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Change We Can't Believe In . . . or Afford: Why the Timing Is Wrong to Reduce the Estate Tax for the Wealthiest Americans

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ARTICLES

Change We Can’t Believe In . . . or Afford: Why the Timing Is Wrong to Reduce the Estate Tax for the Wealthiest Americans

PHYLLIS C. SMITH*

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I. INTRODUCTION

At the end of 2008, the United States was in the midst of an economic storm. Enduring its worst financial state since the Great Depression, the nation faced a number of significant societal and industrial problems. Well-known banks and businesses were fold-

ing, the housing market was in crisis, and the unemployment rate had reached a historical high. While the government endeavored to deal with the country's economic troubles in a variety of ways, it should have been more careful in its development of tax policy. No precise calculus may exist for formulating tax solutions, but the notion that an effective tax policy can be a helpful aid to economic recovery should go unquestioned. Unfortunately, recent tax policy has not reflected the needed concern for the country's economic predicament. This was especially true with respect to several issues which stemmed from the Economic Growth and Tax Relief Reconciliation Act ("EGTRRA") of 2001, also known as the "Bush tax cuts."

Specifically, because of EGTRRA's sunset provisions, reform was necessary to deal with the temporary repeal of the estate tax scheduled for the 2010 tax year. Moreover, reform was needed to respond to EGTRRA's scheduled reinstatement of the 2001 estate tax applicable exclusion amounts in 2011. Needless to say, estate tax reform did not happen prior to 2010, and the timing of the temporary repeal could not have been worse. In fact, the timing of the temporary repeal was in direct contradiction to the original purpose of the estate tax. Whereas transfer taxes were historically instated specifically to raise revenue during the country's financial time of need, the temporary repeal occurred during a

5. See id. § 501(a), 115 Stat. 38, 69.
6. See id. § 901(a), 115 Stat. 38, 150.
7. See Jeffrey A. Cooper, Ghosts of 1932: The Lost History of Estate and Gift Taxation, 9 FLA. TAX REV. 875, 881 (2010) (describing occasions when Congress resorted to estate taxation as emergency measures to raise revenue).
8. See id.
time when the country could least afford to forego additional revenue.  

Even now, the economy is in the stages of recovery. While the estate tax is in situational uncertainty, this is the right time to focus on its original purpose. Any tax implemented must have a revenue generating rationale in order to be sustainable, and the estate tax is not an exception. Because the economic state of the country is still at risk, now is not the time to provide tax breaks to the wealthy by reducing estate tax obligations through increased exemptions and reduced rates.

In order to use the estate tax more effectively to raise revenue, the government need only look to the historical treatment of the estate tax as a foundation to justify imposing an additional tax burden on the wealthy. In fact, it is especially appropriate to raise taxes on the economic elite during a financial crisis because these individuals own a substantial amount of wealth and wealth concentration has contributed to disparities in wealth. In addition, when Congress adopted the estate tax as part of the Internal Revenue Code in 1916, the tax was, in large part, aimed at raising revenue.

The additional financial burden of providing an economic bailout for the country was placed on the propertied, wealthy citizens because they could best afford to provide the additional funding necessary to sustain the country. This financial burden, along with other revenue raising measures, was imposed at death when


10. See David Frederick, Historical Lessons from the Life and Death of the Federal Estate Tax, 49 AM. J. LEGAL HIST. 197, 214 (2007) (“Prior to the phase out, the estate tax generated $23.1 billion in 1998, and . . . $27.4 billion in 2006.” (footnote omitted)).

11. See infra text accompanying notes 227–90.

the taxpayer’s property was already being transferred. While there is extensive literature on whether there should even be an estate tax, there is little discussion as to how tax policy has made the estate tax less effective as a revenue generator and what reform should be made to reverse that phenomenon. This Article seeks to change that. In outlining a framework for restoring the estate tax as an effective supplemental revenue generator, the Article proposes three specific methods of reform.

