PERPETUATING INEQUALITY BY TAXING WEALTH

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INTRODUCTION

In the decade since Michael Graetz and Ian Shapiro wrote the definitive account of the death tax repeal saga of the late 1990s and early 2000s, *Death by a Thousand Cuts: The Fight Over Taxing Inherited Wealth*,[1] the federal estate tax has proven to be surprisingly resilient. After a one-year hiatus and a two-year temporary reprieve, the levy was made permanent again in 2013.[2] At a time when wealth inequality is a topic of major concern, the federal estate tax remains the only levy that is meant specifically to combat the concentration of wealth in the hands of the few. It is also the most progressive part of the tax system, as its burden is borne by the wealthiest Americans.

The survival of the estate tax seemingly fits into America's newfound interest in fighting wealth inequality. Just last year, Thomas Piketty's book, *Capital in the Twenty-First Century*,[3] became a best seller and prompted robust discussions about wealth disparities. Against this backdrop, it appears that Graetz and Shapiro's warning about "[t]he broader antitax force . . . marching forward in Washington and in the great heartland"[4] proved incorrect largely because of the Great Recession.

That is until we take a closer look. The current version of the estate tax is a shadow of its former self. According to the Department of Treasury, in 2014, the estate tax raised $19.3 billion, or 0.6 percent of total federal revenue over $3 trillion.[5] That figure historically stood at between 1 and 2

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1. MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH (2005).

2. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 302, 124 Stat. 3296, 3302.

3. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014).

4. GRAETZ & SHAPIRO, *supra* note 1, at 11.

5. U.S. DEP'T OF THE TREASURY, RECEIPTS BY SOURCE, http://www.treasury.gov/press-center/press-releases/Documents/2014%20Receipts%20by%20Source.pdf [https://perma.cc/5L53-LJZW].

percent of federal revenue.[6] Due to increasing exemptions, in 2013, slightly less than 0.2 percent of all estates owed any estate tax at all.[7] Further, although the marginal tax rate is 40 percent, the average effective tax rate is less than 20 percent.[8]

There is no shortage of proposals to "fix" the estate tax by making it both more far-reaching and meaningful.[9] While these proposals are reasonable, and even modest, they have failed to confront an important part of Graetz and Shapiro's book: stories trump science.[10] Fittingly, in their defense of the Death Tax Repeal Act of 2015,[11] two influential members of the Republican conference focused on a successful storyline drafted and revised in the battles over repeal: the estate tax as an impediment to the American dream framed in terms of the family and the hope of future generations.[12]

This Article attempts to correct this shortcoming in the progressive argument by returning narrative to its central place in the estate tax debate. Drawing on psychological insights, I hope to underscore the difficulty of the effort to preserve progressive taxation and combat wealth inequality.

To this end, this Article proceeds as follows: Part I provides a brief historical overview of the estate tax, including the death tax repeal movement, which gained strength in the 1990s. Common estate tax planning techniques also are discussed to show that there is substantial room for planning and avoidance of the tax.

Part II describes how the current estate tax impasse between repeal advocates and proponents actually results in a weaker estate tax. By focusing on *Graegin*[13] loans and defined value clauses, I show that congressional inaction results in ever-widening loopholes. Because the

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6. STAFF OF THE JOINT COMM. ON TAXATION, 114TH CONG., HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM 28 (Comm. Print 2015). Also worth noting,

> The percentage of decedents liable for the estate tax grew throughout the postwar era reaching a peak in the mid-1970s. The substantial revision to the estate tax in the mid-1970s and subsequent further modifications in 1981 reduced the percentage of decedents liable for the estate tax to less than 1 percent in the late 1980s. The percentage of decedents liable for the estate tax increased from year to year from 1988 through 2000. The increases in the unified credit enacted in 2001 and 2010 (and made permanent in 2013) reduced substantially the percentage of decedents' estates liable for the estate tax.

Id. at 24.

7. *Id.* at 25.

8. TAX POLICY CTR., TABLE T13-0020: CURRENT LAW DISTRIBUTION OF GROSS ESTATE AND NET ESTATE TAX BY SIZE OF GROSS ESTATE, 2013, http://www.taxpolicycenter.org/numbers/Content/PDF/T13-0020.pdf [https://perma.cc/8MFR-4TZY].

9. *See infra* Part III.

10. GRAETZ & SHAPIRO, *supra* note 1, at 221–38. *But see* Paul L. Caron & James R. Repetti, *The Estate Tax Non-Gap: Why Repeal a "Voluntary" Tax?*, 20 STAN. L. & POL'Y REV. 153 (2009) (undermining the characterization of the estate tax as voluntary).

11. Death Tax Repeal Act of 2015, H.R. 1105, 114th Cong. (2015).

12. John Thune & Bill Flores, *Time for the Estate Tax to Die*, USA TODAY (Apr. 16, 2015, 6:56 AM), http://www.usatoday.com/story/opinion/2015/04/16/death-tax-abolish-thune-column/25816117/ [https://perma.cc/VB8Q-RP86].

13. Graegin v. Comm'r, 56 T.C.M. (CCH) 387 (1988). See *infra* Part II for a detailed discussion of *Graegin v. Commissioner*.

debates have focused on the right of the family to retain its wealth, judges increasingly have tolerated efforts to lower estate taxes, even when such planning interferes with the Internal Revenue Service's (IRS or "the Service") collection efforts.

Part III surveys proposals to make the federal estate tax more robust. The proposals present creative solutions to plugging loopholes and fixing the estate tax. However, I argue that the proposals have not confronted the underlying narratives that estate tax abolitionists have advanced. I use System Justification Theory to explain the entrenched and persistent nature of these narratives. Finally, I conclude by suggesting some ways forward.

I. A HISTORICAL OVERVIEW OF FEDERAL ESTATE TAX AND COMMON PLANNING TECHNIQUES

What usually is referred to as the federal estate tax is technically three levies working in conjunction: the estate tax,[14] the gift tax,[15] and the tax on generation-skipping transfers[16] (GST). In order to understand how the estate tax became a part of the conflict over progressive taxation in the United States, some historical perspective is necessary.

A. History

The federal taxation system in the nineteenth century mainly consisted of indirect taxes, such as import duties and regressive excise taxes on alcohol and tobacco.[17] As the nation began to establish itself as a world power, these taxes provided inadequate funds to meet the increasing revenue needs of the federal government.[18] This regressive taxation, which burdened the working classes disproportionately, along with the rise of the holding company and the "unprecedented number of mergers in the manufacturing sector," resulted in wealth becoming increasingly concentrated in the hands of the few.[19]

Progressives continued to press for both a progressive income tax and a tax on inheritances to decrease wealth concentration.[20] This eventually led to the passage of the Sixteenth Amendment and the enactment of the

14. I.R.C. §§ 2001–2209 (2012).

15. *Id.* §§ 2501–2524.

16. *Id.* §§ 2601–2663. Special valuation rules relating to these taxes are included in sections 2701 to 2704. Section 2801 contains rules regarding gifts from expatriates. *Id.* § 2801.

