DEATH COMES TO US ALL, BUT THROUGH INHERITANCE, THE RICH CAN GET RICHER: INHERITANCE AND THE FEDERAL ESTATE TAX

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I. INTRODUCTION

One of the great mysteries in life begs the question: What will happen to me after I die? This specific query will likely remain a mystery as long as the Ouija board proves to be an unreliable source of information. But in modern times people are less mystified and frightened about deciding what happens to their assets after they die. While what happens after death remains a mystery, the system of inheritance and its true effect on society need not be shrouded in the same mysterious cloak. The idea of passing on wealth has been engrained in the American psyche since the start of the country. For centuries, the English battled with its own system of inheritance. They transformed from a group of people with no testamentary freedom into a society controlled by the extremely wealthy who inherited their wealth. It should be no surprise that a country founded by those same people would start its own history with reservations over their inherited system of passing wealth. Early Americans

struggled to decide what to take or leave from the old world, and their struggle did not end with the signing of the Declaration of Independence. As a result, America is still struggling with its inherited system of inheritance today.

In a country that boasts about the national "dream" of starting with nothing and ending with everything through hard work and perseverance, how is it that the archaic tradition of passing on wealth (like the custom of passing on a title of nobility) stands the test of time? Although the founding fathers established America with elements of inheritance engrained in their minds, some initially resisted continuing the English aristocratic system. Unfortunately, man's natural greed and jealousy allowed the institution of inheritance to continue down its destructive path. So, why does America still have inheritance? And, perhaps, would it be better off without it?

This comment discusses the history of America's inheritance system, the recent debate over the federal estate tax, and the unfair nature of the inheritance system. Part II briefly looks at the history behind allowing people to decide what happens to their assets after they die. Part II also provides a historical overview of inheritance in medieval and early modern England and colonial America. Part III discusses the federal estate tax and the recent debate to either permanently repeal or reinstate previous versions of it. This discussion looks at the *Tax Relief, Unemployed Insurance Reauthorization, and Job Creation Act of 2010* and analyzes the estate tax debate including the effects of the estate tax on federal revenue, farmers and small business owners, and charitable donations. Part III will also examine the social impact of inheritance. Part IV discusses the inheritance system's inherently unfair nature by questioning its contribution to the unequal distribution of wealth and exploring the advantages that wealth provides to the few who receive it. This part also refutes the argument that inheritance helps a capitalist system function by demonstrating how inheritance directly opposes capitalism. Finally, Part V argues the potential benefits of extinguishing the current system of inheritance. Ultimately, this comment demonstrates the historical development of inheritance options, examines the harmful effects a generous inheritance may have on American ideology, and explores why America may benefit from the absence of inheritance.

II. THE FIGHT FOR TESTAMENTARY FREEDOM & THE FLIGHT FROM ARISTOCRACY

From its inception, colonial American law paralleled English common law, in some cases identically.[1] These similarities are not surprising because the colonists were still loyal British citizens without a desire for national

1. Carole Shammas, *English Inheritance Law and Its Transfer to the Colonies*, 31 AM. J. LEGAL HIST. 145, 153–61 (1987).

independence.[2] However, when the American British colonists changed their minds and became independent many of their inheritance laws changed as well.[3]

A. When the King Ruled Over All

Under the inheritance laws of medieval England, people lacked the freedom to decide what happened to their property after they died.[4] Generally, two factors helped determine what happed to people's property at death: the situation they were born into and the place where they lived.[5] This was especially true for those born into a lower position, such as peasants.[6] The category of property at issue also limited the control over certain kinds of property.[7] Even then, the laws highly regulated the division of that property.[8] For example, in many parts of medieval England one-third of a man's estate went to his surviving wife, one-third went to his children, and only one-third was left for him to dictate where it went.[9] At that time, the specific regulation of property applied to the male elite of the country.[10] As the English aristocracy came to power, the system of primogeniture (not necessarily popular under Anglo-Saxon control) became the common form of inheritance.[11] Under primogeniture, an estate passed from the father to the eldest son, sometimes leaving the other children very little, if anything.[12] Although the rights of high-ranking men were limited, the rights of women were even more restricted.[13]

When a woman married in medieval England all of her property—from her dowry and any inheritance—became subject to the whims of her new

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2. Holly Brewer, *Entailing Aristocracy in Colonial Virginia: "Ancient Feudal Restraints" and Revolutionary Reform*, 54 WM. & MARY Q. 307, 307 (1997).

3. *Id.*

4. *See* Rosamond J. Faith, *Peasant Families and Inheritance Customs in Medieval England*, 14 AGRIC. HIST. REV. 77, 79–80, 84 (1966) (describing two inheritance customs in the Anglo-Saxon areas of medieval England; how they became medieval English laws; and how they did not change in some areas).

5. Shammas, *supra* note 1, at 145. "In medieval England, how people's property was distributed among their heirs after death depended upon what kind of property they owned, their social status, where they lived, and their sex." *Id.*

6. *See* Faith, *supra* note 4, at 79.

7. *Id.* at 79–80.

8. *See also* Shammas, *supra* note 1, at 146. For example, under Anglo-Saxon law, "bookland" described certain property that could be willed according to the wishes of the decedent. Faith, *supra* note 4, at 79–80. Bookland left no room for the decedent's kin to claim the property. *Id.* Other property had to pass within a family, regardless of the decedent's wishes. *Id.*

9. Shammas, *supra* note 1, at 146.

10. *Id.*

11. Faith, *supra* note 4, at 79–81.

12. *Id.*

13. *See* Ralph V. Turner, *Exercise of the King's Will in Inheritance of Baronies: The Example of King John and William Briwerre*, 22 ALBION, Autumn 1990, at 383, 386–87 (1990) (explaining that while feudal society favored primogeniture inheritance, the king or lord could approve a female inheriting property if no male heirs existed).

husband.[14] However, he could neither sell nor will away any of his wife's property acquired through marriage.[15] While women were essentially under the control of their husbands in terms of property rights, both husbands and wives were under the control of the powerful entities in their world, such as the monarch of the country or the manorial lords of the land where they lived.[16]

In medieval England, the Catholic Church exerted a powerful influence over people.[17] However, the Church encouraged people to exercise testamentary freedom, contrary to the monarch's regulation.[18] It is likely that this fight for testamentary freedom was fueled by the idea that people would give more generously to the Church if they had more control over their wealth.[19] A partial basis for the concept of testamentary freedom was the belief that people would give some of their property to the Church when they died and thus would receive forgiveness for their sins and get more favorable treatment in the afterlife.[20]

During this period, the wealthy elite had limited rights to exercise testamentary freedom; lower classes, however, were not granted the same rights.[21] The Church questioned this unequal distribution of power on the basis that it went against the very idea of repentance, because "if the motive for seeking this power was repentance, it could not be limited to the wealthy any more than the need of repentance could be limited to them."[22] Church leadership and many followers started demanding universal testamentary freedom until it was granted.[23] However, the actual effect on the inheritance customs of England would not be seen for a few more centuries.[24]

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14. Shammas, *supra* note 1, at 147. The husband's degree of control over his wife's property was true while she was alive, if her husband predeceased her, the laws generally protected her rights. Faith, *supra* note 4, at 91. "Widows' rights seem to have been by far the most durable and firmly established of all inheritance customs." *Id.*

15. Shammas, *supra* note 1, at 147.

16. *See* Turner, *supra* note 13, at 386 (focusing on the King's exercise of power over inheritance of baronies, but also discussing the role lords played over the inheritances of people). *See also* Shammas, *supra* note 1, at 148.