First, appropriate estate tax rates should be implemented, along with an accompanying appropriate applicable exclusion amount. Specifically, the estate tax applicable exclusion amount should be reduced, and the estate tax maximum rate should be increased based on the economic temperature of the country. Congress should only curtail the maximum rate when fiscal needs subside. Second, in order to provide a better incentive for the wealthy to make lifetime gifts, both the gift tax applicable exclusion amount and accompanying gift tax rate should be reduced.

Finally, the currently unlimited estate tax charitable bequest deduction should be modified. Specifically, the charitable bequest deduction should be revised to model the charitable contribution limitation deduction set forth under the income tax rules and regulations. As such, the general rule should set the charitable bequest deduction limitation at 50% of the adjusted gross estate, which is consistent with the charitable contribution deduction limitation for income taxation.

Implementing these modifications would create a system that would foster the multiple purposes of the transfer tax system: generating revenue, curtailing wealth concentration, and incentivizing charitable giving such that harmony would be restored between these objectives without having to sacrifice the economic recovery of the country. By placing limitations on the charitable bequest deduction, reducing the applicable exclusion amount, and raising the top marginal rate for the estate tax, revenue may well increase. This is the type of change the nation should believe in.

This Article will present the proposals as follows: Part II provides a historical perspective of the estate tax and examines

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13. For the purpose of this Article, the terms “appropriate tax rate” and “appropriate exclusion amount” are figures, which in the author’s opinion, balance government revenue concerns with individual wealth pursuits.
how the gift tax may make the estate tax more effective. Part III provides an analysis of transfer taxes as revenue resources and further explores how the estate tax may be made more effective. Part IV provides a historical perspective of the charitable contribution deduction and the charitable bequest deduction, including an analysis of where donors contribute. In addition, it reviews justifications for the limitations on the currently unlimited charitable bequest deduction. Part V provides an analysis of wealth concentration and how it may impact the effectiveness of the estate tax. Part VI provides the conclusion.

II. HISTORICAL PERSPECTIVE OF TRANSFER TAXES

A. History of Estate Taxes

The initial manifestation of the estate tax came in 1797 when the United States needed to raise funds in anticipation of expenses to deal with a military conflict against France.14 The tax was enacted in the form of federal tax stamps and was repealed in 1802.15 Not intended to be a massive revenue-raiser, the tax was part of a comprehensive tax plan to generate revenue for the government to finance the military conflict.16 In a similar manner, the

14. Frederick, supra note 10, at 199. During the 1790s, the French had grown hostile towards the United States because they reopened trade with Great Britain, France’s greatest enemy at the time. Id. To combat the French threat, the United States Congress in July 1798 authorized President Adams to increase its naval power by purchasing new warships and arming merchant vessels, both at considerable cost. In anticipation of the costs of the growing conflict with the French, Congress enacted a far reaching stamp tax to raise revenue. Id. (footnote omitted).

15. PATRICK FLEENOR, TAX FOUND., A HISTORY AND OVERVIEW OF ESTATE TAXES IN THE UNITED STATES 3 (1994), http://www.taxfoundation.org/files/f7c34848582a114133f90711b50b9a3a.pdf. “[T]he Stamp Act of 1797 . . . required that federal tax stamps be purchased when transferring property from an estate.” Id. The price of the stamp was directly related to the value of the property being transferred from an estate. Id.

16. Frederick, supra note 10, at 199. This early death tax was not designed as an independent revenue raising provision, but instead fit into a larger picture of taxing a wide array of legal documents, as was common in the laws of England. The stamp tax was therefore not an attempt to impose a heavy tax
transfer tax was reborn during the Civil War to address the financial concerns of the nation. Once again, the primary purpose behind the tax was to finance the war. 17 While the Civil War was undoubtedly a source of economic stress for the country, 18 tax policy was used to generate additional revenue for the nation’s military pursuits.