17. Ajay K. Mehrotra, *Envisioning the Modern American Fiscal State: Progressive-Era Economists and the Intellectual Foundations of the U.S. Income Tax*, 52 UCLA L. REV. 1793, 1803 (2005).

18. *Id.* at 1809.

19. Darien B. Jacobson et al., *The Estate Tax: Ninety Years and Counting*, *in* INTERNAL REVENUE SERV., SOI BULL. 118, 120 (2007), https://www.irs.gov/pub/irs-soi/ninetyestate.pdf [https://perma.cc/74V4-PERX].

20. Mehrotra, *supra* note 17, at 1798 (contending that a particular group of academics helped to bring about a radical transformation in the U.S. public finance system). For a comprehensive account of the forces that brought about the progressive income tax, see generally *id.*

modern estate tax.[21] The estate tax was passed as a part of a comprehensive tax reform package in 1916.[22] The First World War led to a sharp reduction of tariff revenue at a time when the government needed funds for its military buildup.[23] The tax package transformed the income tax "into the foremost instrument of federal taxation," imposed a significant tax on corporate profits, and included an excess-profits tax.[24]

The estate tax was not yet on firm footing, however. In the 1920s, the Calvin Coolidge Administration attempted to repeal the levy.[25] Between 1925 and 1928, led by Treasury Secretary Andrew Mellon, the Administration argued that inheritance taxation undermined the nation's economy and was the providence of the states and not the federal government.[26] In the end, this effort was unsuccessful, as it was opposed by respected tax experts who argued that the estate tax helped lower taxes for those who actually earned wealth.[27]

Although the estate tax was a revenue raiser, this was not the only reason for its enactment; the federal government also wished to redistribute the tax burden and reduce the concentrations of wealth.[28] Because the levy could be avoided by giving away property during life, a gift tax eventually was added, becoming a permanent fixture of the wealth transfer system in 1932.[29] These progressive impulses influenced tax policy through the end of World War II.[30] President Franklin Roosevelt viewed wealth accumulation as a distinctly social phenomenon.[31] For Roosevelt, the wealthy owed a debt to the communities from which they drew their fortunes, and the control of an ever-widening spectrum of industry by a limited number of wealthy individuals stood in contrast to fundamental American values of competition and civil society.[32]

After World War II, progressive ideals held less sway in tax policy, and the estate tax remained essentially the same until 1976. That year, Congress unified the estate and gift taxes into a single rate to combat

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21. *Id.* at 1856.

22. Revenue Act of 1916, ch. 463, §§ 200–212, 39 Stat. 756, 777–80.

23. W. ELLIOT BROWNLEE, FEDERAL TAXATION IN AMERICA 57–60 (2d ed. 2004).

24. *Id.* at 62.

25. For a more comprehensive discussion of this repeal effort, see M. Susan Murnane, *Andrew Mellon's Unsuccessful Attempt to Repeal Estate Taxes*, TAXANALYSTS (Aug. 22, 2005), http://www.taxhistory.org/thp/readings.nsf/ArtWeb/672746F8E859EA77852570900006AC21?OpenDocument [https://perma.cc/244Q-NX94].

26. *Id.*

27. *Id.*

28. David Joulfaian, The Federal Estate Tax: History, Law, and Economics 1-1 to 1-2 (June 2013) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579829 [https://perma.cc/TN4Y-M738].

29. Revenue Act of 1932, ch. 209, § 501, 47 Stat. 169, 245. The gift tax was first introduced in 1924, but repealed in 1926. Revenue Act of 1924, ch. 234, §§ 319–324, 43 Stat. 253, 313–16; Revenue Act of 1926, ch. 27, § 1200, 44 Stat. 9, 125 (repealing the gift tax).

30. BROWNLEE, *supra* note 23, at 5–6.

31. President Franklin D. Roosevelt, Message to Congress on Tax Revision (June 19, 1935), http://www.presidency.ucsb.edu/ws/?pid=15088 [https://perma.cc/GL5Q-L8J4].

32. *Id.*

individuals giving away their wealth during their lifetime to take advantage of the lower gift tax rate, therefore avoiding the higher estate tax rate.[33] The generation-skipping tax was also added in 1976 in response to tax planning that allowed a decedent's children to avoid paying taxes on their death.[34] In 1981, Congress lowered the estate tax rate, made the marital deduction more taxpayer friendly, and raised the exemption from $175,000 to $600,000.[35]

The 1990s saw the rise of the estate tax abolitionists, who presented a sustained challenge to the policy of reducing wealth concentration. This was a broad coalition of outsiders, activists, and legislators who gained strength after the Republican takeover of the House in 1994. The abolitionists almost achieved their goals at the end of the century. In 1999 and 2000, Congress passed bills to permanently repeal the estate tax, but President Bill Clinton vetoed them both.[36] In 2001, after efforts for permanent repeal failed, President George W. Bush signed into law sweeping changes to the estate tax.[37] These changes further undermined attempts to level wealth concentration. The estate tax rate was lowered to 45 percent, and the exemption increased incrementally between 2001 and 2009 to $3.5 million.[38] The estate tax was then repealed in 2010, but was scheduled to return in 2011 with a $1 million exemption.[39]

At the end of 2010, President Barack Obama reached a compromise with Congress that further decreased the reach of the estate tax.[40] The law, which expired after two years, lowered the estate tax rate to 35 percent and increased the exemption to $5 million.[41] The temporary law necessitated negotiations at the end of 2012. The President proposed a return to the $3.5 million exemption and the 45 percent rate.[42] Finally, at the beginning of 2013, the estate tax again was made permanent, with the tax rate increased to 40 percent and the $5 million exemption (indexed for inflation) retained.[43] This compromise ultimately left each side dissatisfied, as abolitionists prefer a complete repeal, and progressives prefer lower exemptions and a higher tax rate.

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33. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2001, 90 Stat. 1520.

34. *Id.* § 2006.

35. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, §§ 401–403, 95 Stat. 172, 299.

36. *See* Lizette Alvarez, *President Vetoes Effort to Repeal Taxes on Estates*, N.Y. TIMES (Sept. 1, 2000), http://www.nytimes.com/2000/09/01/us/president-vetoes-effort-to-repeal-taxes-on-estates.html [https://perma.cc/DF3P-F7HZ].

37. *See* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 501–581, 115 Stat. 38, 69–94.

38. *Id.* §§ 511, 521.

39. *Id.* §§ 521(b), 901.

40. *See* Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 302, 124 Stat. 3296, 3302.

41. *Id.*

42. *See* Siobhan Hughes, *Plan to Raise Estate Tax Divides Democrats*, WALL STREET J. (Nov. 30, 2012, 7:28 PM), http://www.wsj.com/articles/SB10001424127887324020804578151430887301890 [https://perma.cc/BS5N-85UK].

43. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 101, 126 Stat. 2313, 2318 (2013).