17. Shammas, *supra* note 1, at 146.

18. *Id*.

19. *See id. See also* MICHAEL M. SHEEHAN, THE WILL IN MEDIEVAL ENGLAND: FROM THE CONVERSION OF THE ANGLO-SAXONS TO THE END OF THE THIRTEENTH CENTURY 6–18 (1963).

20. SHEEHAN, *supra* note 19, at 305. People gave alms to the Church either during life or upon death because they believed the act of giving would clear them of their sins and grant them repentance and reward in the afterlife. *Id.* at 16–17.

21. *See id.* at 305. *See also* Faith, *supra* note 4, at 79–80 (explaining that before and during the thirteenth century, before English inheritance customs became uniformed, peasants could exercise some testamentary freedom over certain kinds of property, including leaving it to the Church depending on the inheritance customs of the county where they lived).

22. SHEEHAN, *supra* note 19, at 305.

23. *See id. See also* Faith, *supra* note 4, at 90–92 (explaining that inheritance in peasant families deteriorated somewhat after the thirteenth century when decedents began exercising more testamentary freedom).

24. *See infra* notes 36–37 and accompanying text.

B. Then the Church Took Over

In the early sixteenth century, people had the option of a will, intestacy laws, and more testamentary freedom than they had under the monarch and laws of medieval England.[25] This was very different from the highly regulated system governed by the monarch in medieval England.[26] In 1540, the Statute of Wills allowed English citizens to devise more property than before to any heir they chose.[27] Almost a century and a half after the Statute of Wills passed, feudalism ended and English citizens had more ownership control and property to devise.[28] Still, the debate over testamentary freedom continued throughout this period.[29]

The testamentary discussion was split between two basic schools of thought.[30] One side argued for testamentary freedom because a will would remind a wife and children to behave or else risk being disinherited.[31] The other side argued that someone needed to protect the interests of wives and children against spiteful, deathbed disinheritances.[32] In England, the argument ended in the late seventeenth century.[33] Those for testamentary freedom won the fight when the country passed statutes that set up the basis for the English and early American intestacy laws.[34] The new laws presumed a valid will had been created, and the statutes only affected the disbursement of an estate when a will was not present.[35] The new laws, however, did not make the use of wills widespread overnight.[36]

Based on scarce data, approximately one-fourth of adult male decedents used wills during this time; this is contrary to the belief that once it because available, testamentary freedom would be used by the general population.[37] Additionally, the will bequests did not diverge greatly from the disbursements under intestacy.[38] The main digression from the intestate system was that some

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25. Shammas, *supra* note 1, at 148–49.

26. *Id.*

27. *Id.* at 149. "The Statute of Wills permitted testators to divide all of their freehold land and two-thirds of knight's service realty to the heirs of their choice." *Id.*

28. *Id.* Previously, the testator only had the right to devise one-third of his property as he wished; two-thirds went to the widow and the children of the decedent. *Id*. at 146. "The other third became devisable about 130 years later with the abolition of feudal tenures. Thereafter only copyhold land had to follow custom rather than the testator's desire, and the amount of realty held as copyhold was rapidly decreasing." *Id.*

29. *See id.*

30. *See id.* at 149–50.

31. *Id.* Arguably, a husband could write disobedient family members out of his will arbitrarily or shortly before he died. *Id.*

32. *Id.* The customs protecting a widow's rights of inheritance were some of the most durable and unchanged in English inheritance from the thirteenth through the fifteenth centuries. Faith, *supra* note 4, at 91.

33. Shammas, *supra* note 1, at 149–50.

34. *Id.*

35. *Id.*

36. *See id.* at 151.

37. *Id.* The number is approximated because evidence about number of people who used wills is scarce. *Id.*

38. *See id.*

men chose to distribute a larger share between their children, thus leaving less to their wives.[39] This change was contrary to the widow inheritance rights that had been recognized for centuries.[40] Arguably, the main benefit of testamentary freedom allowed a person without children to leave his property to someone other than a distant relation.[41]

The Church also benefitted from the transition to a will writing society when its Ecclesiastical Courts were granted exclusive jurisdiction over issues dealing with wills in the eighteenth century.[42] However, the House of Lords balanced the "exclusive" jurisdiction almost immediately with a Chancellor who could "make any decree suitable to safeguard the estate pending the contest."[43] When the authorities organized this legal system to deal with the problems that could arise from executing a will, people still did not have testamentary freedom over all of their property.[44] Until the Statute of Wills, real property was not devisable, and even then so few people actually owned the land they lived on because of feudalism.[45] Therefore, most people were unable to exercise testamentary control over any real property.[46]

In the seventeenth century, "the strict family settlement" limited a person's control over inherited property and pushed back against the trend toward testamentary freedom.[47] The settlement set out, in one document, the amounts of the patriarch's estate that every family member would receive at different points in their lives.[48] The settlement provided for the financial security of every member of the family not because it promised that each member would receive a large sum but because it ensured that every member would receive something.[49] The patriarch no longer had the power to disinherit a problematic child or even to bribe a daughter to marry someone other than whom she wished.[50] The family settlement secured the future for a man's children and wife and accomplished the goal of barring entail to keep the family estate intact and within the family line forever.[51] The settlement document took the testamentary power out of the hands of the living and kept it in the hands of the

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39. *Id.*

40. *Id.* at 151. *See also* Faith, *supra* note 4, at 90–92.

41. Shammas, *supra* note 1, at 151.

42. Edmond N. Cahn, *Federal Regulation of Inheritance*, 88 U. PA. L. REV. 297, 299 (1940).

43. *Id.*

44. *Id.*

45. *Id. See also* Shammas, *supra* note 1; note 28 and accompanying text.

46. *See* Cahn, *supra* note 42.

47. Shammas, *supra* note 1, at 152.

48. *Id.* at 153 (stating that triggering events for partial distribution of the estate could be reaching majority age, getting married, and the patriarch's death).

49. Eileen Spring, *Law and the Theory of the Affective Family*, 16 ALBION 1, 2 (1984).

50. *Id.*

51. Shammas, *supra* note 1, at 153. The goal of settlements—to keep the family estate in the family—was similar to the goal of peasant inheritance customs under Anglo-Saxon rule—to keep the property in the bloodline. *See* Faith, *supra* note 4, at 86. The English aristocracy prized the primogeniture system of inheritance mainly because it kept property within a family, similar to the former peasant customs of passing property through the family, even when a decedent had a level of testamentary freedom. *Id.* at 81, 86.

dead.[52] Ultimately, the family settlement denied any testamentary freedom the law granted.[53]

Settlements, much like the entails barred in England, often removed females from the land succession line.[54] The property passed from oldest son of one generation to oldest son of the next.[55] Also similar to entail, the property rights that passed to an heir were similar to the rights of a life tenant, rather than an owner, meaning the property was inalienable.[56] Once the heir died, the estate passed to the next in line.[57] Sometimes a title of aristocracy accompanied the estate in a family line, and it also passed from generation to generation.[58] Through this system, powerful families in early modern England succeeded in "maintaining a narrow unilateral system for the descent of property and thus keeping the same dynasties on top for centuries."[59] Therefore, the English aristocracy was born.[60]

The rich and powerful, with the help of the Church, made it possible for a person to exercise testamentary freedom.[61] They also devised a way to avoid the possible pitfalls of that freedom: controlling the rights of beneficiaries through entails or settlements.[62] They wanted to keep this system of maintaining an aristocracy alive.[63] As a result, the aristocracy was precisely what early Americans supposedly ran away from when they broke away from England.[64]

C. Say "Goodbye" to the Aristocracy, But Not for Long

Some areas of colonial America accepted the primogeniture system, which favored the oldest son.[65] Intestacy laws in six colonies awarded a double share of real property to the oldest son and a single share to the other children.[66] This was in contrast to the even less egalitarian system of primogeniture, which left

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52. Spring, *supra* note 49, at 2.

