worried about competing

---

14. Revenue Act of 1916, Pub. L. No. 64-271, § 200, 39 Stat. 756, 777.

15. Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223, 225–26 (1956).

16. Oakes, *supra* note 3, at 451 (citing 1826 Pa. Laws No. 72). The revenue was used to fund a new canal. *Id.* at 452.

17. *Id.* at 451–54.

18. 1885 N.Y. Laws 820. A “collateral heir” is “[s]omeone who is neither a direct descendant nor an ancestor of the decedent, but whose kinship is through a collateral line, such as a brother, sister, uncle, aunt, nephew, niece, or cousin.” *Heir*, BLACK’S LAW DICTIONARY (10th ed. 2014). On the other hand, a “lineal heir” is “[s]omeone who is either an ancestor or a descendant of the decedent, such as a parent or a child.” *Id.*

19. Oakes, *supra* note 3, at 457.

20. *Id.* at 457–60. The progressive death transfer tax was more common at the time than the flat tax. *Id.* at 459–60. A progressive tax imposes an increasing marginal rate of tax as the estate or inheritance amount increases. See Kelly Phillips Erb, *Our Current Tax v. The Flat Tax v. The Fair Tax: What’s The Difference?*, FORBES (Aug. 7, 2015, 10:16 AM), <https://www.forbes.com/sites/kellyphillips/erb/2015/08/07/our-current-tax-v-the-flat-tax-v-the-fair-tax-whats-the-difference/> [https://perma.cc/FKQ2-A7QD]. A flat tax imposes the same rate of tax regardless of the size of the estate or inheritance amount. *Id.*

21. Revenue Act of 1916, Pub. L. No. 64-271, § 200, 39 Stat. 756, 777.

22. See Oakes, *supra* note 3, at 468.

23. *Id.*

24. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, TAX OVERLAPPING IN THE UNITED STATES 20 tbl.5 (1964).

25. Jeffrey A. Cooper, *Interstate Competition and State Death Taxes: A Modern Crisis in Historical Perspective*, 33 PEPP. L. REV. 835, 837–38 (2006). Florida and Alabama, two of the three holdouts, actively advertised to and targeted wealthy individuals to move to their states because of their lack of a death transfer tax. JARED WALCZAK, TAX FOUND., STATE INHERITANCE AND ESTATE TAXES: RATES, ECONOMIC IMPLICATIONS, AND THE RETURN OF INTERSTATE COMPETITION 6–7 (2017), <https://files.taxfoundation.org/20171024103443/Tax-Foundation-SR2351.pdf> [https://perma.cc/792U-975W].

amongst each other for wealthy taxpayers.<sup>26</sup> This competition led to three national conferences where states attempted to figure out a solution that would allow them to continue to collect death transfer tax revenue while preventing the migration of wealthy residents.<sup>27</sup> The result of the three conferences was the Delano Committee Report, which proposed that the federal government pick up the cost of state death transfer taxation.<sup>28</sup>

*B. The 1924 Enactment of a Federal Credit for State Death Transfer Taxes*

In 1924, partly in response to the outcry from states following the enactment of the federal estate tax,<sup>29</sup> the federal government passed the Revenue Act of 1924.<sup>30</sup> The Act amended the Internal Revenue Code to provide a dollar-for-dollar credit on a federal estate tax return for state death transfer taxes paid.<sup>31</sup> This change allowed states to place the burden of their death transfer taxes on the federal government rather than on their residents, effectively eliminating interstate competition.<sup>32</sup> During a hearing regarding the Revenue Act of 1924, Senator Jones of New Mexico asked, “[W]ould it not be equitable for the Federal Government only to lay its hand upon that part of the inheritance after all State taxes and expenses have been deducted, regardless of the amount?”<sup>33</sup> This statement indicates that at least one member of Congress supported the enactment of the credit as a form of deference to state death transfer taxes.<sup>34</sup>

The credit was initially capped at twenty-five percent of the federal estate tax,<sup>35</sup> but the cap was raised in 1926 to eighty percent.<sup>36</sup> Iowa Congressman William Green, the individual behind the 1926 raise, proposed it seemingly to prevent states—most notably Florida—from attracting residents who wished to avoid state death transfer taxes.<sup>37</sup> During a floor debate Congressman Green said, “Let me say to the people of Florida . . . [You

---

26. See WALCZAK, *supra* note 25, at 7.

27. Cooper, *supra* note 25, at 838–39. The first conference was held by the National Tax Association and resulted in the creation of the National Committee on Inheritance Taxation which held the next two conferences. E.M. Perkins, *State Action Under the Federal Estate Tax Credit Clause*, 13 N.C. L. REV. 271, 275–76 (1935).

28. WALCZAK, *supra* note 25, at 7.

29. *Id.*

30. Revenue Act of 1924, Pub. L. No. 68-176, 43 Stat. 253.

31. Revenue Act of 1924 § 301(b).

32. See *infra* note 43 and accompanying text.

33. *Revenue Act of 1924: Hearings on H.R. 6715 Before the S. Comm. on Fin.*, 68th Cong. 225 (1924) (statement of Sen. Andrieus Jones, Member, S. Comm. on Fin.).

34. See *id.*

35. Revenue Act of 1924 § 301(b).

36. Revenue Act of 1926, Pub. L. No. 69-20, § 301(b), 44 Stat. 9, 70.

37. Cooper, *supra* note 25, at 858–59.

are] filling up your community with members of that ancient dishonorable order of tax dodgers, who, of all citizens, are the most narrow, the most selfish, and the most unpatriotic.”<sup>38</sup> Congressman Green, by raising the cap, sought to eradicate completely the problem of interstate competition and the benefit states without a death transfer tax reaped by attracting new, wealthy residents.<sup>39</sup>

The federal credit for state death transfer taxes “became the foundation for many state death tax systems.”<sup>40</sup> In the few years following 1926, almost every state adopted a death transfer tax equal to or above the maximum federal credit.<sup>41</sup> Most states did not have an independent death transfer tax, but instead their tax was tied to the maximum federal credit, a tax known as a “pick-up tax.”<sup>42</sup> After just a few years, the new federal credit “had effectively negated the interstate competition” for wealthy individuals that worried state governments just a few years earlier.<sup>43</sup>

### C. The EGTRRA of 2001 and the Demise of the Federal Credit

The landscape of state death transfer taxes changed suddenly when Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA).<sup>44</sup> Not only did EGTRRA increase the estate tax exclusion amount,<sup>45</sup> reduce the maximum marginal estate tax rate,<sup>46</sup> and gradually, but temporarily, repeal the federal estate tax,<sup>47</sup> it also included a four-year phase-out of the state death transfer tax credit, completely

---

38. 69 CONG. REC. 964 (1925) (statement of Rep. Green).

39. *See id.*

40. Steven D. Nofziger, Comment, *EGTRRA and the Past, Present, and Future of Oregon's Inheritance Tax System*, 84 OR. L. REV. 317, 320 (2005).

41. Cooper, *supra* note 25, at 839–40. However, Nevada held out and did not adopt an estate tax until 1987. NEV. REV. STAT. § 375A.100 (1987). Some states imposed death transfer taxes above the pick-up tax threshold. WALCZAK, *supra* note 25, at 7. But, by the close of the twentieth century, most states relied only on the pick-up tax. Cooper, *supra* note 25, at 875.