B. Common Estate Tax Planning Techniques

Ever since the inception of wealth transfer taxation, taxpayers and their planners have found ways to minimize tax liability. Taxpayers have the right to avoid, reduce, or minimize their taxes.[44] To help explain why the estate tax is so porous, I will describe two common estate tax planning techniques.[45]

The Irrevocable Life Insurance Trust uses a combination of gift and estate tax rules to avoid estate taxes and provide liquidity to the grantor's estate.[46] Although the details can vary on the margins, the planning technique is achieved as follows. The trust is funded with a life insurance policy on the life of the grantor. The beneficiaries are family members of the grantor. The trust is irrevocable, so it is considered a completed gift. The insurance policy is now controlled by a trustee, and the grantor has no control over it, so it is out of his estate.[47] Because the insurance policy has not been paid up, the gift of the policy is not substantial enough to trigger tax implications.

To pay up the policy, the grantor transfers an amount equal to the annual exclusion (currently $14,000) each year.[48] These amounts are not eligible for the exclusion unless they are present interests, which the beneficiary could enjoy right away.[49] To meet this requirement, the donor gives each beneficiary a discretionary right to withdraw the amount for a few days.[50] The yearly transfers continue for the life of the donor and can result in life insurance policies valued at several million dollars. When the donor dies, the value of the policy is not included in his estate because he did not possess "any of the incidents of ownership."[51]

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44. *See* Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935) ("Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.").

45. More sophisticated planning techniques can yield more significant tax savings. For example, Mitt Romney's estate planning became an issue after his tax returns showed that he had gifted his heirs $100 million tax free. He used an Intentionally Defective Grantor Trust (IDGT). Jesse Drucker, *Romney 'I Dig It' Trust Gives Heirs Triple Benefit*, BLOOMBERG (Sept. 27, 2012, 4:00 AM), http://www.bloomberg.com/news/articles/2012-09-27/romney-i-dig-it-trust-gives-heirs-triple-benefit [https://perma.cc/R2AX-H4VW]; *see also* Dwight Drake, *Transitioning the Family Business*, 83 WASH. L. REV. 123, 127–28 (2008) (describing several advanced estate planning techniques and why they may be inadvisable for family businesses).

46. *See* William S. Huff, *The Irrevocable Life Insurance Trust*, 38 ARK. L. REV. 139, 139–41 (1984).

47. *See* I.R.C. § 2042(2) (2012) (providing that life insurance proceeds are only included in the gross estate of a decedent if she has incidents of ownership over it).

48. *See id.* § 2503(b)(1) (setting the annual exclusion, to be adjusted to inflation by multiples of $1000). The exclusion is currently $14,000. Rev. Proc. 2015-53, 2015-44 I.R.B. 623.

49. Fondren v. Comm'r, 324 U.S. 18, 20 (1945).

50. This power has come to be known as a *Crummey* power after the taxpayer who brought the case that upheld the technique. Crummey v. Comm'r, 397 F.2d 82, 86 (9th Cir. 1968).

51. I.R.C. § 2042(2).

Family-limited entities also are used commonly to move wealth from one generation to another while minimizing estate taxes.[52] This technique relies on gift and estate tax valuation rules. Although most families use partnerships, limited liability corporations and Subchapter S corporations can achieve the same result.[53] The fair market value of an asset for estate and gift tax purposes is "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."[54] The family limited partnership (FLP) works because of two factors: (1) parents often want to keep their business in the family and as such place restrictions on transfer, and (2) an asset with restrictions on transfer is not worth as much as one without.[55]

The FLP is usually formed by a parent who transfers most of her property to the partnership in exchange for limited partnership interests. The general partner is often a corporation owned by the individual and her children. The FLP need not be an actual business; many FLPs only contain stocks and cash. When the parent transfers these partnership interests, they have to be discounted to reflect a lack of marketability and control.[56] For example, assume that the parent had property worth $10 million. If she did nothing with this property, she would be liable for tax on the amount over her lifetime exemption, $4.75 million. If instead she used an FLP to transfer the property, that $10 million could perhaps be discounted 35 percent because the interest has restrictions on transfer and it cannot easily be sold on the market. The property value could then further be reduced by another discount of 15 percent because the general partner (the corporation owned by the family) controls all the decisions. Thus, if the interest were to be sold, the buyer would have no control of the partnership. After these discounts, the $10 million property would be valued at $5.525 million, and taxes would only be due on $275,000.

Although these illogical discounts are based solely on arbitrary form changing, this technique has been used for over two decades.[57] At first the IRS contended that the separate interests in the FLP should be aggregated for valuation purposes, but it eventually abandoned this position.[58] The IRS

52. *See, e.g.*, Drake, *supra* note 45, at 191.

53. Subchapter C corporations are avoided because they are taxed at the entity level. I.R.C. § 11.

54. Treas. Reg. § 20.2031-1(b) (1965).

55. *See* Drake, *supra* note 45, at 191, 199–200.

56. *See* Courtney Lieb, Comment, *The IRS Wages War on the Family Limited Partnership: How to Establish a Family Limited Partnership That Will Withstand Attack*, 71 UMKC L. REV. 887, 893 (2003).

57. *See* Kenneth P. Brier & Joseph B. Darby III, *Family Limited Partnerships: Decanting Family Investment Assets into New Bottles*, 49 TAX LAW. 127, 127 (1995) ("However, in recent years, a series of successful estate tax valuation cases, coupled with formal concessions by the Service on some key legal issues, have created an incentive for taxpayers to broaden the uses of FLPs. In turn, these incentives have raised the question of how far taxpayers can go in utilizing the FLP for gift and estate planning purposes, particularly as a new bottle into which to decant other types of family investment assets.").

58. Rev. Rul. 93-12, 1993-1 C.B. 202.

closely scrutinizes FLPs, but taxpayers generally have been successful in court.[59]

II. Judicial Base Erosion of the Federal Estate Tax

Since the compromise reflected in the American Taxpayer Relief Act of 2012 was reached at the start of 2013, no legislation modifying the federal estate tax has been enacted. This suggests that the legislative and executive branches have reached an impasse that preserves the status quo. This part shows that despite the lack of new laws, estate tax loopholes continue to grow because erosion of the estate tax base has been accelerated by judges. As I will discuss later in this Article, the narrative of the estate tax as a limit on the freedom of disposition has been entrenched further by court decisions.

A. From Graegin *to* Keller*: Estate Tax Advantages in Illiquidity*

The estate tax advantages of loans incurred by an illiquid estate to finance estate tax obligations can be considerable. A noticeable shift in the judicial permissiveness of this technique can be tracked by looking at three cases: *Estate of Graegin v. Commissioner*,[60] *Estate of Black v. Commissioner*,[61] and *Keller v. United States*.[62] The first case was decided before the estate tax battles of the 1990s and early 2000s. The latter two cases were decided during the more recent period of increasing exemptions and arguably increased judicial deference to freedom of disposition.