53. *Id*.

54. *Id.* Entailing property controlled and limited the power future generations could exercise over property and, in fact, meant that property "could not be alienated but must pass on to heirs of the body generation after generation." Shammas, *supra* note 1, at 152.

55. Faith, *supra* note 4, at 81, 86.

56. Shammas, *supra* note 1, at 153.

57. *See id.*

58. *See id.*

59. *Id.*

60. *Id.*

61. *See* Spring, *supra* note 49. *See also* SHEEHAN, *supra* note 19; Shammas, *supra* note 1, at 153.

62. *See id.*

63. *See id*.

64. *See* discussion *infra* Part II.C.

65. *See* John J. Waters, *Family, Inheritance, and Migration in Colonial New England: The Evidence from Guilford, Connecticut*, 39 WM. & MARY Q. 64, 66 (1982) (explaining that colonial Connecticut society still valued the ideals of the primogeniture system favoring the oldest son over all other children). *See also* Shammas, *supra* note 1, at 156.

66. Shammas, *supra* note 1, at 162 (displaying a table setting out inheritance laws in the Massachusetts, New Hampshire, Connecticut, Rhode Island, Pennsylvania, and Delaware colonies in 1720).

all of the realty to the oldest son; New York was the only colony to use that system.[67] Civil lawyers fought to retain primogeniture, which was prevalent in the colonies, "in order to preserve a strong landed elite."[68] The power associated with owning land in geographically small England carried over to America, even though more land was available.[69] Evidently, the early Americans still had enough "dynastic feeling" to want to have some sort of inheritance system that favored the oldest son in order to maintain some form of an aristocracy.[70]

In the late 1700's, the Americans freed themselves from one sovereign and were attempting to loosen the grip of another—the aristocracy.[71] After breaking away from British rule, Americans questioned the English tradition of maintaining an elite aristocracy.[72] Shortly after colonists declared independence, Thomas Jefferson transformed Virginia laws to parallel the ideals and goals of the Revolution.[73] He fought to abolish entail or primogeniture and erase the existence of an aristocracy in Virginia and throughout the entire country.[74] Jefferson and others believed the only way to form a true republic in this newly independent country was to get rid of the system that consistently awarded power with power and aided in the unequal distribution of wealth.[75] The American Revolution was based on the principle that a man can achieve great things by being a great man; therefore, it made little sense to uphold a system of wealth and power distribution that favored breeding over morality.[76]

Practically speaking, circumstances were different in America, so entailing land was not as necessary.[77] In England, through primogeniture, the oldest son received all of the land, and the younger children sometimes received cash to compensate them.[78] This system worked best in England but was not as well suited for America since equitable distribution of land was a more practical option than in England.[79] Over time, the attack on entail and primogeniture

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67. *Id.* at 156.

68. *Id.*

69. *See* Waters, *supra* note 65, at 73. Colonial America was a "landowning society" where it was less important than in England that a male's right to own land was superior to a female's right, but the right in general was very important. *Id.*

70. Shammas, *supra* note 1, at 157. "We should not underestimate the degree to which Anglo settlers replicated the mode of wealth transmission existing in the mother country." *Id.* at 161.

71. *See* Brewer, *supra* note 2.

72. *See id.*

73. *Id.*

74. *Id.*

75. *See id.* at 307–08.

76. "'Virtue,' Paine declared, 'is not hereditary.' Why, then should political power be inherited?" *Id.* at 308–09 (quoting Thomas Paine, *Common Sense*, *in* THOMAS PAINE READER 101 (Michael Foot & Isaac Kramnick eds., 1987)).

77. *See* Shammas, *supra* note 1, at 157. Comparatively, land was not as plentiful in England, and cash was not as bountiful in America. *Id.*

78. *Id.*

79. *Id.*

was effective because "all American states that had enforced entail and primogeniture during the colonial period abolished them."[80]

In addition to ridding America of the entail and the primogeniture inheritance models, the colonists also created a new way to legally deal with probate.[81] Clerically, the probate system mirrored the Chancellor in England with limited jurisdiction given to the individual states.[82] The states had exclusive jurisdiction, free from federal authority, if the case dealt with probating a will or an estate.[83] However, the federal court could exercise jurisdiction if the proceeding related to the individual interests of any person involved in the probate.[84] Considering the colonists' recent past, they were reasonably suspicious of the threat of tyrannical power, so the colonists sought a local system of inheritance to govern the limitation on federal jurisdiction.[85]

D. Are Americans Just Early, Modern English Citizens with Cell Phones?

The desire for testamentary freedom in medieval England created a venue for the aristocratic model of primogeniture to become the norm in early modern England.[86] The movement towards writing wills and giving property to anyone at death created a system of intestacy that favored a system where the oldest son inherited and maintained the family's estate.[87] As a result, primogeniture was constraining and restrictive; so, eventually, Revolutionary Americans had to fight against their inherited system of passing wealth.[88] Ironically, the desire to have the freedom to determine the fate of one's property began the transition in England towards testamentary freedom.[89] Then American's desire for freedom led them to fight England's prized system of primogeniture and aristocracy and to free them from the control of entail.[90] Americans believed they were finally rid of entail and aristocracy; but were they really?

III. THE FEDERAL ESTATE TAX

Depending on the exemption amount and tax percentage, the estate tax can have a significant effect on the transfer of property from decedents to their heirs. Many people have speculated and debated about the steady repeal of the

80. Brewer, *supra* note 2, at 309.
81. *See* Cahn, *supra* note 42, at 301.
82. *Id.* at 300–01.
83. *Id.* at 301.
84. *Id.*
85. *See id.* at 302–04.
86. *See* discussion *supra* Parts II.A–B.
87. *See* discussion *supra* Part II.B.
88. *See* discussion *supra* Part II.C.
89. *See* discussion *supra* Part II.C.
90. *See generally* Brewer, *supra* note 2, at 307–09.

American federal estate tax since enacted in 2001.[91] This debate centers on concerns regarding how much property one may pass on without the beneficiary or heir feeling the sting of tax consequences.[92] The recent legislation reviving the federal estate tax has been a topic of much debate.[93] This part will discuss the main arguments for and against the permanent repeal of the estate tax and will provide a brief explanation of the recent legislation dealing with the federal estate tax, including the Economic Growth and Tax Relief Reconciliation Act of 2001 and the Tax Relief, Unemployed Insurance Reauthorization, and Job Creation Act of 2010.