42. Cooper, *supra* note 25, at 839.

43. *Id.* at 860. The state death transfer tax credit caused a significant increase in state death transfer tax revenue. Death transfer taxes rose from an average of 7.9 percent of state revenue in 1915 to an average of 10.1 percent in 1930. SUBCOMM. OF THE H. COMM. ON WAYS & MEANS, 72D CONG., DOUBLE TAXATION 132 (Comm. Print 1933).

44. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 [hereinafter EGTRRA]. Just prior to EGTRRA, the state death transfer tax credit involved a graded scale where states could receive a maximum of sixteen percent of the total fifty-five percent federal estate tax rate levied on large estates. I.R.C. § 2011(b) (2000).

45. EGTRRA, *supra* note 44, at § 521. The “exclusion amount” is an amount excluded from an estate’s gross value for purposes of calculating the tax owed at the federal level. Julie Garber, *Exemption from Estate Taxes: Estate Tax Definition and the Exemption*, BALANCE (May 11, 2017), <https://www.thebalance.com/exemption-from-estate-taxes-3505525> [<https://perma.cc/TVT6-GC4X>].

46. EGTRRA, *supra* note 44, at § 511.

47. EGTRRA, *supra* note 44, at § 501.

replacing it with a tax deduction by 2005.<sup>48</sup> The state death transfer tax deduction was far less generous than the previous tax credit,<sup>49</sup> and therefore gave new life to interstate competition and signaled the beginning of the downfall of state death transfer taxes.<sup>50</sup> States could no longer rely on the federal government to largely bear the burden of state death transfer taxes. Congress likely replaced the credit with the deduction to generate federal revenue to ease the financial burdens of other changes in EGTRRA:

The federal government passed EGTRRA, but seemingly wasn't fully prepared to pay for it. Rather, by repealing the state death tax credit, the architects of EGTRRA placed much of the revenue burden on state governments. In fact, during most of the coming decade, the top net marginal federal estate tax rate may prove to be higher than it was prior to EGTRRA. Overall gross federal estate tax rates overtly decline, but it's the states that lose much of the revenue as a result.<sup>51</sup>

The federal credit may have been repealed and replaced to counter EGTRRA's overall \$1 trillion reduction in federal revenue in just the first ten years after its passage.<sup>52</sup>

Because the majority of states prior to 2001 only relied on a pick-up tax and did not have an independent death transfer tax,<sup>53</sup> the repeal of the federal credit effectively repealed many states' death transfer taxes.<sup>54</sup> A few states that previously had a pick-up tax enacted a stand-alone death transfer tax.<sup>55</sup> And a few states affirmatively repealed their death transfer tax after

---

48. EGTRRA §§ 531–532; see Leonard E. Burman, William G. Gale & Jeffrey Rohaly, *Options to Reform the Estate Tax*, URB.-BROOKINGS TAX POL'Y CTR., at 1, 2 (Mar. 2005), <https://www.urban.org/sites/default/files/publication/51521/311153-options-to-reform-the-estate-tax.pdf>. [<https://perma.cc/JD9V-YL5S>].

49. WALCZAK, *supra* note 25, at 8. The repeal of the tax credit hurt taxpayers because the tax credit reduced total tax liability by a dollar-for-dollar amount, while the less-generous deduction only reduced the amount on which the taxpayer is taxed. *Id.* A deduction reduces taxable income and its value depends on the taxpayer's marginal tax rate, while a credit reduces tax directly and does not depend on tax rates. *What Are Tax Credits and How Do They Differ from Tax Deductions?*, TAX POLICY CTR., <https://www.taxpolicycenter.org/briefing-book/what-are-tax-credits-and-how-do-they-differ-tax-deductions> [<https://perma.cc/JG45-3CBH>].

50. Cooper, *supra* note 25, at 876–78.

51. Jeffrey A. Cooper et al., *State Estate Taxes After EGTRRA: A Long Day's Journey into Night*, 17 QUINNIPIAC PROB. L.J. 317, 320–21 (2004).

52. *Changes in CBO's Baseline Projections Since January 2001*, CONG. BUDGET OFFICE (June 7, 2012), <https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/06-07-changessince2001baseline.pdf> [<https://perma.cc/EA4X-E5EX>].

53. See *supra* notes 41–42 and accompanying text.

54. See Cooper, *supra* note 25, at 877.

55. Norton Francis, *Back from the Dead: State Estate Taxes After the Fiscal Cliff*, URB.-BROOKINGS TAX POL'Y CTR. 6 (Nov. 14, 2012), <https://www.urban.org/sites/default/files/publication/26196/412694-Back-from-the-Dead-State-Estate-Taxes-After-the-Fiscal-Cliff.PDF> [<https://perma.cc/627D-GJS9>].

EGTRRA.<sup>56</sup> After the repeal of the federal credit, states could no longer receive revenue from their death transfer taxes while allowing the federal government to bear the burden, reverting state death transfer taxes to their pre-1924 state.<sup>57</sup>

Before EGTRRA, every state had some sort of a death transfer tax;<sup>58</sup> today only seventeen states and the District of Columbia have such a tax.<sup>59</sup> The decrease of states with a death transfer tax is partly due to the effective repeal of state pick-up taxes when the federal credit was repealed and the failure of states to subsequently enact an independent death transfer tax.<sup>60</sup> However, the decrease is also attributable to states gradually repealing their death transfers taxes in response to EGTRRA's reintroduction of interstate competition.<sup>61</sup>

#### *D. State Death Transfer Taxes Today*

Today, eleven states (and the District of Columbia) impose an estate tax,<sup>62</sup> five states impose an inheritance tax,<sup>63</sup> and one state imposes both an estate tax and an inheritance tax.<sup>64</sup> State estate taxes are typically imposed on the entirety of a decedent's estate, regardless of to whom the bequests are made.<sup>65</sup> Of the states that impose estate taxes today, top marginal rates

---

56. See Cooper, *supra* note 25, at 877–78.

57. See *supra* Part I.A.

58. WALCZAK, *supra* note 25, at 8.

59. See *infra* notes 62–64. Recent states to phase out or repeal state death transfer taxes include: Delaware (H.B. 16, 149th Gen. Assemb., Reg. Sess. (Del. 2017)); Indiana (H.B. 1001, 118th Gen. Assemb., Reg. Sess. (Ind. 2013)); North Carolina (H.B. 998, 2013 Sess. Gen. Assemb. (N.C. 2013)); Tennessee (H.B. 3760, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012)); and Ohio (H.B. 3, 129th Gen. Assemb., Reg. Sess. (Ohio 2011)).

60. Cooper, *supra* note 25, at 876–78.

61. *Id.* at 878. “The state death tax uniformity of the late twentieth century is now but a memory. Interstate competition to attract wealthy residents begins anew. This time, Congress has left the fray, leaving state leaders to sort out matters for themselves.” *Id.*

62. States that impose an estate tax are: Connecticut (CONN. GEN. STAT. § 12-391 (2018)); Hawaii (HAW. REV. STAT. § 236E-8 (2018)); Illinois (35 ILL. COMP. STAT. 405/3 (2018)); Maine (ME. STAT. tit. 36, § 4103 (2018)); Massachusetts (MASS. GEN. LAWS ch. 65C, § 2A (2018)); Minnesota (MINN. STAT. § 291.01 (2018)); New York (N.Y. TAX LAW § 952 (McKinney 2018)); Oregon (OR. REV. STAT. § 118.010 (2018)); Rhode Island (44 R.I. GEN. LAWS § 44-22-1 (2018)); Vermont (VT. STAT. ANN. tit. 32, § 7442a (2018)); Washington (WASH. REV. CODE § 83.100.040 (2018)). The District of Columbia also imposes an estate tax. D.C. CODE § 47-3702 (2018).