In *Graegin*, the decedent's probate estate possessed only $20,000 of liquid assets from which to satisfy an estate tax liability of over $200,000.[63] A trust established by the decedent held the preferred stock in a closely held corporation, the common stock of which was largely owned by the decedent's son (who also served as the corporation's president).[64] To avoid selling the preferred stock, the estate (of which the decedent's son served as coexecutor) borrowed the $200,000 estate tax liability from the corporation.[65] In one sense, the decedent's son was on both sides of the transaction. In a more formalistic sense, the parties (the estate and the corporation) structured the loan as an unsecured fifteen-year balloon

59. *See, e.g.*, Kimbell v. United States, 371 F.3d 257, 268–69 (5th Cir. 2004) (holding that there were significant nontax motives to form the FLP, including the desire to retain assets in a single well-managed entity).
60. 56 T.C.M. (CCH) 387 (1988).
61. 133 T.C. 340 (2009).
62. 697 F.3d 238 (5th Cir. 2012).
63. *Graegin*, 56 T.C.M. (CCH) at 389.
64. *Id.*
65. *Id.*

obligation, calling for interest at 15 percent per year.[66] The note prohibited prepayment of interest and principal.[67]

The estate claimed a deduction for the full, undiscounted value of the interest payment (approximately $450,000) due at the conclusion of the fifteen-year note term.[68] The Tax Court sustained the deduction against the IRS's challenge, finding the loan was incurred by the estate necessarily to avoid the forced sale of illiquid assets and finding the arrangement to constitute a genuine loan (despite admittedly being "disturbed" by the single payment of interest and principal).[69] Note that what is now called the *Graegin* loan technique will produce considerable estate tax savings even when the estate tax and income tax rates are equivalent. Because the estate was able to currently deduct a future payment of interest, the current estate tax savings will necessarily outweigh the future income tax cost (with such savings increasing with the term of the loan).

The Service continued to challenge the *Graegin* loan technique, which subsequently was pursued in connection with FLP planning. For instance, in *Estate of Black*, the decedent's estate borrowed $71 million from an FLP in which the decedent held an interest.[70] The Tax Court determined that, as a practical matter, the estate depended on a distribution from the partnership to satisfy its obligations under the loan:

> The loan structure, in effect, constituted an indirect use of . . . stock [owned by the partnership] to pay the debts of [the decedent's] estate and accomplished nothing more than a direct use of that stock for the same purpose would have accomplished, except for the substantial estate tax savings.[71]

Accordingly, the court upheld the IRS Commissioner's denial of the deduction for interest paid under the loan.[72]

However, not all courts are as exacting in their scrutiny of *Graegin* loans. For instance, in *Keller*, the U.S. Court of Appeals for the Fifth Circuit distinguished *Estate of Black* and approved an interest deduction under fairly extreme circumstances.[73] Following the death of her husband, the decedent in *Keller* began exploring plans to establish an FLP to be funded with approximately $300 million of cash, certificates of deposit, and bonds.[74] Two family trusts were to hold the limited partnership interests, and an LLC was to be formed to hold the general partnership interests.[75] The decedent executed the documents forming the limited partnership and LLC and then died a few days later.[76] The expected capital contributions

66. *Id.*
67. *Id.*
68. *Id.* at 390.
69. *Id.* at 390–91.
70. Estate of Black v. Comm'r, 133 T.C. 340, 358 (2009).
71. *Id.* at 385.
72. *Id.*
73. Keller v. United States, 697 F.3d 238, 247–48 (5th Cir. 2012).
74. *Id.* at 240.
75. *Id.*
76. *Id.* at 240–41.

were described in contemporaneously produced notes and spreadsheets, but the decedent died before the assets were actually transferred to the partnership.[77] Acting on the advice of its accountant, who believed that the formation and funding of the limited partnership had been ineffective, the estate paid over $147 million in estate taxes.[78] But the accountant later reconsidered this position after attending a continuing legal education seminar.[79]

Roughly a year after the decedent's death, the estate completed the funding of the partnership.[80] The estate then pursued a refund of a significant portion of the estate tax liability, with the refund based primarily on valuation discounts attributable to the partnership interests.[81] In addition to funding the partnership, the estate retroactively restructured its earlier estate tax payment as a loan from the partnership to the estate, followed by the estate's payment of taxes.[82] The estate issued a backdated promissory note to memorialize the restructured transaction.[83] Accordingly, the estate claimed a deduction for interest payments on the restructured loan, and this deduction served as an additional basis for the refund claim.[84]

The Government argued that the circumstances in *Keller* were essentially the same as those in *Estate of Black* and that the Fifth Circuit therefore should deny the interest deduction.[85] The Fifth Circuit disagreed, distinguishing *Estate of Black* on the basis that partnership assets were the only assets in that case that could have been used to make the loan payments.[86] By contrast, the estate in *Keller* included additional nonpartnership assets, which (in theory at least) could have been liquidated to finance the loan payments.[87] For this reason, the court rejected the Government's argument that the tax payment should have been characterized as a partnership distribution.[88] The court apparently was not persuaded by the fact that the assets used to make the tax payment were, in fact, the same assets that the court also held had been transferred to the partnership.

Ironically, one of the bases for allowing the interest deduction was that the estate was largely illiquid, as the estate's nonpartnership assets consisted of ranch and mineral holdings.[89] Of course, the decedent died holding primarily liquid assets—i.e., the $300 million of cash, certificates of deposit, and bonds—and these assets were in fact liquidated to satisfy the estate tax liability. Nonetheless, the court considered the estate to be

77. *Id.* at 241.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 247.
86. *Id.*
87. *Id.*
88. *Id.* at 247–48.
89. *Id.* at 247.

illiquid and thus entitled to the interest deduction because the liquid assets were beneficially owned by the partnership as of the decedent's death.[90]

B. From Procter *to* Wandry*: The Evolution of Conditions Subsequent*

The evolution in the conditions subsequent cases is even more troubling in its scope. Successful use of this technique prevents the Service from making meaningful adjustments on audited returns.

In *Commissioner v. Procter*,[91] the taxpayer possessed remainder interests in two trusts that were to become possessory on his mother's death. He assigned these remainder interests to a separate trust, which obligated the trustees to use trust property to satisfy the balance due on loans to the taxpayer by the taxpayer's mother.[92] The taxpayer retained an income interest in any funds that remained after repayment of the loans, and the principal of the trust was to be distributed to the taxpayer's children on his death.[93]

In an attempt to insulate the transfer from gift tax consequences, the taxpayer inserted a savings clause into the transfer document.[94] This provision instructed that, in the event of a final order or judgment determining that any portion of the transfer constituted a gift, that portion of the property would "automatically be deemed not to be included in the conveyance in trust hereunder and shall remain the sole property of [the taxpayer]."[95] The Fourth Circuit refused to enforce this provision on policy grounds:

> This is clearly a condition subsequent and void because contrary to public policy. A contrary holding would mean that upon a decision that the gift was subject to tax, the court making such decision must hold it not a gift and therefore not subject to tax. . . . It is manifest that a condition which involves this sort of trifling with the judicial process cannot be sustained.[96]

The court justified its holding on three grounds: (1) the provision had a tendency to discourage the collection of tax; (2) the condition would obstruct the administration of justice by forcing courts to pass on a moot issue; and (3) the condition itself was illogical—a final order of judgment of a tax liability could not be reversed by a subsequent transfer.[97]

90. *Id.* at 248.
91. 142 F.2d 824 (4th Cir. 1944).
92. *Id.* at 825.
93. *Id.*
94. *Id.* at 827.
95. *Id.*
96. *Id.*
97. *Id.* at 827–28. The Service in Revenue Ruling 86-41, 1986-1 C.B. 300, provided examples of two other provisions that it viewed as unenforceable under the *Procter* doctrine. *Id.* The first example consisted of a conveyance of an undivided fractional interest in real property with an adjustment clause providing the following: if the value of the conveyance exceeded the prevailing annual exclusion amount, then the fractional amount of the conveyed property would be reduced so that the value of the gift would be fully shielded by

Procter has come to stand for the proposition that conditions subsequent to the initial gratuitous transfer that are introduced for the purpose of avoiding the imposition of the gift tax violate public policy.