A. Where Did It Go? A Brief Explanation of the Tax Reform Acts of 2001 & 2010

"On June 7, 2001, President George W. Bush signed into law the Economic Growth and Tax Relief Reconciliation Act of 2001 (2001 Act)."[94] President Bush enacted the 2001 Act to fulfill his promise to cut taxes.[95] This act was expansive and dealt with many different federal tax provisions, including the estate tax.[96] The 2001 Act set up a gradual repeal of the estate tax with the intent that the tax would be completely gone for one year, 2010 and return in 2011 at the 2002 rates.[97] The gradual repeal set up by the 2001 Act of the estate tax increased the exemption amount every year until 2010 when the tax was automatically repealed.[98] Originally, the tax would be repealed automatically because of the sunset provision contained at the end of the 2001 Act that placed the expiration date on the repeal as December 31, 2010.[99]

Recent amendments to the 2001 Act extended provisions of the Act for two years and enacted a retroactive estate tax for 2010.[100] On December 17, 2010, President Barack Obama signed the Tax Relief, Unemployed Insurance

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91. *See generally* Jacob S. Hacker & Paul Pierson, *Abandoning the Middle: The Bush Tax Cuts and the Limits of Democratic Control*, 3 PERSP. ON POL. 33 (2005) (discussing the effects of the repeal of the federal estate tax).

92. *Id.*

93. *See generally* Russell Berman, *Estate Tax Proposal Draws Fire from Conservatives Who Want Full Repeal*, THE HILL (Dec. 9, 2010), http://thehill.cim/homenews/senate/132813 (discussing the views of Democrats and Republicans on the revival of the federal estate tax).

94. Robert Clofine, *Is the Death Tax Dead?* (Feb.2, 2010), http://www.estateattorney.com/elderlaw-articles/taxes-pit-estatetaxrepeal.html. *See also* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 501–561, 115 Stat. 38, 39 (2001).

95. Clofine, *supra* note 94.

96. *See* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 501–561, 115 Stat. 38 (2001).

97. Clofine, *supra* note 94. *See also* Economic Growth and Tax Relief Reconciliation Act §§ 501(a)–(b) & 901.

98. Ambrecht & Associates, *Summary of the Economic Growth and Tax Relief Reconciliation Act of 2001* 2, http://www.taxlawsb.com/resources/general/EGTRRASummary.pdf (showing charts that outline the future changes in the estate, gift, and generation-skipping transfer taxes).

99. Economic Growth and Tax Relief Reconciliation Act § 901.

100. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, §§ 101(a), 301(a)–(c), 124 Stat. 3296 (2010).

Reauthorization, and Job Creation Act of 2010 (2010 Act), which extended certain portions of the 2001 Act through January 1, 2013.[101] Absent further amendments to the 2001 Act, the rates for the estate tax from 2002 will return on January 1, 2013.[102] Additionally, the 2010 Act set the estate tax exemption at $5 million for 2011 and 2012 with a maximum percentage of 35%.[103]

The 2010 Act complicates estate planning by adding an optional retroactive tax to the estates of decedents who died in 2010.[104] According to this provision, executors can elect to either apply the current estate tax ($5 million exemption and 35% maximum rate) or to forego the use of the estate tax altogether.[105] It appears counterintuitive, but some executors may choose to apply the current estate tax (along with the exemption amount) instead of avoiding the tax completely because it may result in paying a lesser amount of taxes on the whole estate.[106] Along with the estate tax in 2010, the step-up in basis also disappeared as an option for estates to apply to assets in order to lower tax consequences resulting from property appreciation.[107]

Consider Dennis, an eighty-seven-year-old, who died in 2010 and left an estate, including a home he purchased many years before and several stocks whose original records may be impossible to locate at this time.[108] If the executor, Elle, chooses not to apply the estate tax retroactively, the value of all of the assets would be subject to a carryover basis.[109] Using carryover basis, Elle would need to find the original cost Dennis paid for the house, locate the original records for the stocks, and find what Dennis originally paid for other assets. She would then value Dennis's basis as the original purchase value of the assets. Then the carryover basis would simply shift that value to the estate. In this case, the estate would be subject to capital gains taxes on the substantial appreciation of the home and the stocks. Additionally, the heirs would pay income taxes if one of them sold an asset.

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101. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act § 101.

102. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act § 101(a).

103. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act § 302(a)(1)–(2).

104. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act § 301(c). *See also* Eva Rosenberg, *The Dead Have Choices: 2010 Estate Tax Options*, SMARTMONEY (Jan. 18, 2010, 7:00 AM), http://bx.businessweek.com/small-business-tax-deductions/view?url=http%3A%2F%2Fc.moreover.Com%2Fclick%2Fhere.pl%3Fr3948535967%26f%3D9791.

105. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act § 301(c). *See also* Rosenberg, *supra* note 104.

106. *See* Rosenberg, *supra* note 104.

107. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act § 301 (titled "Reinstatement of Estate Tax; Repeal of Carryover Basis"). *See also* Rosenberg, *supra* note 104.

108. *See generally* Rosenberg, *supra* note 104. This hypothetical was based on Eva Rosenberg's explanatory article and example contained within. *Id.*

109. CCH Tax Briefing, Special Report, *President Signs Two-Year Extension of Bush-Era Tax Cuts, Payroll Tax Relief, Estate Tax Compromise*, at 9 (Dec. 21, 2010), http://tax.cchgroup.com/downloads/files/pdfs/legislation/bush-taxcuts.pdf. The EGTRRA two year extension included a limited step-up in basis available in 2010 for up to $1.3 million in assets or $4.3 million if there was a surviving spouse. Economic Growth and Tax Relief Reconciliation Act §§ 541–542(a).

Alternatively, if Elle decides to apply the current estate tax, then the estate would be subject to a $5 million exemption and the estate tax would only apply to the portion over $5 million. To determine the value of the estate, a step-up in basis would apply to assets of the estate. Stepped-up basis is determined by the fair market value of the property on the day Dennis died instead of the original value.[110] It is likely that the fair market value will be higher than the original cost because of the types of assets in this case. This would not lower the total value of the estate to fit under the exemption, but the other taxes would be lower. Because the current exemption is so high, this is Elle's best option to subject Dennis's estate to the least tax consequences possible.

The 2010 Act confused many estate executors and estate planners, especially in regards to those who died with an estate in 2010.[111] In an eleventh-hour move, the legislature confused things and provided no hope for consistency in the future.[112] The federal estate tax is unpredictable and inherently unreliable for those attempting to determine the long-term effects of the tax reform legislation, which started the process to repeal the federal estate tax in 2001.

B. Effects of 2001 Tax Cuts

People have speculated about the long-term effects of the 2001 Act because of the massive amounts of tax cuts it enacted, but the true effects will take years to realize.[113] The short-term effects, however, are easier to determine. The 2001 Act tax cuts favored the wealthier portion of the population over the middle to lower class populations.[114] In fact, "36 percent of the cuts accrued to the richest 1 percent of Americans."[115] This share equaled the amount of tax cuts received by the bottom 80% of Americans.[116] Some speculate that the real effects of the 2001 Act on the American population will show that the bottom 80% of households in America lost more money than they gained.[117]

The 2010 Act presented several problems for estate planners and their clients.[118] For example, consider the situation in which an estate-planning

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110. CCH Tax Briefing, *supra* note 109.

111. *See* Rosenberg, *supra* note 104 (explaining the consequences of choosing to apply the estate tax).

112. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act § 101(a)(1).

113. *See* J. Richard Aronson & Vincent G. Munley, *Wealth-Transfer Taxes in U.S. Fiscal Federalism: A Levy Still in Need of Reform*, 31 PUBLIUS 151, 152 (2001). *See also* Hacker & Pierson, *supra* note 91.