63. States that impose an inheritance tax are: Iowa (IOWA CODE § 450.10 (2018)); Kentucky (KY. REV. STAT. ANN. § 140.010 (West 2018)); Nebraska (NEB. REV. STAT. § 77-2001 (2018)); New Jersey (N.J. STAT. ANN. § 54:34-1 (West 2018)); and Pennsylvania (72 PA. CONS. STAT. § 9106 (2018)).

64. Maryland imposes both an inheritance tax and an estate tax. MD. CODE ANN., TAX–GEN. §§ 7-202, 7-302 (LexisNexis 2018).

65. See *supra* note 1.

range from sixteen percent<sup>66</sup> to twenty percent.<sup>67</sup> Two states simply impose a flat rate<sup>68</sup> of tax of sixteen percent rather than using a marginal rate structure.<sup>69</sup> States with estate taxes all provide an exclusion amount.<sup>70</sup> Exclusion amounts range from \$1 million<sup>71</sup> to \$5.49 million.<sup>72</sup>

Inheritance taxes differ from estate taxes in that they can, and often do, prescribe different tax rates based on the bequests.<sup>73</sup> This is because the tax is not levied on the estate itself, but rather on bequests made from the estate.<sup>74</sup> Of the states that impose inheritance taxes today, top rates range from ten percent<sup>75</sup> to eighteen percent.<sup>76</sup> However, inheritance tax rates do not apply uniformly to all bequests in each state. Today, state inheritance taxes differ between lineal heirs<sup>77</sup> (e.g., spouses, parents, children, and grandchildren), collateral heirs<sup>78</sup> (e.g., siblings, nieces, nephews, aunts, and uncles), and nonrelated heirs (e.g., neighbors and friends).<sup>79</sup> States with inheritance taxes either exempt lineal heirs altogether,<sup>80</sup> or tax them at more favorable rates than collateral heirs and nonrelatives.<sup>81</sup> Further, most states tax collateral heirs at a more preferential rate than nonrelatives.<sup>82</sup>

---

66. See WALCZAK, *supra* note 25, at 3 (using rates from the year 2017). The states that impose a top marginal rate of sixteen percent include Illinois, Massachusetts, Minnesota, New York, Oregon, Rhode Island, and the District of Columbia. *Id.*

67. *Id.* Washington is the only state to impose a top marginal rate of twenty percent. *Id.*

68. See *supra* note 20.

69. See WALCZAK, *supra* note 25, at 3. These states are Vermont and Maryland. *Id.*

70. See *supra* note 45.

71. See WALCZAK, *supra* note 25, at 3. Massachusetts and Oregon provide for an exclusion amount of \$1 million.

72. *Id.* Hawaii and Maine provide for an exclusion amount of \$5.49 million. *Id.* This amount is tied to the federal exclusion amount. HAW. REV. STAT. § 236E-6(a) (2018); ME. STAT. tit. 36, § 4102(5) (2018).

73. See *supra* note 1.

74. *Id.*

75. See WALCZAK, *supra* note 25, at 3. Maryland imposes an inheritance tax rate of only ten percent. MD. CODE ANN., TAX-GEN. § 7-204(b) (LexisNexis 2018).

76. See WALCZAK, *supra* note 25, at 3. Nebraska imposes an inheritance tax rate of eighteen percent. NEB. REV. STAT. § 77-2006 (2018).

77. See *supra* note 18.

78. *Id.*

79. WALCZAK, *supra* note 25, at 16.

80. IOWA CODE § 450.9 (2018); MD. CODE ANN., TAX-GEN. § 7-203(b) (LexisNexis 2018); N.J. STAT. ANN. § 54:34-2 (West 2018); 72 PA. CONS. STAT. § 9111 (2018).

81. KY. REV. STAT. ANN. § 140.070 (West 2018); NEB. REV. STAT. §§ 77-2001; 77-2004 (2018). However, while Kentucky does impose an inheritance tax on most lineal heir bequests, Kentucky exempts all bequests to surviving spouses and certain limited amounts to other lineal heirs. KY. REV. STAT. ANN. § 140.080 (West 2018).

82. IOWA CODE §§ 450.9-10 (2018); KY. REV. STAT. ANN. § 140.070 (West 2018); NEB. REV. STAT. § 77-2006 (2018); N.J. STAT. ANN. § 54:34-2; 72 PA. CONS. STAT. § 9116 (2018). However, Maryland taxes most collateral heirs and nonrelative heirs at the same rate. MD. CODE ANN., TAX-GEN. § 7-203(b) (LexisNexis 2018).

### E. The Federal Estate Tax

The modern federal estate tax was first enacted in 1916 with World War I as a backdrop.<sup>83</sup> Congress at the time saw death transfers as a large source of untapped but much needed revenue.<sup>84</sup> The House Ways and Means Committee reported that the revenue system would “be more evenly and equitably balanced” if “a larger portion of our necessary revenues” were “collected from the incomes and inheritances of those deriving the most benefit and protection from the Government.”<sup>85</sup>

Currently, the Internal Revenue Code requires an estate tax to be paid on estates exceeding an exclusion amount.<sup>86</sup> For 2017, that exclusion amount was \$5.49 million per individual.<sup>87</sup> The Tax Cut and Jobs Act of 2017<sup>88</sup> raised the exclusion amount for 2018 to \$11,180,000.<sup>89</sup> The exclusion amount has regularly and significantly been increased even before 2017 and 2018.<sup>90</sup> Further, in 2010, an estate tax portability provision was enacted, allowing a surviving spouse to use his or her deceased spouse’s unused exclusion amount.<sup>91</sup> The 2018 exclusion and the spousal portability provision allow a married couple to transfer over \$22 million at death without being subject to the federal estate tax.<sup>92</sup>

In recent decades there has been movement to repeal the federal estate tax. The EGTRRA of 2001 would have temporarily repealed the federal estate tax in 2010, but without further action by Congress, the estate tax law would have reverted to its pre-EGTRRA state in 2011.<sup>93</sup> In December 2010, Congress passed the 2010 Tax Act, which reinstated the estate tax for 2010 retroactively and instituted it for all future years.<sup>94</sup> Though in recent years

---

83. Revenue Act of 1916, Pub. L. No. 64-271, § 200, 39 Stat. 756, 777 (1916); see Eisenstein, *supra* note 15, at 230.

84. Eisenstein, *supra* note 15, at 230.

85. S. REP. NO. 64-793, at 3 (1916).

86. I.R.C. § 2001 (2018).

87. *Estate Tax*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/estate-tax> [<https://perma.cc/Z5C5-W78E>] (last updated Nov. 27, 2018) [hereinafter *Estate Tax (IRS)*].

88. Tax Cut and Jobs Act of 2017, Pub. L. No. 115-97, § 11061, 131 Stat. 2054, 2091 (2017) (codified as amended at 26 U.S.C. § 2010(c)(3)).

89. *Estate Tax (IRS)*, *supra* note 87. For 2019, the exclusion amount is \$11.4 million. *Id.*

90. In 2004, the exclusion amount was \$1.5 million, in 2006 it was \$2 million, and in 2009 it was \$3.5 million. *Id.*

91. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 303, 124 Stat. 3296, 3302.