More than fifty years later, with savings clauses or other conditions subsequent unenforceable under *Procter* and its progeny, taxpayers recently have turned their sights to so-called defined value transfer clauses as a way of avoiding the conditions subsequent label while achieving a similar result. The first case that tested this taxpayer strategy was *McCord v. Commissioner*.[98] In *McCord*, a husband and wife made irrevocable transfers of all of their limited partnership interests in a family-owned partnership to four donees, two of which were tax-exempt entities.[99] Importantly, the assignment agreement did not specify the respective percentages of partnership interests that were to be transferred to each donee.[100] Instead, the assignment agreement specified only the fair market value of partnership interests that each donee was to receive.[101]

The assignment agreement instructed that the assigned partnership interests be allocated among the donees in the following cascading order: (1) generation skipping transfer (GST) trusts were to receive partnership interests equal to the amount of the taxpayers' remaining GST tax exemption; (2) the taxpayers' sons were to receive partnership interests worth approximately $7 million, reduced by the value of the interests conveyed to the GST trusts under the first allocation; (3) a nonprofit symphony was to receive the lesser of $134,000 worth of partnership interests or the amount of any partnership interests that remained after the first two allocations; and (4) a tax-exempt community foundation was to receive the value of any partnership interests not allocated under the prior provisions.[102] The taxpayers retained no control over how the assigned partnership interests would be allocated among the donees.[103] Rather, the donees made this determination several months after the assignment by having the assigned partnership interests appraised and allocating those interests with the defined-value instructions.[104] Only at this point were the precise percentage partnership interests that were transferred to each donee established.[105] A few months after the donees executed the confirmation agreement, the partnership redeemed the limited partnership interests held by the tax-exempt organizations.[106]

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the exclusion amount. *Id.* The second example achieved the same result, albeit through a different route. Instead of reducing the portion of the conveyed property in hindsight, the transfer obligated the transferee to return each dollar to the transferor. *Id.*

98. 120 T.C. 358 (2003), *rev'd*, 461 F.3d 614 (5th Cir. 2006).

99. *Id.* at 364.

100. *Id.* at 365.

101. *Id.*

102. *Id.* at 364–65.

103. *Id.* at 365–66.

104. *Id.* at 366.

105. *Id.*

106. *Id.*

The taxpayers reported the value of their gifts based on the per-unit value reflected in the appraisal, which incorporated a variety of entity-related valuation discounts.[107] The Service determined that the per-unit value of the assigned partnership interests was almost double the amount claimed by the taxpayers and therefore increased the value of the gifts to the GST trusts and to the taxpayers' sons.[108] The taxpayers, however, were not particularly concerned with the Service's valuation objection.[109] They argued that, pursuant to the formula clause in the assignment agreement, the Service's increased valuation of the assigned partnership interests simply meant that more of the partnership interests should have been allocated to the tax-exempt community foundation as the residual value had done.[110] This adjustment would have produced no additional revenue; the increased gift to the community foundation would have been offset by an increased charitable deduction.[111] The Service, in turn, responded that any transfer that systematically protected a revaluation of the transferred property from generating additional tax revenue was void on public policy grounds.[112]

The Tax Court issued a divided opinion in the case. The majority opinion approached the matter by starting with the percentage partnership interests that ultimately were received by each donee—in effect, treating the taxpayers' assignment agreement and the donees' confirmation agreement as components of a single transaction.[113] The majority first determined the proper per-unit value of the assigned partnership interests through a painstaking analysis.[114] Then, to determine the gift tax consequence, they applied the proper per-unit value to the percentage partnership interests that actually were received by the donees.[115] The majority refused to treat the revaluation of the partnership interests as allocating additional interests to the tax-exempt foundation, noting that the community foundation was not entitled to an additional share of the transferred partnership interests under state law.[116] Having undermined the taxpayers' attempt to bulletproof the gift from valuation challenge in this manner, the majority did not need to address the public policy challenge. However, other judges of the Tax Court would have utilized the public policy doctrine articulated in *Procter* and *Ward* to deny any increase in the charitable deduction for amounts the charitable organizations would never receive.[117]

On appeal to the Fifth Circuit, the Government dropped its public policy argument and, instead, advanced the theory endorsed by the Tax Court

107. *Id.* at 367–68. *See generally supra* Part I.B.
108. *McCord*, 120 T.C. at 368.
109. *Id.* at 369.
110. *Id.*
111. *Id.* Keep in mind, however, that the percentage partnership interest received by the foundation was set by the donees' confirmation agreement and that the foundation's interest was redeemed shortly thereafter. *Id.* at 365–66.
112. *Id.* at 369.
113. *Id.* at 396–97.
114. *Id.* at 398.
115. *Id.*
116. *Id.* at 406.
117. *Id.* at 427–30 (Laro, J., dissenting).

majority. In a fairly indignant opinion, the Fifth Circuit emphatically reversed in the taxpayers' favor.[118] As reflected below, the Fifth Circuit disapproved of the majority's consideration of the manner in which the donees allocated the percentage partnership interests among themselves:

> It is clear beyond cavil that the Majority should have stopped with the Assignment Agreement's plain wording. By not doing so, however, and instead continuing on to the post-gift Confirmation Agreement's intra-donee concurrence on the equivalency of dollars to percentage of interests in [the partnership], the Majority violated the firmly-established maxim that a gift is valued as of the date that it is complete; the flip side of that maxim is that subsequent occurrences are off limits.[119]

Without explaining how the property interests transferred to each donee could be determined without reference to the donees' confirmation agreement, the Fifth Circuit viewed the transfer of value that occurred under the assignment agreement as completing the gift.[120] Accordingly, any increase in the per-unit valuation of the partnership interests could not increase the taxpayers' gift tax liability.[121]

Defined-value transfers understandably have become quite popular in the estate-planning community since the Fifth Circuit's reversal in *McCord*. Although the appellate court in *McCord* did not address challenges to defined-value transfers based on *Procter*-like public policy objections—because the Government did not advance these arguments on appeal—the Tax Court's subsequent decision in *Estate of Petter v. Commissioner*[122] has mitigated any lingering public policy concerns.