114. MAJ. STAFF OF J. ECON. COMM., 11TH CONG., EXTENDING THE BUSH TAX CUTS IS THE WRONG WAY TO STIMULATE THE ECONOMY, 4 (Comm. Print 2008) [hereinafter BUSH TAX CUTS].

115. Hacker & Pierson, *supra* note 91. *See also* BUSH TAX CUTS, *supra* note 114.

116. Hacker & Pierson, *supra* note 91 (showing that the cuts helped out the wealthy more than the rest of the country).

117. *Id.* at 34. *See also* BUSH TAX CUTS, *supra* note 114, at 3–4.

118. *See* Greenberg Traurig, LLP, *Coping with the Uncertain Effects of Estate and GST Tax Repeal in 2010*, 1 (Tax Alert February 2010) (explaining the problems presented by the repeal of the estate and generation-skipping transfer taxes, while also soliciting the firm's expertise on the subject).

document includes a formula to determine the amount of an estate that passes to a beneficiary.[119] What if the formula also included terms such as "the maximum amount that can pass without estate tax"?[120] If the person died in 2010, when there was no estate tax, deciding how much money passes to the beneficiaries becomes problematic.[121] Those who created estate planning documents or had their estate planning documents modified after the 2001 Act have a way to draft the document to account for the possibility of the absence of an estate tax.[122] However, those who died in 2010 without accounting for the 2010 Act may find it difficult to divide the person's estate according to his will.[123] The new legislation has a further problem: it provides the option to retroactively apply the estate tax to a decedent's estate that passed in 2010.[124]

C. The Great Debate

The recent legislation, along with the return (and partial retroactive effect) of the estate tax, revived many arguments regarding complete repeal of the estate tax discussed since the beginning of the American federal estate tax in 1916.[125] The main theme of these debates follows the basic liberal versus conservative argument. The liberal side views a complete repeal of the tax as maintaining the separation between the rich and the poor; the conservative side views any governmental interference on this transfer as unnecessary and, more importantly, costly.[126] The debate, especially as the repeal of the estate tax draws to a close at the end of 2010, obviously shifted away from legislative or governmental points of view and morphed into a moral debate.[127] From a moral approach, the debate arguments shifted to the estate tax "destroys family businesses" versus the estate tax is "essential to preserving meritocracy in U.S.

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119. *Id.* at 1–2.

120. *Id.*

121. *Id.*

122. *Id.* at 2.

123. *See id.*

124. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act § 301(c). *See supra* notes 91–92 and accompanying text.

125. *See* Ryan J. Donmoyer, *Return of Estate Tax Looms as Final Impediment to Extending Bush Tax Cuts*, BLOOMBERG (Nov. 28, 2010, 10:00 PM), http://www.bloomberg.com/news/2010-11-29/return-of-estate-tax-looms-as-final-impediment-to-extending-bush-tax-cuts.html. *See also* Russell Berman, *Estate Tax Proposal Draws Fire from Conservatives Who Want Full Repeal*, THE HILL (Dec. 9, 2010, 7:00 AM), http://thehill.com/homenews/senate/132813; CONG. BUDGET OFFICE PAPER, *The Estate Tax and Charitable Giving* (July 2004), *available at* http://www.cbo.gov/ftpdocs/56xx/doc5650/07-15-CharitableGiving.pdf [hereinafter *Charitable Giving*]; Ron Durst, *Federal Estate Taxes Affecting Fewer Farmers But the Future Is Uncertain*, 7 AMBER WAVES, Issue 2, at 10 (June 2009), http://www.ers.usda.gov/AmberWaves/June09/PDF/FederalEstateTax.pdf; MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH (2005) (discussing the history of the estate tax and the seemingly incongruent support by both parties in its repeal in 2001 through interviews with many individuals who played a part in the legislation's enactment).

126. *See* Berman, *supra* note 93.

127. *See* Donmoyer, *supra* note 125.

society."[128] This section discusses the main issues presented and argued regarding the estate tax debate: (1) federal revenue, (2) the effects on farmers or small business owners, (3) charitable giving, and (4) the social impact of the estate tax.[129]

1. Federal Revenue

The obvious argument for federal revenue is that if the estate tax disappears, there will be less revenue because people will no longer pay that tax. However, a summary of the cause and effect of repealing the estate tax and losing federal revenue is not that simple and straightforward. Mainly, every tax inextricably links to every other tax; therefore, repealing one tax might offset another tax.[130] The convoluted relationship between the federal revenue and state revenue makes it difficult to determine the exact effects repealing the estate tax would have on the federal revenue and on individual state revenue.[131]

Despite the attention the federal taxes receive, especially during an election campaign, the revenue from federal taxes may not be as voluminous as many people assume. However, the amount those taxes produce has an effect on the funding of programs that may be important to the general public, "such as Medicare, Social Security, education, and reduction of the national debt."[132] Therefore, when taxes are cut, the programs they fund suffer. While many people support the lowering of taxes, including repealing the estate tax, they may neither understand nor agree with the negative consequences those programs may experience.[133] Cutting taxes may even negatively affect state governments because the federal government, its taxes, and state governments are intertwined.[134]

Proponents of the assumption that the repeal of the estate tax negatively affects state governments believe the federal taxes and their exemptions provide an incentive for individuals to spend money.[135] This assumption derived from the American tax system's "degree of paternalism."[136] It encourages people to spend money by offering incentives and exemptions up to certain amounts for

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128. *See id.*

129. *See infra* Part III.C.1–4.

130. *See infra* Part III.C.3 (discussing that repealing the estate tax will lower charitable donations and will consequently raise income taxes due to fewer itemized deductions from fewer charitable donations; thus, the lost federal revenue from the repealed estate tax will offset with increased revenue from income tax). *See also Charitable Giving*, *supra* note 125, at 1.

131. *See* Hacker & Pierson, *supra* note 91, at 34.

132. *Id. See also* Aronson & Munley, *supra* note 113, at 151. The revenue created by the estate and gift taxes in 2009, before their repeal, amounted to about $26 billion, only one percent of the entire federal tax revenue. Durst, *supra* note 125, at 11.

133. *See* Hacker & Pierson, *supra* note 91, at 34.

134. Aronson & Munley, *supra* note 113, at 151.

135. *Id.* at 154.

136. *Id.*

different activities.[137] While the federal government relies heavily on revenue from income taxes, state governments rely heavily on revenue from sales taxes and partially on income tax revenue.[138] Therefore, if the federal taxes and exemptions go down or disappear then the incentive to buy things go down, which means less revenue from sales taxes and less money for state governments to use in funding programs.[139] The possible negative effects on state governments and the federal revenue were not the only issues people were concerned about in the years that followed the enactment of the 2001 Act.[140]

2. Farmers and Small Business Owners

One of the most sympathetic reasons for the permanent repeal of the estate tax concerns the possible negative effects of the estate tax on small business owners and farmers.[141] However, similar to the misconception that the federal estate tax generates a large portion of revenue, the majority of farms and small businesses will not be subject to the estate tax in its current form.[142] Small businesses are twice as likely to be subject to the estate tax as other estates, and farm estates are even more likely to owe a tax.[143] The reason for the higher probability of incurring the tax has to do with the fact that small businesses and farm estates generally have more assets, specifically real estate, than do other individual estates.[144] To address the increased vulnerability of farms and small businesses, Congress included provisions in the Tax Reform Act of 1976.[145]

The first provision included in the Tax Reform Act of 1976 to protect farmers and small business owners was the special valuation provision.[146] This section changed how heirs and beneficiaries valued real estate used for farming

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137. *Id.* The logic parallels that of a store putting on a sale. If people believe they are saving money, then they are likely to spend more. Similarly, if people performed a generation-skipping transfer, but the amount of the transfer was less than the maximum exemption, then they might be inclined to increase the amount they transfer believing they are receiving a greater benefit. In reality, they are actually giving more money. *See id.* Theoretically, current tax laws encourage people to make charitable donations tax-free (through tax exemptions) because individuals give more freely money they were not expecting to have. If there was no estate tax and no related exemption, then people would possibly give less to charities because they would no longer save money through a tax exemption. Instead, the money they give to a charity would literally come out of their pockets and not from a tax exemption. *See id.*

138. *Id.*

139. *Id.*

140. *See* Hacker & Pierson, *supra* note 91. *See infra* Part III.C.2–4.