92. See *id.*

93. EGTRRA, *supra* note 44, at § 501.

94. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 301, 124 Stat. 3296, 3300; see Genevieve M. Moore, *Understanding the Implications of the Temporary Repeal of the Federal Estate Tax*, LexisNexis (Mar. 29, 2010), <https://www.lexisnexis.com/legalnewsroom/lexis-hub/b/how-do-i/posts/understanding-the-implications-of-the-temporary-repeal-of-the-federal-estate-tax> [<https://perma.cc/RQK3-YNRP>].

there has again been support to repeal the federal estate tax, the Tax Cuts and Jobs Act of 2017 ultimately did not repeal it.<sup>95</sup> However, since the 2017 Tax Act, there has again been push to repeal the federal estate tax.<sup>96</sup>

## II. THE EFFECTS OF CURRENT STATE DEATH TRANSFER TAXES

State death transfer taxes today have three effects that signal that their end is here: (1) a discriminatory effect; (2) a behavioral effect; and (3) a revenue (or lack of revenue) effect.

### A. *The Discriminatory Effect*

Inheritance taxes today tax lineal heirs at a more preferential rate than collateral heirs, and collateral heirs at a more preferential rate than nonrelative heirs.<sup>97</sup> To illustrate the discriminatory nature of current inheritance taxes, this Note will examine Iowa's inheritance tax. Iowa's inheritance tax has been characterized as "the nation's most complicated,"<sup>98</sup> so it is ripe for an in-depth examination. In Iowa, there is no tax if the net estate is less than \$25,000.<sup>99</sup> Bequests to surviving spouses and lineal heirs are not subject to the tax.<sup>100</sup> There are different rate schedules for: (1) brother, sister, son-in-law, and daughter-in-law (five to ten percent marginal tax rate);<sup>101</sup> (2) uncle, aunt, niece, nephew, foster child, cousin, brother-in-law, sister-in-law, step-grandchild, and all other individual persons (ten or fifteen percent marginal tax rate);<sup>102</sup> (3) firm, corporation, or society organized for profit (flat fifteen percent tax rate);<sup>103</sup> (4) charitable, educational, or religious organization organized under the law of any other state or foreign country (flat ten percent tax rate);<sup>104</sup> (5) unknown heirs due to contingent events (flat five percent tax rate);<sup>105</sup> and (6) charitable, educational, or religious purposes as defined by the Internal Revenue Code, and public institutions within the state Iowa (no tax).<sup>106</sup> The Iowa

---

95. See Russell Berman, *What's in—and out of—the Final Republican Tax Bill*, ATLANTIC (Dec. 17, 2017), <https://www.theatlantic.com/politics/archive/2017/12/final-trump-republican-tax-bill-promises-details/548603/> [https://perma.cc/6DSM-CWKS].

96. See, e.g., S. 215, 116th Cong (1st Sess. 2019) (Senate bill proposed on January 24, 2019 to repeal the federal estate tax).

97. See *supra* notes 80–82 and accompanying text.

98. WALCZAK, *supra* note 25, at 16.

99. IOWA CODE § 450.4 (2018).

100. § 450.9.

101. § 450.10(1).

102. § 450.10(2).

103. § 410.10(4).

104. § 410.10(3).

105. § 450.93.

106. § 450.4(2)–(3).

inheritance tax rate schedules favor different groups of individual or organizational heirs over others.

The constitutionality of an inheritance tax such as Iowa's has been questioned because classes of individuals are subject to differing treatment. In *Tyler v. Iowa Department of Revenue*,<sup>107</sup> the Iowa Supreme Court held that the Iowa inheritance tax does not violate the Iowa State Constitution's equal protection clause because different tax treatment of different classes of beneficiaries "is rationally related to the legislature's legitimate state interest in promoting and preserving family relationships through the tax laws."<sup>108</sup> The Iowa Supreme Court found that "[f]avorable tax treatment of intrafamily transfers . . . allows more assets to remain within the family. This strengthens the family and helps the family maintain financial security. Such tax laws also incentivize persons to keep their wealth within that group rather than transferring it outside."<sup>109</sup> Other courts faced with challenges to the discriminatory nature of state inheritance taxes have similarly upheld such taxes against equal protection claims.<sup>110</sup>

American families have been changing in recent decades, and the traditional family (a married couple with children) no longer represents the vast majority of families in the United States.<sup>111</sup> The non-traditional family, on the rise today, may consist of an unmarried couple,<sup>112</sup> a single parent,<sup>113</sup> or a stepfamily. While the idea of a family has been changing in recent decades, the structures of state inheritance taxes have not. State inheritance

---

107. 904 N.W.2d 162 (Iowa 2017).

108. *Id.* at 164. The Iowa Supreme Court applied the rational basis test to its review of the challenged inheritance tax. *Id.* at 166. "Under the rational basis test, 'the statute need only be rationally related to a legitimate state interest.'" *Id.* (quoting *Qwest Corp. v. Iowa State Bd. of Tax Review*, 829 N.W.2d 550, 558 (Iowa 2013)).

109. *Id.* at 168.

110. *See, e.g.,* *Beals v. Comm'r of Corps. & Taxation*, 352 N.E.2d 692, 695 (Mass. 1976) ("[I]mposing an inheritance tax when an adopted child of a lineal descendant receives property and no such tax when a natural child of a lineal descendant receives property in the same circumstances does not deny equal protection of the laws."); *Estate of Kunkel v. United States*, 689 F.2d 408, 416–17 (3d Cir. 1982) (Pennsylvania's inheritance tax statute, imposing a higher tax rate on bequests to step-grandchildren than on bequests to step-children, children of one's adopted children, and spouses does not deny equal protection).

111. In 1950, approximately eighty percent of households were married households. *Percent of Households by Type*, U.S. CENSUS BUREAU, <https://www.census.gov/content/dam/Census/library/visualizations/time-series/demo/families-and-households/hh-1.pdf> [<https://perma.cc/UM8Y-WR3Y>]. However, in 2017, that number was less than fifty percent. *Id.*

112. In 1950, married couples made up ninety-three percent of all families with children under age eighteen. *The Majority of Children Live with Two Parents, Census Bureau Reports*, U.S. CENSUS BUREAU (Nov. 17, 2016), <https://www.census.gov/newsroom/press-releases/2016/cb16-192.html> [<https://perma.cc/22D8-7AVS>]. In 2016, that number dropped to sixty-eight percent. *Id.* In 2016, more than eight million opposite-sex couples live together without being married. *Id.*

113. In 1960, the percentage of children living in families with two parents was eighty-eight percent. *Id.* In 2016, that number decreased to sixty-nine percent. *Id.* In 1960, eight percent of children lived only with their mother, but by 2016 that number had risen to twenty-three percent. *Id.*

taxes still highly favor lineal relatives, favor non-lineal relatives, and disfavor nonrelatives.<sup>114</sup>

Nontraditional families face a variety of potential problems when it comes to an inheritance tax that discriminates against different relationships. For example, unmarried couples may be subject to a state inheritance tax on bequests to each other. Even the bequests of childless married couples to other family members, such as nieces and nephews, or to friends, may be subject to an inheritance tax. “[T]he inheritance tax’s lack of acknowledgment of nontraditional families not only fails to adequately reflect the population but creates an unfair preference for traditional family structures while placing nontraditional families at a disadvantage.”<sup>115</sup>