The taxpayer in *Petter* first transferred stock in United Parcel Service to an LLC and then made gratuitous assignments of LLC units.[123] Each assignment concerned a specified number of LLC units, with a defined value being transferred to an irrevocable trust and the remaining value passing to community foundations.[124] The transfer agreements provided that if the value of the units transferred to the trust, as finally determined for gift tax purposes, exceeded the amount of the defined value transfers, the trust would make corrective transfers of LLC units to the charitable beneficiary.[125] The IRS challenged the per-unit value of the transferred LLC interests and further argued that any purported reallocation of units from the trust to the charitable beneficiary should be disregarded under *Procter* as a subsequent transfer.[126] The Tax Court disagreed, finding that the taxpayer's transfer was one of a formula amount instead of an absolute

118. McCord v. Comm'r, 461 F.3d 614, 632 (5th Cir. 2006).
119. *Id.* at 626.
120. *Id.* at 627.
121. *Id.* at 628.
122. 98 T.C.M. (CCH) 534 (2009), *aff'd*, 653 F.3d 1012 (9th Cir. 2011).
123. *Id.* at 535.
124. *Id.* at 536.
125. *Id.* at 536–37.
126. *Id.* at 539.

number of LLC units.[127] The court found this distinction meaningful, noting that "savings clauses are void, but formula clauses are fine."[128]

In addition to distinguishing the *Procter* decision, the Tax Court went on to dismiss other public policy arguments against the technique, noting that a redetermination of the value of the transferred parties would have economic consequences to the transferees and relying on the fiduciary obligations of the charitable organizations to enforce their rights under the gift agreements.[129] In short, the Tax Court was not willing to treat the charities as serving a mere accommodation role in the taxpayer's estate planning.

On appeal to the Ninth Circuit, the Service dropped its *Procter* argument, arguing instead that the adjustment feature of the defined-value clauses subjected a portion of the gift to the charity (the corrective transfers) to a condition precedent—an IRS audit—in violation of Treasury Regulation section 25.2522(c)-3(b)(1).[130] The Ninth Circuit rejected this argument, distinguishing true conditional gifts—if, for example, a portion would pass to charity only in the event of an audit—from formula gifts, in which the number of units received by the charity is predetermined but not ascertainable until per-unit values finally are determined.[131] According to the court, the corrective transfers to the charity were not dependent on an IRS audit; rather, the IRS audit simply resolved an open question as to how many units the charity was entitled to receive, that number being fixed (though unknown) as of the date of the original assignments.[132] The Ninth Circuit pointed out that the IRS was not the only party that could have challenged the per-unit value.[133] Either the trust or the charity could have challenged the valuation as well (and thereby potentially triggered corrective transfers), though the court acknowledged that neither party was likely to do so.[134]

In *Wandry v. Commissioner*,[135] the Tax Court approved a substantially more aggressive planning technique: the use of a defined-value clause without a charitable component.[136] In *Wandry*, a husband and wife formed an LLC with their four children.[137] On January 1, 2004, when the gift tax exemption equivalent was $1,000,000 and the annual exclusion was $11,000, each of the taxpayers executed an assignment of "a sufficient number of my [LLC membership units] so that the fair market value of such Units for federal gift tax purposes shall be [$261,000 for each assignment to

127. *Id.* at 542.
128. *Id.*
129. *Id.* at 542–43.
130. Estate of Petter v. Comm'r, 653 F.3d 1012, 1018 (9th Cir. 2011).
131. *Id.* at 1018–20.
132. *Id.* at 1020.
133. *Id.* at 1019.
134. *Id.*
135. 103 T.C.M. (CCH) 1472 (2011).
136. *Id.* at 1478–79.
137. *Id.* at 1473.

a child and $11,000 for each assignment to a grandchild].”[138] The assignment further provided:

> Although the number of Units gifted is fixed on the date of the gift, that number is based on the fair market value of the gifted Units, which cannot be known on the date of the gift but must be determined after such date based on all relevant information as of that date.[139]

The assignment also stated:

> [I]f, after the number of gifted Units is determined based on [an appraisal], the IRS challenges such valuation and a final determination of a different value is made by the IRS or a court of law, the number of gifted Units shall be adjusted . . . so that the value of the number of Units gifted to each person equals the amount set forth above, in the same manner as a federal estate tax formula marital deduction amount would be adjusted for a valuation redetermination by the IRS and/or a court of law.[140]

The Service argued that the case should be controlled by *Procter* on the theory that the assignment instrument allowed taxpayers to “take property back” on the happening of a condition subsequent—that is, an adjustment in value of the gift tax units for gift tax purposes.[141] Relying in significant part on the Ninth Circuit’s decision in *Petter*, the court interpreted the assignments as transferring a predetermined number of LLC units, even though the exact number of units would not be known until the date on which the per-unit gift tax value finally was determined.[142] In the view of the Tax Court, both before and after the IRS audit, the children and grandchildren were entitled to receive the same number of units, and thus the assignments would not be viewed as creating an impermissible condition subsequent of the type found invalid in *Procter*.[143]

The Tax Court refused to distinguish *Petter* on the basis that it involved charitable beneficiaries or that, in *Petter*, the adjustment clause affected only the relative shares of the donees and not the amounts transmitted by the taxpayer: “It is inconsequential that the adjustment clause reallocates membership units among [taxpayers] and the donees rather than a charitable organization because the reallocations do not alter the transfers.”[144] The Tax Court was also apparently unconcerned that the Ninth Circuit’s reasoning in *Petter* was based in substantial part on Treasury Regulation section 25.2522(c)-3(b)(1), which was obviously of no direct relevance in the *Wandry* case.[145] Although the congressional policy of encouraging charitable gifts may have influenced the result in *Petter*, the Tax Court

138. *Id.*
139. *Id.* at 1473–74.
140. *Id.* at 1474.
141. *Id.* at 1477.
142. *Id.*
143. *Id.* at 1478.
144. *Id.*
145. *Id.* at 1477.

concluded that this factor was not outcome determinative.[146] Furthermore, the court determined that the absence of a charitable donee in the *Wandry* transaction did not raise additional public policy concerns.[147] Although the Government's appeal of the *Wandry* decision was subsequently dismissed by stipulation, the Service issued a nonacquiescence to the decision.[148]

The *Wandry* decision is important because it starkly reveals a historical shift in the way courts analyze estate planning techniques. Although the conditions subsequent and the illiquidity cases have been discussed separately, there is a historical thread tying them together. The *Procter* Court's broad and substantive public policy holding can be seen as grounded in a historical understanding that administering a tax system sometimes requires looking beyond the form of a transaction.[149] A taxpayer can structure her affairs in a way that meets the letter of the law, but tax benefits can still be denied by a court after viewing the transaction as a whole.

The *McCord*, *Petter*, and *Wandry* Courts represent a rejection of this principle in favor of estate tax formalism. With increased focus on the details of the taxpayer transaction, the overall thrust of the tax avoidance has been subsumed. The next part of this Article argues that this formalism has been spurred by, and in turn has entrenched, a narrative of the estate tax as a limit on liberty and the freedom of disposition.