141. *See* Donmoyer, *supra* note 125. *See also* Durst, *supra* note 125, at 11.

142. In 2009, when the estate tax exemption amount was $3.5 million, only 2.9% of the 38,234 farm estates in America had assets that would have been subjected to the estate tax if a transfer occurred during that year. Durst, *supra* note 125, at 12. As the 2010 Act stands, the estate tax has a $5 million exemption and will remain at this rate, absent further legislation, until 2013. *Id.*; *see also* Tax Relief, Unemployed Insurance Reauthorization, and Job Creation Act §§ 101, 302(a)(1). Consequently, even fewer farms will be subjected to the federal estate tax in the near future. *Id.*

143. Durst, *supra* note 125, at 12.

144. *See id.*

145. *Id.* at 14.

146. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2003, 90 Stat. 1520 (1976).

purposes or "other closely held business use" when determining the value of the estate for estate tax purposes.[147] Previously, heirs or beneficiaries used the fair market value of real estate—its "highest and best use"—on the day the decedent died to determine its value, but this provision allowed farm real estate that met certain criteria to be valued at its current use, lowering the value of the estate as a whole.[148] This provision was intended to subject fewer farm estates to tax consequences because the lower values of the real estate would cause the estate's value as a whole to fall under the exemption limit.[149] Furthermore, the provision also stipulated that if the real estate was transferred to a non-family member or was no longer used for farming or other closely held business use within fifteen years of the decedent's death, then the tax benefits from the special valuation would be recaptured.[150] That caveat to the special farm real estate valuation provision supports the argument that it was Congress's intent to protect small family businesses and farms from the estate tax, and also that the estates valued over the exemption amount, even with this special provision, were the kind of estates intended to be taxed.[151] Additionally, Congress enacted another provision to help protect small businesses and farms from the possible negative effects of the estate tax by allowing payment of the estate tax in certain situations over a longer period of time.[152]

The special valuation provisions under the Tax Reform Act of 1976 set up a new extended payment of the estate tax specifically for farms and other similar small businesses.[153] The provision provides that certain estates involving a farm or other small businesses may pay the pending estate tax over a period of fifteen years, requiring payments only on the interest, and not on the actual tax, for the first five years.[154] Beneficiaries have more time than the usual nine months from the decedent's death to pay the estate tax.[155] Comparatively, the estate tax shows that Congress never intended the beneficiary of the American farmer or small business owner to suffer from the evils of the estate tax.[156] Congress took several steps to protect the beneficiaries from that exact outcome.[157] Because of these two provisions and current estate tax exemption, Congress limited the negative effects on farms and other small

147. STAFF OF J. COMM. ON TAXATION, 94TH CONG. 2D SESSION, SUMMARY OF THE TAX REFORM ACT OF 1976, 85 (Comm. Print 1976) [hereinafter SUMMARY].

148. *See id.* at 85–86.

149. *See* Durst, *supra* note 125, at 14.

150. Tax Reform Act of 1976 § 2003; SUMMARY, *supra* note 147, at 84–85.

151. *See* SUMMARY, *supra* note 147, at 84–85. *See also* Durst, *supra* note 125, at 14.

152. *See* Tax Reform Act § 2004(a)–(d)(West 1976). *See also* Durst, *supra* note 125, at 14.

153. *See* Tax Reform Act § 2004(a)–(d).

154. Tax Reform Act § 2004. *See also* SUMMARY, *supra* note 147, at 86. To qualify for the extended payment schedule, the farm or other business must equal at least 65% of the total value of the estate. Tax Reform Act § 2004.

155. *See* SUMMARY, *supra* note 147, at 86. *See also* Durst, *supra* note 125, at 14.

156. *See generally* SUMMARY, *supra* note 147, at 85–86.

157. *See id.*

businesses.[158] Not every farm can be protected from the federal estate tax, but Congress took great measures to ensure that the small family-operated farms that are the most economically vulnerable only suffer minimal harm.[159]

Although there are different kinds of farms, some are more likely than others to be subject to the estate tax because of the value of the estate.[160] Three basic kinds of farms operate in America: rural residence, intermediate, and commercial.[161] The rural residence farms make up almost 75% of American farms, but in 2009 they accounted for only one-third of the estate tax revenue from all farms.[162] Commercial farms generated almost 40% of the estate tax revenue from farms in 2009, even though those farms only accounted for about 6% of the total farm estates that year.[163] This disparity can be explained; commercial farms have higher sales than do intermediate farms or rural residence farms, where the owner usually has another occupation in addition to farming.[164] A commercial farmer's primary (if not only) goal is to make money by selling what is grown on that land; farming is the commercial farmer's business.[165]

All businesses, especially successful ones, have tax consequences; farming is no exception. When a business such as a farm proves to be successful and profitable, it makes more sales and earns more money; therefore, a more successful farm would be more susceptible to tax consequences because of its larger size and commercial value. Additionally, the estate tax returned in 2010 with the $5 million exemption, up from the $3.5 million exemption in 2009.[166] The new law included the higher exemption and other provisions to protect small family farms that do not operate as commercial businesses.

3. Charitable Giving

Taxes and exemptions have a large effect on an individual's incentive to make a charitable donation.[167] As a result, the relationship between taxes and giving must be taken into account when discussing the positive and negative aspects of the federal estate tax.[168] A 2004 Congressional Budget Office Paper explained this relationship by analyzing the effects of increasing the estate tax exemption amount, decreasing the tax percentage maximum, and repealing the

158. *See* Tax Reform Act § 2004(a)–(d).
159. *See* Tax Reform Act § 2004(a)-(d).
160. *See* Durst, *supra* note 125, at 12.
161. *Id.* at 13.
162. *Id.* at 12–13.
163. *Id.* at 13.
164. *Id.* at 12–13.
165. *See id.* at 12.
166. *See* Tax Relief, Unemployed Insurance Reauthorization, and Job Creation Act § 302(a)(1). *See also* Economic Growth and Tax Relief Reconciliation Act § 521(a).
167. *See Charitable Giving*, *supra* note 125, at 1.
168. *Id.*

estate tax permanently.[169] According to the paper, an individual's incentive to give money to a charitable organization could be directly affected by whether that individual will experience a positive consequence.[170] For testators and beneficiaries, the positive consequence generally takes the form of an itemized deduction for tax.