Current state inheritance taxes favor family relationships over friendships (and further favor lineal family relationships over non-lineal family relationships).<sup>116</sup> A potential reason for this favoritism is that states desire to incentivize family behavior and allow for a private safety net created by family bequests.<sup>117</sup> However, this reasoning, while laudable, is outdated. While it may be a worthy cause to encourage familial behavior and a private safety net, it should not be at the expense of the nontraditional family, those who choose not to have children, and those who consider nonrelatives to be their family. The idea that the lineal family should be incentivized over other relationships is no longer viable due to the gradual increase over time of nontraditional families. States should provide equal treatment to traditional families and all others by taxing all bequests at the same rate.<sup>118</sup>

### B. *The Behavior Effect*

History shows state death transfer taxes affect individual behavior. When interstate competition first began in the early 1920s following the enactment of the federal estate tax, some states were actively trying to lure wealthy residents with the promise of no death transfer tax.<sup>119</sup> Many state leaders

---

114. See *supra* notes 80–82 and accompanying text.

115. Brittany J. Faulkner, Note, “*The Ugly Stepsister*”—*Inheriting the Defects of Nebraska’s Inheritance Tax*, 46 CREIGHTON L. REV. 285, 305 (2013). Additionally, the discriminatory inheritance tax punishes nontraditional families who do not do sufficient tax planning that is above and beyond what would be required by traditional families to achieve similar results. See Mary Ellen Wimberly, Note, *No State Left Behind: An Analysis of the Post-EGTRRA Death Tax Landscape and an Argument for Kentucky to Repeal State Death Taxes*, 104 KY. L.J. 525, 537 (2015–2016).

116. See *supra* notes 80–82 and accompanying text.

117. Margaret Ryznar, *The Odd Couple: The Estate Tax and Family Law*, 76 LA. L. REV. 523, 546 (2015); see *Tyler v. Iowa Dep’t of Revenue*, 904 N.W.2d 162, 168 (Iowa 2017).

118. This Note argues that the discriminatory rate structures of state inheritance taxes is just one reason of many for the need for their repeal. But if states are unwilling to consider total repeal of their state inheritance tax, they should at least consider adopting a nondiscriminatory structure.

119. See *supra* note 25 and accompanying text.

were worried that death transfer taxes would cause a mass exodus of wealthy residents to states without such a tax, which led to the ultimate enactment of the federal credit for state death transfer taxes paid.<sup>120</sup>

Residents of states with a death transfer tax may weigh the cost of the tax against the expense of domiciling in another state without such a tax, and may conclude that relocating is the more efficient option. There may also be other benefits in favor of changing domicile to avoid a state death transfer tax, such as moving to a state where one already has family and friends, where there are many employment opportunities, and where there is a warmer climate (for example, Florida).<sup>121</sup> Additionally, it may be quite easy for wealthy residents to establish their domicile in a different state as they may already have a second home in another state.<sup>122</sup> On the other hand, the costs of moving are substantial, including transportation to a new state, a possible increase in the cost of living, the emotional costs of leaving one's home behind, and the cost of finding new employment.<sup>123</sup>

The tradeoff of moving to a different state to avoid a state death transfer tax may result in an individual choosing to relocate. There is evidence showing that many individuals make this tradeoff. One study found that “[c]ontrolling for state- and wealth-class specific fixed effects . . . high state inheritance and estate taxes . . . have statistically significant, but modest, negative impacts on the number of federal estate tax returns filed in a state.”<sup>124</sup> The possibility of ante-mortem capital flight of wealthy residents is a real threat to a continuing regime in which some states have death transfer taxes and others do not.

A state should not encourage its residents to move to another state through its use of a death transfer tax. Capital flight away from a state leads to a decrease in revenue for the state.<sup>125</sup> Property and income that is taken out of a state can no longer be taxed by that state, whether through a death transfer tax, an income tax, or any other sort of state tax. The repeal of the federal credit for state death transfer taxes<sup>126</sup> has reintroduced the old but familiar problems of interstate competition and ante-mortem capital flight.

---

120. *Id.*; see *supra* Part I.A–B.

121. Timothy J. Witt, Comment, *Individuals and Inheritance Taxes: A Praxeological Examination of Pennsylvania's Inheritance Tax*, 114 PENN ST. L. REV. 1105, 1129 (2010).

122. *Id.* at 1130. Those who move to warmer states during the winter are referred to as “snowbirds,” and changing one's domicile would be especially easy for these individuals. See Faulkner, *supra* note 115, at 299.

123. Witt, *supra* note 121, at 1128–29.

124. Jon Bakija & Joel Slemrod, *Do the Rich Flee from High State Taxes? Evidence from Federal Estate Tax Returns* (Nat'l Bureau of Econ. Research, Working Paper No. 10645, 2004), <http://www.nber.org/papers/w10645> [<https://perma.cc/TT59-YY8L>].

125. See Witt, *supra* note 121, at 1130–31.

126. See *supra* note 48 and accompanying text.

Residents of states with death transfer taxes do not necessarily need to go to the extreme of moving states to avoid such a tax. Other undesirable tactics have been developed to avoid state death transfer taxation. If a state does not impose a gift tax, one simple tactic to avoid a state death transfer tax is to make an inter vivos gift.<sup>127</sup> Individuals may also shift their assets and investments, such as by selling one's business before death, utilizing a tax-advantaged vehicle, or bringing children on as owners of a home or co-investors in a business.<sup>128</sup> Individuals may also transfer their property to a foreign limited liability company, which allows such individuals to dodge a state death transfer tax because the chosen foreign jurisdiction does not have the tax.<sup>129</sup> The availability of these tactics encourages individuals to shift resources from their most productive uses to less efficient uses to avoid a state death transfer tax.<sup>130</sup> State death transfer taxes should not encourage these avoidance tactics.

Individuals may also try to avoid a state death transfer tax by simply not reporting death transfers at all. It may be difficult for individuals to avoid reporting a real estate transfer, but personal property, such as family heirlooms, "are the most difficult assets to track."<sup>131</sup> Individuals may easily avoid reporting transfers of personal property, and thus avoid a state death transfer tax altogether.<sup>132</sup>

The repeal of the federal credit for state death transfer taxes reintroduced the same sort of interstate competition that was present pre-1924.<sup>133</sup> Once again state death transfer taxes encourage behavior that should not be encouraged—ante-mortem capital flight, tactics that avoid taxation but also avoid the most productive use of property, and outright failure to report. The effect that state death transfer taxes have on individual behavior is a strong indication of the need for their complete repeal.

---

127. See Nofziger, *supra* note 40, at 351–52. Property given as a gift during one's lifetime (an inter vivos gift) may not be included in the gross estate at one's death, and thus may not be subject to a state death transfer tax (depending on the state's specific statutes and whether or not there is some sort of a gift tax). *Id.* But individuals should still be wary of the federal gift tax if they use this tactic to avoid state death transfer taxes. See I.R.C. § 2503 (2018).

128. WALCZAK, *supra* note 25, at 20.

129. Faulkner, *supra* note 115, at 298–99. "The inheritance tax does not tax the intangible property of a non-resident, which includes interests in foreign limited liability companies. Therefore, the state cannot impose an inheritance tax upon an individual's transferred interest in a foreign limited liability company." *Id.* at 299; see also Nofziger, *supra* note 40, at 350; Curt S. Steger, Note, *Dodging the Tax Bullet: The Use of Foreign Limited Liability Companies by Retired Farmers to Limit State Inheritance Tax Liability for the Next Generation of Small Farmers*, 15 DRAKE J. AGRIC. L. 167, 198 (2010).