III. PROPOSALS TO "FIX" THE FEDERAL ESTATE TAX AND THE LESSONS OF PSYCHOLOGY

For those worried about the current state of our wealth transfer system, all is not lost. The estate tax still brings in revenue that our fiscally imbalanced nation needs. As proponents have noted, the revenues generated from the estate tax between 2016 through 2025 would be enough to fund the Food and Drug Administration, the Centers for Disease Control and Prevention, and the Environmental Protection Agency.[150]

The proliferation of loopholes is not intractable, as there have been several proposals to increase the revenue potential and efficacy of the federal estate tax. This part briefly covers the details of some representative proposals. It acknowledges their potential efficacy but argues that their reliance on facts ignores the importance of stories in human decision

146. *Id.* at 1477–78.
147. *Id.* at 1478.
148. *See* 2012-46 I.R.B. 542.
149. As explained by Judge Learned Hand, "[T]he meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create." Helvering v. Gregory, 69 F.2d 809, 810–11 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935).
150. Chye-Ching Huang & Brandon Debot, *Ten Facts You Should Know About the Federal Estate Tax*, CTR. ON BUDGET & POL'Y PRIORITES (Mar. 23, 2015), http://www.cbpp.org/research/ten-facts-you-should-know-about-the-federal-estate-tax [https://perma.cc/E5MB-T5V9].

making. I then introduce System Justification Theory to show how these estate tax stories became entrenched narratives.

A. Proposals: Executive, Legislative, and Academic

The Obama Administration's budget proposals for fiscal years 2014 through 2016 would put pre-2009 estate tax exemptions and tax rates back into place, but would retain the present portability rules for spouses.[151] The exemption amount would be $3.5 million for estate and generation-skipping transfer tax purposes and $1 million for gift tax purposes, with neither amount indexed for inflation.[152] The top estate and gift tax rate would be 45 percent.[153]

On the legislative front, Representative Jim McDermott introduced a more ambitious proposal to amend the estate tax in 2014. The Sensible Estate Tax Act of 2014 would modify the wealth transfer tax rules by reducing the exemption amount and increasing the applicable tax rates.[154] The bill would reduce the exemption amount for estate, gift, and generation-skipping transfer tax purposes to $1 million, indexed for post-2000 inflation.[155] The bill also would increase the top marginal tax rate to 55 percent and provide for inflation indexing of the rate bracket cut-off points.[156]

Academics also have widely addressed estate and gift tax reform, and there have been numerous proposals to improve the estate tax. Representative examples include proposals from Paul Caron and James Repetti and from Edward McCaffery.

Paul Caron and James Repetti have advanced a number of estate and gift tax reform proposals, which they argue would generate needed revenue, reduce inequality, and contribute to economic growth. One proposed solution is returning to the $3.5 million exemption and increasing the maximum rate to 45 percent—similar to the Obama proposal—but also limiting the GST tax exemption to transfers occurring within fifty years.[157] Additionally, they recommend eliminating minority discounts in certain circumstances.[158] Next, they suggest maintaining parity between the estate and gift tax unified credit.[159] They also advance restricting the ability of

151. U.S. DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2016 REVENUE PROPOSALS 193–94 (2015), https://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2016.pdf [https://perma.cc/ENQ9-B8CM].

152. *Id.* at 194.

153. *Id.*

154. H.R. 4061, 113th Cong. (2014).

155. *Id.*

156. *Id.*

157. Paul L. Caron & James R. Repetti, *Revitalizing the Estate Tax: 5 Easy Pieces*, 142 TAX NOTES 1231, 1235–36 (2014).

158. *Id.* at 1232–35.

159. *Id.* at 1235–39.

gifts made in trust to qualify for the gift tax annual exclusion and, finally, restricting Grantor Retained Annuity Trusts through a lifetime cap.[160]

According to Edward McCaffery, it is unlikely that the estate tax will become more meaningful in the foreseeable future, but it is also unlikely that it will be repealed.[161] McCaffery argues that the battle over the estate tax has distracted us from the advantages that stepped-up basis[162] provides.[163] Instead of focusing on increasing the rates or lowering the exemption, McCaffery would change the section 1014 basis rules that allow for stepped-up basis.[164] McCaffery suggests that such a move would eliminate certain kinds of tax planning and lessen wealth concentrations more effectively.[165]

B. Stories Trump Science

While the above proposals are reasonable alternatives to the status quo, they do little to confront the unpopularity of the estate tax. "Stories Trump Science," the twentieth chapter of the Graetz and Shapiro account of the estate tax battles, states:

> Like Kerry, Dukakis, and Dewey before them, the opponents of estate tax repeal failed to grasp that in politics, science is never enough. By expecting science to sway political opinion, the repeal opponents let the ball get away from them. While the Democrats snoozed, their opponents transformed one major tax policy—the levy on inheritances—from a radical fringe reform to an apparently populist demand to repeal an "immoral" tax.[166]

Graetz and Shapiro go to substantial lengths in their book to show that the success of the death tax repeal movement was not just the result of money and behind-the-scenes lobbying. Rather, estate tax abolitionists understood that tax policy is more about ideology than facts. The repeal movement let the wealthy stay in the background and relied on the stories of farmers and small business owners to convince Americans that the estate tax was unfair.[167]

This argument about narrative explicitly relies on psychological insights and, more specifically, on the work of Jerome Bruner, a cognitive psychologist.[168] In his influential book, *Actual Minds, Possible Worlds*,[169] Bruner argued that cognitive science to that point had been too narrowly

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160. *Id.* at 1239–40.
161. Edward J. McCaffery, *Distracted from Distraction by Distraction: Reimagining Estate Tax Reform*, 40 PEPP. L. REV. 1235, 1236 (2013).
162. As currently structured, untaxed appreciation in property disappears at death and is not taxed. Pursuant to IRC section 1014(a), someone who inherits property receives a basis equal to the fair market value on the date of the decedent's death.
163. McCaffery, *supra* note 161, at 1237.
164. *Id.* at 1250–52.
165. *Id.* at 1252–53.
166. GRAETZ & SHAPIRO, *supra* note 1, at 226.
167. *Id.* at 230.
168. *Id.*
169. JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS (1986).

focused on the logical, more scientific aspects of the mind—the "paradigmatic mode."[170] Bruner underscored the importance of what he termed the "narrative mode."[171] This part of the mind uses creativity to make experiences meaningful.[172] It appreciates good stories, gripping drama, primitive myths and rituals, and plausible historical accounts, and it is not tethered to the facts or science of these accounts.[173]

As such, the lack of "rightness" in death tax accounts is only of partial importance. A part of the mind will ultimately be attracted to the meaning and comfort that stories provide. The story of the farmer forced to sell property to pay taxes is thus more important than noting that only a handful of small farms are affected by the estate tax. Bruner's work suggests that progressives should focus their energies on countering the estate tax abolitionist narrative. As Graetz and Shapiro noted, something like "The Paris Hilton Tax Cut" might be a good start.[174]

Unfortunately, countering stories with other stories might not be enough. More recent research suggests that countering the death tax narrative might be even more complicated as stories become entrenched and tend to be defended vigorously as part of the status quo.