Theoretically, if an individual donates while he is alive, he will not be taxed for the income he donated in that year. Alternatively, if he makes a bequest at his death, the amount of the bequest will not be added to his estate and will not add to the estate's taxable value.[171] Based on the relationship between the tax incentive provided by the charitable giving deduction and the federal estate tax, increasing the estate tax exemption amount while also decreasing the maximum tax percentage would have a negative effect on the amount of charitable donations made in America. People do not participate in charitable giving to receive a tax benefit, but a tax benefit can make the decision to donate an easier one.[172] A person who makes a charitable donation either during life or at his death lowers the value of the estate and, therefore, lowers the estate's tax liability.[173] By increasing the exemption amount of the estate tax, the incentive to make a charitable contribution lowers because not as many estates would be subject to the tax. Fewer estates would stand to benefit from making a charitable gift.[174]

Similarly, if legislation decreases the estate tax percentage, the cost of making the charitable donation increases.[175] If an individual's estate is subjected to the estate tax at a rate of 55%, and the individual leaves a charitable bequest in a will, then the cost of that bequest to the beneficiaries comes out to only fifty-five cents on the dollar.[176] However, if the same individual made the same charitable bequest, but the estate tax rate was 35% instead of 55%, then the cost of the donation would be twenty cents higher for every dollar given.[177] The increase in exemption level and the differences in the cost of charitable giving would account for the 3% decrease in charitable donations hypothesized by the Congressional Budget Office for the year

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169. *See id.*
170. *See id.*
171. *See id.* at 3.
172. *See id.*
173. *See id.* at 1.
174. *See id.* at 1, 3.
175. *See id.* at 3.
176. *See id.* This hypothetical assumes that the amount contained in the bequest makes up a part of the taxable estate and is above the exemption amount. The cost would be fifty-five cents for every dollar donated because that money would go to the beneficiaries if it were not donated. *See id.* However, it would have been taxed at 55%, and, therefore, the beneficiaries would have only received forty-five cents on the dollar. *See id.* This theory also applies if the individual made a donation while living instead of a bequest in a will, except that the cost of the donation would deal with the income tax bracket the individual was in. *See id.*
177. *See id*. In this situation, the beneficiaries would lose sixty-five cents for every dollar given away, as opposed to the forty-five cents in the first scenario. *See id.* Similarly, a donation made during the individual's lifetime would be more costly for the same reasons as above. *See id.*

2000.[178] While this decrease would not be a substantial one, there could potentially be a greater negative impact if the estate tax was repealed altogether rather than simply lowered.[179] If the estate tax had been repealed, the incentive to participate in charitable giving would have decreased so much that the total amount of donations, whether made during an individual's lifetime or else in his will, would have dropped by 6% to 12% in America.[180]

These possible decreases in charitable giving are not terrifying in and of themselves. In fact, if charitable donations decrease, the amount of itemized deductions for income tax purposes decrease, then the revenue from the federal income tax generates more federal tax revenue. That revenue could help offset the lost revenue from the repeal of the estate tax.[181] While that possibility appears to dispel at least some of the fears supporters of the estate tax have, one important question remains: What then would happen to the actual charitable organizations that depend on those donations and bequests to continue their programs?

4. Social Impact: Meritocracy

In 2010 (the year of no estate tax) a few very wealthy individuals, such as George Steinbrenner, former owner of the Yankees, died.[182] It was this passing of large estates without federal estate tax consequences that led many individuals to voice their opinions and support the return of the federal estate tax.[183] Such estates now face the possibility that the estate tax might apply retroactively, and that such estates will not remain entirely free from tax consequences.[184] Nevertheless, the fear that the estate tax could someday be permanently repealed awoke and took form shortly after the passing of these wealthy individuals.[185]

The existence of an estate tax boils down to the idea that America is and should remain a meritocracy, not an aristocracy.[186] Large estates that pass on wealth without any tax penalties simply because the decedent passed away in a certain year as opposed to any other paint a very discomforting, and yes, unfair, picture.[187] The idea of permanently repealing the estate tax goes against the

178. *See id.* at 1, 3–4, 8.

179. *See id.* at 1, 8.

180. *See id.* at 1, 4, 8.

181. *See supra* Part III.C.1.

182. Ruth Marcus, Opinion, *George Steinbrenner and Estate Tax Insanity*, WASH. POST (July 15, 2010), http://voices.washingtonpost.com/postpartisan/2010/07/george_steinbrenner_and_estate.html. *See also* Donmoyer, *supra* note 125.

183. *See* Donmoyer, *supra* note 125. "Proponents of the tax . . . view it as essential to preserving meritocracy in U.S. society. That argument has gained steam this past year with the deaths of at least five U.S. billionaires." *Id.*

184. *See generally* Marcus, *supra* note 183.

185. *See id. See also* Donmoyer, *supra* note 125.

186. *See* Donmoyer, *supra* note 125. *See also* Marcus, *supra* note 183.

187. *See* Marcus, *supra* note 183.

very foundation of this country's original ideology, and considering the relatively small number of estates the estate tax actually applies to, the arguments for a permanent repeal do not have much support.[188] The founders came from a world built upon an aristocracy, something many of them vehemently despised, and yet what has been created in the wealthiest portion of this country can accurately be described as a modern-day aristocracy.[189] If the estate tax was permanently repealed, the estates of the wealthiest group of the population, the group that could aid the most in leveling the income disparity and the treasury deficit, and the only group ever affected by the estate tax, would no longer be subjected to any tax consequences.[190] This should not happen.

IV. SHOULD WE STILL HAVE INHERITANCE?

The direct correlation between the system of inheritance and the inequality of wealth in America is evidenced by the fact that a small percentage of the population controls the vast majority of wealth. In this type of system, a person's income no longer matters because if a person does not have wealth to build on, he is already behind in the race to be the most successful. The argument supporting the modern system of inheritance cites the beneficial relationship between inheritance and capitalism.[191] However, this relationship does not exist, at least not in the positive form many believe it to take. In fact, inheritance works against and may even prevent capitalism. This Part will discuss the unjust nature of the inheritance system, including a look at the capitalism argument and its shortcomings.

A. The Inherent Nature of the Inheritance System

While the juvenile argument of "that's not fair" rarely receives critical attention or causes great minds to think twice, sometimes there is some truth to it: some things are simply not fair. A very small and disproportionate number of people control the vast majority of wealth in America.[192] In 2007, the

188. *See id.* "For almost a century the estate tax affected only the richest 1 or 2 percent of citizens, encouraged charity, and placed no burden on the vast majority of Americans. This tax was grounded on a core American value: that all people should have an equal opportunity to pursue their economic dreams." GRAETZ & SHAPIRO, *supra* note 125, at 1.

189. *See supra* Part II.C.

190. *See* Marcus, *supra* note 182.

191. *See infra* Part IV.B.