130. See WALCZAK, *supra* note 25, at 21.

131. Faulkner, *supra* note 115, at 298.

132. See *id.*

133. See *supra* notes 25–28 and accompanying text.

### C. *The Revenue Effect*

When state death transfer taxes were popular in the early 1920s<sup>134</sup> they comprised roughly 7% of total state tax revenue.<sup>135</sup> Following the enactment of the federal state death transfer tax credit in 1924, state death transfer tax revenue rose from 7.9% of state revenue in 1915 to 10.1% of state revenue in 1930.<sup>136</sup> Generating state revenue was a prominent reason for the popularity of state death transfer taxes during that time period.<sup>137</sup>

However, state death transfer taxes today are no longer generating substantial revenue. The percentage of state revenue from death transfer taxes has declined since their peak in the early 1900s.<sup>138</sup> In 2017, Iowa's inheritance tax made up approximately 1% of the state's revenue,<sup>139</sup> Washington's estate tax made up approximately 0.8% of its revenue,<sup>140</sup> and New York's estate tax made up approximately 1.5% of its revenue.<sup>141</sup> Other states that have a state death tax transfer and report death tax transfer revenue typically receive around 1% of their revenue from the tax.<sup>142</sup> It is

---

134. See *supra* note 22–24 and accompanying text.

135. Cooper, *supra* note 25, at 837.

136. See *supra* note 43.

137. See *supra* Part I.A–B.

138. See *supra* note 43 and accompanying text.

139. Jeff Robinson, *Monthly General Fund Revenue Receipts Through June 30, 2017*, IOWA LEGIS. SERVS. AGENCY, at 5 (July 3, 2017), <https://www.legis.iowa.gov/docs/publications/MM/858418.pdf> [<https://perma.cc/C5AM-LQ6T>].

140. WASH. STATE DEP'T OF REVENUE, TAX STATISTICS 2017, at 7 (2017), [https://dor.wa.gov/site/default/files/legacy/Docs/Reports/2017/Tax\\_Statistics\\_2017/Tax\\_Statistics\\_2017.pdf](https://dor.wa.gov/site/default/files/legacy/Docs/Reports/2017/Tax_Statistics_2017/Tax_Statistics_2017.pdf) [<https://perma.cc/c/8RS7-R2L8>].

141. N.Y. DEP'T OF TAXATION AND FIN., 2016–2017 NEW YORK STATE TAX COLLECTIONS: STATISTICAL SUMMARIES AND HISTORICAL TABLES 6 (Aug. 2017), [https://www.tax.ny.gov/pdf/2016-17\\_collections/2016\\_17\\_Collections\\_Report.pdf](https://www.tax.ny.gov/pdf/2016-17_collections/2016_17_Collections_Report.pdf) [<https://perma.cc/ZY3K-S57Z>].

142. Connecticut received about 1.3% of its revenue from its estate tax in 2017. *Revenue, Connecticut's Finances*, <http://ctstatefinance.org/revenue> [<https://perma.cc/63JH-9CEY>]. Hawaii received about 0.7% of its revenue from its estate tax in 2016. DEP'T OF TAXATION STATE OF HAWAII, ANNUAL REPORT 2015–2016, at 1, 29, [files.hawaii.gov/tax/stats/stats/annual/16annrpt.pdf](https://files.hawaii.gov/tax/stats/stats/annual/16annrpt.pdf) [<https://perma.cc/DU7F-HNRK>]. Illinois received about 0.7% of its revenue from its estate tax in 2017. Craig Lesner, *Tax Day 2017: Where Does Illinois' \$38.1 Billion in Tax Revenue Come From?*, ILLINOIS POLICY (Apr. 17, 2017), <https://www.illinoispolicy.org/tax-day-2017-where-does-illinois-38-1-billion-in-tax-revenue-come-from/> [<https://perma.cc/5SCM-RUAC>]; *State Revenue by Revenue Source*, State of Illinois Comptroller, <https://illinoiscomptroller.gov/financial-data/state-revenues/by-revenue-source/> [<https://perma.cc/V7XX-H5BX>] (data obtainable by searching for “Estate Taxes” revenue in 2017). Maine received about 0.4% of its revenue from its estate tax in 2010. DAN COYNE, MAINE REVENUE & SPENDING PRIMER 2011 7, [https://www.mecep.org/wp-content/uploads/2014/09/Maine\\_Revenue\\_and\\_Spending\\_Primer\\_2011-3-4-2011.pdf](https://www.mecep.org/wp-content/uploads/2014/09/Maine_Revenue_and_Spending_Primer_2011-3-4-2011.pdf) [<https://perma.cc/P73M-3ML6>]. The District of Columbia received about 0.8% of its revenue from its estate tax in 2015. D.C. FISCAL POLICY INSTITUTE, REVENUE: WHERE D.C. GETS ITS MONEY 4 (Feb. 9, 2017), <https://www.dcfpi.org/wp-content/uploads/2017/08/Revenue-Primer-2016-FINAL-VERSION.pdf> [<https://perma.cc/X2SN-T5DJ>]. Kentucky received about 0.5% of its revenue from its inheritance tax in 2016. KENTUCKY DEP'T OF REVENUE, 2015–2016 KENTUCKY DEP'T OF REVENUE ANNUAL REPORT 2, [https://revenue.ky.gov/News/Publications/Annual%20Reports/20152016%20Annual%20Report\\_web.pdf](https://revenue.ky.gov/News/Publications/Annual%20Reports/20152016%20Annual%20Report_web.pdf) [<https://perma.cc/HDR8-TEPS>]. Pennsylvania received about 1.4% of its revenue from its inheritance tax in 2017. *Revenue Source by*

difficult to justify the continuance of state death transfer taxes given their dwindling revenue creation.

In addition to little revenue generated by state death transfer taxes, there may be high administrative and compliance costs to the taxes. Some have argued that administrative and compliance costs outweigh the revenue generated by death transfer taxes. A 2012 Republican Joint Economics Committee Report found that administrative and compliance costs of the federal estate tax exceeded the amount of revenue collected by the tax.<sup>143</sup> If the administrative and compliance costs of a tax are greater than revenue generated by the tax, then it would be economically sensible to repeal the tax. Although there is no state data available, the same high administrative costs may exist at the state level and thus weigh in favor of repealing state death transfer taxes.

A solution to counteract the declining state revenue from state death transfer taxes may be to increase the tax rates. However, this is only a short-term solution to increase state revenue. In the long term, a higher death transfer tax rate may cause residents to leave the state or be a barrier for new wealthy residents to come to the state: “[S]tate revenue would likely decline in the long term as individuals responded to those high inheritance tax rates. Rapidly declining state revenue would result from high inheritance taxes and their effect on ante-mortem capital consumption, ante-mortem capital flight, and post-mortem capital consumption.”<sup>144</sup>

One of the original purposes of state death transfer taxes was to raise revenue.<sup>145</sup> However, today the remaining state death transfer taxes are not creating much revenue for states. If state death transfer taxes are not generating much revenue, then there may be no justification for their continuance, and it may be time for their repeal.