C. System Justification Theory and the "Death Tax" Repeal Movement

System Justification Theory (SJT) connects the use of narrative to the persistence of the status quo and hierarchy in American society. The theory, first proposed by John Jost and Mahzain Banaji in 1994,[175] posits that there is an underlying human need to support and defend the social status quo, even among those who are seemingly most disadvantaged by it.[176] SJT explains the contours of this motive and the contexts in which it operates.[177] Similar to the group justification theories, SJT predicts that the powerful are motivated to preserve their dominant position in society.[178] Yet, the support of such policies is not based on group-level ethnocentrism alone.

Instead, SJT suggests that people can, at least under certain circumstances, be motivated to justify and defend the existing status quo.[179] Such motivation can manifest itself in many different ways. However, in the realm of group relations, one way that system justification can emerge is in terms of justifying and defending the existing dominance of the wealthy

170. *Id.* at 12–14.
171. *Id.* at 13–14.
172. *See id.*
173. *See id.*
174. GRAETZ & SHAPIRO, *supra* note 1, at 233–35.
175. John T. Jost & Mahzarin R. Banaji, *The Role of Stereotyping in System-Justification and the Production of False Consciousness*, 33 BRIT. J. SOC. PSYCHOL. 1 (1994).
176. *See id.* at 10.
177. *See id.*
178. *See id.*
179. *See id.*

in society, irrespective of the perceiver's own group membership.[180] This leads to a counterintuitive prediction, in the sense that even the nonwealthy would be expected to justify the status quo.[181]

Support for the system is often manifested in different ways. For example, stereotypes and stock narratives can help justify systems by suggesting reasons that capable, smart, and hardworking individuals are at the top and that dumb, slothful, and irresponsible individuals are at the bottom. In this way, our current, limited system of wealth taxation reflects the notion that, contrary to our apparent commitment to equal opportunity, we value and encourage wealth accumulation.

As Jost and his colleagues are careful to note, membership in a high versus low status group is not the only determinant of system-justifying motives.[182] In particular, the ideological beliefs of the perceiver also can play an important role.[183] These beliefs are nourished by stories:

> Analogies that maintain the basic structure of relationships among the elements are most easily retrieved and applied. Thus, we find it easier to analogize from one hierarchical system to another, given that there are corresponding roles for leaders and followers. Metaphors that map from one system level to another are quite common: a family (of nations), (it takes) a village, a (salvation) army, a war on (poverty, drugs, terror). These frames are powerful both because they bring many implicit associations and because they activate thoughts about systems that are themselves the subject of system-justifying motives.[184]

Individuals do not have to go very far to find ways to justify the status quo because stereotypes, stories, and ideologies supply easy explanations and excuses for the system.

System justification does leave room for changing the status quo. It acknowledges that individuals are parts of multiple, overlapping systems whose importance varies by time and context.[185] The instances in which the status quo is resisted are the exceptions, unfortunately. More often than not individuals have a conservative tendency to accept the legitimacy of the established hierarchy and to perceive existing institutions as basically reasonable and just until proven otherwise.[186]

System justification theorists have explicitly connected their insights to Graetz and Shapiro's institutional account.[187] The success of estate tax abolitionists was partly a triumph of framing. According to Gary Blasi and John Jost, estate taxes involve two common systems: (1) the family and

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180. *See id.* at 13.
181. *See id.*
182. *See id.* at 14.
183. *See generally* John T. Jost et al., *Political Conservatism As Motivated Social Cognition*, 129 PSYCHOL. BULL. 339 (2003).
184. Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119, 1151 (2006).
185. *Id.* at 1124.
186. *Id.*
187. *Id.* at 1154–55.

(2) the nation.[188] Repeal advocates successfully framed the issue as one of family rather than country. As such, the estate tax was an affront to a family's future instead of a guarantor of equal opportunity. Blasi and Jost suggest that advancing another version of the family frame might have helped progressives counter repeal efforts.[189]

With this understanding, the previously discussed jurisprudence, and more specifically the historical shift between *Procter* and *Wandry*, comes into focus. The courts not only shifted from a substantive to a formalistic analysis, but from a "nation" frame to a "family" frame. If seen as an issue of family, then all but the most egregious taxpayer attempts to avoid the tax can be blessed as legitimate.

CONCLUSION

The preceding discussion underscores some of the challenges for those who favor reducing wealth inequality, at least partially, through the tax system. It is not only a matter of economics and facts. It is also, and possibly more importantly, a battle of narrative. Ceding the rhetorical ground is unlikely to bring success because it ignores the ways human minds work. The following is not meant to be an exhaustive discussion of the options going forward or their permutations, but rather some suggestions for progressives.

The most obvious area of focus is reframing the death tax narrative. This could include advertisements with Paris Hilton as suggested by Graetz and Shapiro. Unfortunately, progressives have displayed an unwillingness to engage in such framing. Perhaps it is seen as too manipulative, but it is difficult to fathom a more far-reaching tax without reframing. Even if the attempt is made, it is not clear that nuanced progressive arguments can be captured in a simple-system frame. This would involve a sustained effort. Cognitive psychologist George Lakoff has suggested the frame of a national membership organization where taxes are the dues.[190]

Another approach may be to ignore the estate tax, as suggested by McCaffery. The small size of the tax is one reason, the entrenched family framed narrative is another. Given the sustained work that would be required to reframe the tax, it may not be worth the effort. While McCaffery focused on the stepped-up basis rules, it may be that progressives should move away from the tax system more generally. For example, campaign finance has been an area in which wealth inequality arguments have been used much more forcefully and effectively.[191] The frame of a game played with unequal rules and resources has been successfully utilized by politicians across the spectrum. Efforts could be focused on the institutional hurdles in that arena.

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188. *Id.* at 1154.
189. *Id.* at 1155.
190. GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE: THE ESSENTIAL GUIDE FOR PROGRESSIVES 25 (2004).
191. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1371 (1994).

Perhaps surprisingly, I am at least somewhat sympathetic to an approach that may eventually result in a repeal of the federal estate tax. While I am committed to a system that lessens wealth inequality, I am increasingly agnostic about the form taxation takes. Although I would not suggest repealing the estate tax without getting anything in return, I have no objection to the estate tax serving as a bargaining chip in broader budget negotiations. The estate tax might be the most progressive part of the tax system but the collection of revenue is not a primary concern if we use spending to maintain the progressivity of the system. An attachment to the federal estate tax is indeed a distraction if it works to prevent other ways of reducing wealth disparities.

Ultimately, any successful strategy needs to reclaim the historical battles and lessons that two centuries of taxation have taught us. While the estate tax may not be ideal, it is the result of compromises which were difficult to achieve. If it is repealed, it is doubtful that another levy will take its place in combating wealth concentrations.