192. Mariacristina De Nardi, *Wealth Inequality and Intergenerational Links*, 71 THE REV. OF ECON. STUDIES 743, 743–44 (July 2004). *See also* D. W. Haslett, *Is Inheritance Justified?*, 15 PHIL. & PUB. AFFAIRS 122, 123 (Spring, 1986). While the exact numbers Haslett used to show the unequal distribution of wealth are outdated (they are from 1983), the idea of the wealth breakdown in America is the same today. *See* G. William Domhoff, *Power in America: Wealth, Income, and Power*, WHO RULES AMERICA?, Sept. 2005 (updated July 2011), http://sociology.ucsc.edu/whorulesamerica/power/wealth.html (explaining the use of wealth and income distributions in America as power indicators and using up-to-date figures).

wealthiest one percent of Americans controlled over one-third of America's private wealth.[193] The majority of the American population controlled less than half of the wealth controlled by the wealthiest 1%.[194] Wealth offers unique opportunities to those who possess it: it generates income when invested, it acts as a safety net during economic recessions (similar to the recent American recession), and it provides employment and educational opportunities that would otherwise be unattainable.[195] The advantages of wealth do not create the inequality of wealth, but they do cause that inequality to be more persistent.[196]

The majority of the country possesses an unequally small amount of wealth, but that does not mean the same group of people with very little wealth also earn a disproportionately small amount of the country's total income (such as the income in the form of wages).[197] This inequality does mean, however, that most people in the country do not have, and most likely will never have, control over most of the wealth in this nation because it is passed through inheritance from generation to generation and not "earned" in an egalitarian sense.[198] To analogize, if life was a race, the finish line was a certain fixed dollar amount that represented a person's total net worth, and every person in America was a runner, then the individuals who started the race with a large estate from their parents essentially got a head-start. It would not matter how fast a person was, if he had to start at zero dollars it would be impossible for him to catch up to a person who started a few feet (or dollars) from the finish line. Inheritance, as a system, creates inequality of wealth, and consequently denies most of the American population all of those advantages that wealth provides.[199] The inequality of wealth in this country, and the fact that our laws aid in preserving this system instead of fighting against it, contradicts the beliefs and aspirations this country was built upon.[200]

B. Inheritance: Friend or Foe of Capitalism?

Many people who support the current system of inheritance also support capitalism. They believe that inheritance acts to intervene to maintain our capitalist society.[201] However, it is clear that inheritance actually works against

193. *See* Domhoff, *supra* note 192. According to the chart used, in 2007 the top 1% controlled 34.6% of the total net worth of wealth in the country; the next 19% controlled 50.5%; the bottom 80% controlled only 15%. *Id.*

194. *See id.*

195. Lisa A. Keister, *Sharing the Wealth: The Effect of Siblings on Adults' Wealth Ownership*, 40 DEMOGRAPHY 521, 521 (Aug. 2003).

196. *See id.* at 521–22. *See also* Haslett, *supra* note 192, at 127–31.

197. *See* Domhoff, *supra* note 192. *See also* Haslett, *supra* note 192, at 124.

198. *See* Haslett, *supra* note 192, at 124–26. *See also* De Nardi, *supra* note 192, at 744. "The rich leave more wealth to their offspring, who, in turn, tend to do the same. This behavior generates some large estates that are transmitted across generations because of the voluntary bequests . . . ." *Id.*

199. Keister, *supra* note 195, at 521–22. *See also* Haslett, *supra* note 192, at 127–28.

200. *See supra* Part II.C. *See also* Brewer, *supra* note 2, at 307–08.

201. Haslett, *supra* note 192, at 188.

promoting capitalism and frustrates the basic functions of an efficient capitalist society.[202]

Three basic ideals lay the foundation for capitalism and tie it to the supply-and-demand relationship that supports it as a functioning economic system: freedom, equal opportunity, and proportionate distribution in relation to productivity.[203] Considering the relationship between the three ideals and inheritance, the latter two ideals present an especially confusing and contradictory position.[204] Specifically, the structure of inheritance opposes the idea of equal opportunity, a clear and universally understood concept.[205] For a capitalist structure to be efficient and to reach its full potential, all members of the society must have the equal opportunity to pursue the trade of their choice and to be productive in that trade.[206] To achieve these goals everyone must start from the starting line at the same time, with no one receiving a head start.[207] Unfortunately, inheritance does not accomplish this goal and instead goes against the structure of a capitalist system by offering advantages to only a few privileged individuals.[208]

The system of inheritance functions contrary to capitalism not only because it destroys equal opportunity, but also because it leads to distributing rewards not according to an individual's level of productivity.[209] The conflict between these two structures becomes clear when looking at the central idea of both.[210] Capitalism operates based on the distribution system of "[t]o each according to what he and the instrument he owns produces," whereas the foundational principle of inheritance can be more aptly described as "to each according to what his parents left him."[211] The goal of inheritance contradicts the idea of distribution based on productivity because a person could be completely unproductive but, depending on the choices and wealth of his

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202. *See id.* at 126–31.

203. *See id.*

204. *See id.*

205. *See id.* at 128–31.

206. *See id.* at 128–29.

207. *See supra* Part IV.A. *See also* Haslett, *supra* note 192, at 188.

208. *See* Haslett, *supra* note 192, at 130–31. "Wealth *is* opportunity." *Id.* at 130. By equating wealth with opportunity, Haslett makes it clear that, by its very nature, inheritance creates unequal opportunity because it creates unequal wealth. *See id.* He next presents a hypothetical of someone inheriting $1 million and then being able to invest that sum in certain bonds that offered a secured yearly income. *Id.* This income could be a substantial amount because of the size of the original capital investment that this individual would not have had without inheritance. *See id.* Significantly, this individual would most likely not have achieved such a yearly income without the system of inheritance, meaning that a person who does not benefit from such a bequest would not have this opportunity, but instead might be constrained to working in a field that does not require initial capital, such as labor or other lower paying positions. *See id.* Thus, in this hypothetical, inheritance literally prevents people from having an equal opportunity to pursue whichever employment they desire. *See id.*

209. *See id.* at 127–28.

210. *See id.*

211. MILTON FRIEDMAN, CAPITALISM & FREEDOM 161–62 (1962). *See also* Haslett, *supra* note 192, at 127.

parents, could obtain a large amount of wealth through inheritance.[212] The argument that inheritance does not heed, but in fact aids capitalist systems must, therefore, fall flat. Distribution according to inheritance essentially creates a system that uses luck to decide who gets what amount of wealth, instead of a system of distribution that encourages productivity through incentive, or in other words, a capitalist society.[213]

V. CONCLUSION

America's system of inheritance has a place. That system, however, should not determine the ownership of the majority of wealth in America nor base determinations on a pre-determined and unfair system. The current system removes the right to equal opportunity and frustrates the incentive of productivity. The American inheritance system is antiquated and outdated, keeping Americans trapped in the middle ages like peasants.

The American inheritance system is contrary to the ideals of the founding fathers that fought for freedom from the English aristocracy. If the laws do not change and inheritance in its current form continues, the rich will get richer by passing massive amounts of wealth at death with very little consequence. If the system continues to allow the wealthy to give their children a financial benefit, the infamous "American dream" would be lost forever. It would no longer be the mantra of America to praise someone for making something out of nothing because that would be impossible. From the beginning, Americans realized the system was inherently unjust because it blindly passed wealth and subsequently political power to someone who was born into the right family. This realization took centuries to formulate and crystallize enough for people to change the system entirely and form a democracy. Perhaps it may be time for Americans to look at another time-honored tradition and evaluate it in the same light.

Generally, giving or even having money to gift to family or friends is not unfair or unjustified. However, it may be time to reconsider the American inheritance system. This system may ensure testamentary freedom, but it also creates an avenue to form a modern-day aristocracy. The rich leave their beneficiaries with a head start, and the poor continuously struggle to keep up with those who have been handed wealth on a silver platter. The new (old) American nightmare is being realized.

Initially, inheritance was an exercise of freedom and personal rights. It has become a bar from freedom and creates limitations for some people. That begs the question: Does inheritance do more harm than good?

by Meggie Orgain

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212. *See* Haslett, *supra* note 192, at 128.
213. *See id.* at 127–28.