---

*Fiscal Year*, PENNWATCH, <http://pennwatch.pa.gov/revenue/Pages/Revenue-Source-by-Fiscal-Year.aspx> [<https://perma.cc/XH7X-N6HK>]. Maryland received about 1.4% of its revenue from its estate and inheritance taxes in 2017. DEP'T OF LEGISLATIVE SERVICES, MARYLAND GENERAL FUND REVENUES 1980-2020 (Oct. 2018), <http://dls.maryland.gov/pubs/prod/NoPblTabDatafiles/OperBgt/Maryland-General-Fund-Revenues.pdf> [<https://perma.cc/52SX-EHPW>].

143. STAFF OF J. ECON. COMM. REPUBLICANS, COSTS AND CONSEQUENCES OF THE FEDERAL ESTATE TAX: AN UPDATE (July 25, 2012), [https://www.jec.senate.gov/public/\\_cache/files/bc9424c1-8897-4dbd-b14c-a17c9c5380a3/costs-and-consequences-of-the-federal-estate-tax-july-25-2012.pdf](https://www.jec.senate.gov/public/_cache/files/bc9424c1-8897-4dbd-b14c-a17c9c5380a3/costs-and-consequences-of-the-federal-estate-tax-july-25-2012.pdf) [<https://perma.cc/Z36Y-CBD3>]. However, a 1999 study found that the administrative and compliance costs of the federal estate tax are only about seven percent of the total estate tax revenue. Charles Davenport & Jay A. Soled, *Enlivening the Death-Tax Death-Talk*, 84 TAX NOTES 591, 630 tbl.14 (1999).

144. Witt, *supra* note 121, at 1135 (footnotes omitted).

145. See *supra* Part I.A–B. States were fearful pre-1924 when the few states without a state death transfer tax attempted to attract wealthy residents who did not wish to pay such a tax. See *supra* notes 25 and 26 and accompanying text.

### III. WEALTH INEQUALITY AND STATE DEATH TRANSFER TAXES

This Note argues that it is time for state death transfer taxes to be repealed because some are discriminatory, all negatively alter individuals' behavior, and all fail to raise enough revenue to justify their continuance. However, this Note does not also argue that the federal estate tax should be repealed.<sup>146</sup> In 2014, federal estate and gift taxes provided approximately 0.6% of total federal revenue,<sup>147</sup> which is approximately the same percentage or even less than a state's revenue from a death transfer tax.<sup>148</sup> While both the federal estate tax and state death transfer taxes fail to account for much revenue, the federal estate tax is achieving an important purpose that state death transfer taxes cannot achieve—reducing wealth inequality in society.

Wealth inequality is a problem in the United States—and the problem is growing. In 1983, the top ten percent of households controlled 68.2% of the total wealth in society, while the bottom sixty percent controlled only 6.1%; and, in 2007, the top ten percent of households controlled 73.1% of the total wealth in society, while the bottom sixty percent only controlled 4.2%.<sup>149</sup> Another recent study found that the top tenth of a percent of individuals held twenty-two percent of the wealth in 2012, up from seven percent in 1978.<sup>150</sup> Inheritances account for forty percent of all wealth in the United States and four percent of annual household income.<sup>151</sup> That only 0.2% of deaths in the United States in 2014 resulted in federal estate tax liability<sup>152</sup> demonstrates just how concentrated wealth is with certain individuals.<sup>153</sup> The federal

---

146. In fact, this Note supports the federal estate tax because it works to eliminate wealth inequality in society. *See infra* notes 154–56 and accompanying text.

147. Andrew Lundeen, *The Estate Tax Provides Less than One Percent of Federal Revenue*, TAX FOUND. (Apr. 7, 2015), <https://taxfoundation.org/estate-tax-provides-less-one-percent-federal-revenue/> [<https://perma.cc/386R-ZXGZ>]. This number is down from about one percent in 1990. *Id.*

148. *See supra* notes 139–42 and accompanying text.

149. *20 Facts About U.S. Inequality that Everyone Should Know*, STANFORD CTR. ON POVERTY & INEQUALITY (2011), <https://inequality.stanford.edu/publications/20-facts-about-us-inequality-everyone-should-know> [<https://perma.cc/5Y6F-WMH3>].

150. Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. ECON. 519, 520 (2016), <http://dx.doi.org/10.1093/qje/qjw004> [<https://perma.cc/33AC-55WX>].

151. Lily Batchelder, *The “Silver Spoon” Tax: How to Strengthen Wealth Transfer Taxation*, WASH. CTR. FOR EQUITABLE GROWTH (Oct. 31, 2016), <http://equitablegrowth.org/tax-finance/silver-spoon-tax/> [<https://perma.cc/E7M3-2QVW>].

152. *See The Federal Estate Tax: A Critical and Highly Progressive Revenue Source*, INST. ON TAXATION & ECON. POLICY 1 (Dec. 2016), <https://itep.org/wp-content/uploads/estatetaxreport1216.pdf> [<https://perma.cc/YG63-6CAD>] [hereinafter *The Federal Estate Tax (Institute)*].

153. In 2014, the exemption amount was \$5,340,000, thus the only estates that paid the estate tax were larger than this amount. *See Federal Estate and Gift Tax Rates, Exemptions, and Exclusions, 1916-2014*, TAX FOUND. (Feb. 4, 2014), <https://taxfoundation.org/federal-estate-and-gift-tax-rates-exemptions-and-exclusions-1916-2014/> [<https://perma.cc/RL8A-73XL>]. One may also argue that the fact that

estate tax can be used to moderate the accumulation of wealth and alleviate wealth inequality.<sup>154</sup>

Arguably, the most important purpose of the federal estate tax is to lessen wealth inequality in society. As two authors explained:

Because it affects only those who are most able to pay, the estate tax is the most progressive component of a tax code that overall is only modestly progressive, particularly when regressive state and local taxes are taken into account. It is also the nation's most effective tax policy tool to mitigate the negative effects of inheritances, which account for about 40 percent of household wealth and are extremely concentrated at the top. Because they are correlated with the parent's economic outcomes and provide an alternative to earned income, inheritances likely limit intergenerational mobility.<sup>155</sup>

Large inheritances keep wealth within a small percentage of individuals and prevent redistribution of wealth that is concentrated in large inheritances. The federal estate tax combats growing wealth inequalities that results partly due to large inheritances.

While a major justification for the federal estate tax is that it limits wealth inequality in the United States,<sup>156</sup> it is difficult to also apply this justification to state death transfer taxes. The federal estate tax is already working to combat wealth inequality, so it is questionable whether state death transfer taxes are needed as well.<sup>157</sup> But it is arguable that the federal estate tax alone does not do enough to alleviate wealth inequality, and that additional state death transfer taxes are needed to limit large inheritances. It may also be argued that the federal estate tax exemption amount is too large, and the exemption amounts for many state estate taxes, which are often smaller than the federal exemption amount,<sup>158</sup> are appropriate to target those estates that are not quite large enough to trigger the federal estate tax. However, as big a problem as wealth inequality may be, state death transfer taxes are not a workable solution.

---

only 0.2% of deaths in the United States in 2014 resulted in federal estate tax liability also demonstrates that the federal exemption amount is too high—an argument that is beyond the scope of this Note.

154. *The Federal Estate Tax (Institute)*, *supra* note 152, at 1.

155. Chye-Ching Huang & Chloe Cho, *Ten Facts You Should Know About the Federal Estate Tax*, CTR. ON BUDGET & POLICY PRIORITIES (Oct. 30, 2017) (footnote omitted), <https://www.cbpp.org/research/federal-tax/ten-facts-you-should-know-about-the-federal-estate-tax> [<https://perma.cc/2CHS-XQD7>].

156. See Krisanne M. Schlachter, Note, *Repeal of the Federal Estate and Gift Tax: Will It Happen and How Will It Affect Our Progressive Tax System?*, 19 VA. TAX REV. 781, 789 (2000).

157. Additionally, the federal estate tax is probably not causing individuals to move like state death transfer taxes do. It seems more likely that a wealthy individual will relocate states to avoid a state death transfer tax than they are to move countries to avoid the federal estate tax.

158. See *supra* notes 71 and 72 and accompanying text.

It is highly unlikely that all fifty states could agree on and impose a single death transfer tax structure. Without all states having the same death transfer tax or the reintroduction of the federal credit for state death transfer taxes,<sup>159</sup> the problems of interstate competition will forever persist.<sup>160</sup> The solution then to wealth inequality does not lie with state death transfer taxes, and combatting wealth inequality cannot be used as their justification. State death transfer taxes are not an effective tool because they will also revive interstate competition that state legislators pre-1924 sought desperately to avoid.<sup>161</sup> The solution to wealth inequality lies elsewhere, perhaps with a change to the federal estate tax by raising rates and decreasing the exemption amount, because the federal estate tax will not create problems of interstate competition.<sup>162</sup>

#### IV. HOW STATES SHOULD RESPOND TO THE END OF STATE DEATH TRANSFER TAXES

It is time for state death transfer taxes to end. Many state death transfer taxes are discriminatory.<sup>163</sup> All remaining taxes create interstate competition for wealthy residents and incentivize tax-avoidance behavior.<sup>164</sup> All remaining taxes generate little in revenue.<sup>165</sup> Additionally, state death transfer taxes cannot be a workable solution to wealth inequality in the United States.<sup>166</sup> With no justification for their continuance, states should consider repealing their death transfer taxes.

##### A. *Repeal the State Death Transfer Tax*

The remaining states with a death transfer tax should gradually repeal their tax over a period of years to allow taxpayers time to react to the change

---

159. Both are unlikely to happen. It would be nearly impossible to get all fifty state legislatures to agree on a single death transfer tax structure. And the federal government would likely be wary of reintroducing the federal credit because it would reduce the federal government estate tax revenue.

160. See *supra* Part II.B. Additionally, in some states the purpose of the death transfer tax is clearly not to combat wealth inequality since their tax either exempts all bequests made to lineal heirs or taxes those bequests at highly preferential rates, which likely make up a large percentage of all bequests. See, e.g., IOWA CODE § 450.9 (2018); KY. REV. STAT. ANN. § 140.070 (West 2018); MD. CODE ANN., TAX-GEN. § 7-203(b) (LexisNexis 2018); NEB. REV. STAT. § 77-2004 (2018); N.J. STAT. ANN. § 54:34-2 (West 2018); 72 PA. CONS. STAT. § 9116(a) (2018).

161. See *supra* notes 25–28 and accompanying text.

162. This Note cautions against repealing the federal estate tax, which has been considered in recent years. See *supra* notes 93–96 and accompanying text. A repeal would eliminate a powerful tool against wealth inequality. However, the arguments for and against strengthening the federal estate tax are outside the scope of this Note.

163. See *supra* Part II.A.

164. See *supra* Part II.B.

165. See *supra* Part II.C.

166. See *supra* Part III.

and to allow legislatures to make up for any budget shortfalls. A few states that have recently repealed their death transfer tax have done so gradually. Tennessee, for example, passed a bill in 2012 that phased out its inheritance tax by gradually raising its exemption amount until 2016, when the tax was completely eliminated.<sup>167</sup> Indiana also enacted a law in 2012 that would phase out Indiana's inheritance tax over nine years.<sup>168</sup> On the other hand, some states have retroactively repealed their state death transfer tax, such as North Carolina, which enacted a bill on July 23, 2013, that repealed its estate tax retroactively on January 1, 2013.<sup>169</sup> And still other states have enacted legislation completely repealing their state death transfer tax a few months after enactment.<sup>170</sup>

A gradual repeal of death transfer taxes rather than a complete and immediate repeal is better for states and their taxpayers. It allows states time to either find alternative revenue sources or eliminate items from their budget due to the decrease in revenue. An immediate repeal of a death transfer tax may leave a state scrambling to make up lost revenue or deciding what to cut from its budget.<sup>171</sup> Additionally, a gradual repeal will give state residents notice of the change and allow them time to respond with changes to their estate plans. An immediate repeal, or even a retroactive repeal, may leave taxpayers with little time to alter estate plans in response to the repeal.

### *B. At the Least, Repeal the Discriminatory Death Transfer Tax*

If states with a discriminatory death transfer tax<sup>172</sup> are not willing to fully repeal their tax, then they should at least amend their tax so that all bequests are taxed at the same rate. With the recent changes to the make-up of United States households, the idea that transfers to lineal heirs should be preferred is outdated.<sup>173</sup> Eliminating discriminatory rate structures in state death transfer taxes will at least eliminate disfavored treatment given to collateral heirs and nonrelated heirs, although the current landscape favors total repeal of all state death transfer taxes.

---

167. H.B. 3760, 107th Gen. Assemb., Reg. Sess. (Tenn. 2012).

168. S.B. 293, 117th Gen. Assemb., Reg. Sess. (Ind. 2012). However, in 2013, a bill was passed that completely and immediately repealed the state's inheritance tax. H.B. 1001, 118th Gen. Assemb., Reg. Sess. (Ind. 2013).

169. H.B. 998, 2013 Sess. Gen. Assemb. (N.C. 2013).

170. *E.g.*, H.B. 16, 149th Gen. Assemb., Reg. Sess. (Del. 2017).

171. Though the argument still holds that state death transfer taxes do not generate enough revenue to justify their continuance, this Note recognizes that even a loss of a little revenue may force a state to change its spending behavior.

172. *See supra* Part II.A.

173. *See supra* notes 111–13 and accompanying text.

## CONCLUSION

It is time for the remaining states with death transfer taxes to consider repeal. Some state death transfer taxes have rates that give preferential treatment to bequests that are likely on the decline due to changes in household structure.<sup>174</sup> State death transfer taxes, as a result of interstate competition, give incentives to people to move states, underreport death transfers, and use other tactics to avoid a state death transfer tax.<sup>175</sup> State death transfer taxes are failing to be a significant source of state revenue.<sup>176</sup> Additionally, state death transfer taxes cannot be an effective tool to combat wealth inequality.<sup>177</sup> Without any justification and serving no purpose, the state death transfer tax is at its end. The remaining states with a death transfer tax should begin the process of repeal.

*Jenny L. Juehring*\*

---

174. *See supra* Part II.A.

175. *See supra* Part II.B.

176. *See supra* Part II.C.

177. *See supra* Part III.

\* J.D. (2019), Washington University School of Law; B.A. (2016), University of Iowa; A.A. (2013), Muscatine Community College. Thank you to Professor Cheryl D. Block for her guidance, support, and thoughtful suggestions during the initial drafting stages. A sincere thank you to all *Washington University Law Review* members who contributed to my note and made my experience with the *Law Review* so enjoyable. From the *Law Review*, I would like to especially thank Emily S. Scholting, George C. Boden, Jennifer L. Stocker, and Nathan B. Finkelstein for their invaluable assistance throughout the editing process.