When the anticipated amount of revenue fell short, however, Congress responded by increasing some of the tax rates and implementing the gift tax as a backstop to prevent the wealthy from avoiding a tax altogether by gifting the property during their lifetimes. 19 Used in this fashion, the estate tax served as a source for generating revenue on the basis of governmental need, demonstrating the estate tax has the ability to raise revenue effectively without having to serve as the primary source of the nation’s revenue. As Congress had in past times, the estate tax was once again repealed after the financial necessity had dissipated. 20

Under the Revenue Act of 1916, the estate tax was again reinstated because of the government’s anticipated need for revenue. 21 With the entrance into World War I impending, revenue was needed to fund the country’s war costs. 22 Moreover, even though the estate tax was only reinstated as a supporting source of

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Id. (footnote omitted).


18. See Casualties and Costs of the Civil War, DIGITAL HIST., http://www.digitalhistory.uh.edu/historyonline/us20.cfm (last updated Apr. 12, 2012) (noting that the cost of the Civil War was approximately $6.8 billion, and was one of the most costly wars in history for our nation).

19. Frederick, supra note 10, at 200. See infra Part II.B for a more detailed discussion regarding the role of the gift tax.

20. Frederick, supra note 10, at 200.

21. Id. at 205.

22. Ajay K. Mehrotra, Mergers, Taxes, and Historical Materialism, 83 IND. L.J. 881, 903 (2008) (“Nearly every facet of American life, including the federal tax system, was dramatically altered by the war. Beginning with the Revenue Act of 1916, which significantly increased income tax rates, enacted a graduated estate tax, and imposed an innovative war profits tax on certain businesses, the World War I revenue acts radically redirected American fiscal policy . . . .” (footnote omitted)).
revenue to the individual income tax, the reinstatement marked a
turn in history for the transfer tax system.\textsuperscript{23} Similar to past periods 
of economic crises when the United States had been involved in or 
was about to enter a military conflict, our government strategically 
used the estate tax to address imminent financial needs of the 
country.\textsuperscript{24} When coupled with other revenue raising measures 
such as the income tax, the estate tax proved to be an effective tool 
at generating the kind of capital necessary to restore the econo-
my.\textsuperscript{25}

In fact, during the period following World War I, prosperity 
fLOURished.\textsuperscript{26} Such prosperity suggests that the estate tax has the 
potential to be a valuable tool for raising revenue when used 
properly and effectively.\textsuperscript{27} Very simply, by increasing the estate 
tax on the wealthiest citizens, Congress can address the economic 
stresses of the country without placing an undue burden on indi-
vidual wealth pursuits.

Unlike times past, however, the end of World War I did not 
result in the end of the estate tax. While a repeal of the tax would 
have naturally resulted after the war if the tax’s only purpose was 
to finance the military conflict, context reveals that raising revenue 
was no longer the primary motivator for imposing the estate tax. 
In fact, by the end of the war, the progressive movement in Ameri-
ca had gained enough political support to shift the focus of the es-

\begin{itemize}
\item \textsuperscript{23} FLEENOR, supra note 15, at 5.
\item \textsuperscript{24} Frederick, supra note 10, at 199–200 (detailing the use of the estate 
tax during the “Undeclared War” with France in the 1790s, the Civil War, and 
the Spanish-American War).
\item \textsuperscript{25} Id. at 200 (“The central historical lesson from these forerunners to the 
modern estate tax is simple: a death tax can be an effective and relatively un-
controversial tool for raising substantial revenue in a time of financial crisis, 
especially war.”).
\item \textsuperscript{26} See Cooper, supra note 7, at 885 (“Between 1921 and 1928, the num-
ber of Americans with annual incomes over $1,000,000 increased from 21 to 
511, while the number earning between $500,000 and $1,000,000 annually in-
creased from 63 to 983.”).
\item \textsuperscript{27} See Frederick, supra note 10, at 200–01 (“The 1898 death tax raised 
$22.5 million in four short years. Adjusted for inflation, these totals be-
come $184 million and $525 million, respectively, in the year 2006. Such col-
lections can have a significant impact on a financial crisis, especially when cou-
pled with other revenue producing measures such as income taxes and property 
taxes.” (footnotes omitted)).
\end{itemize}
tate tax from revenue generator to an instrument to combat wealth concentration.\textsuperscript{28} With the Revenue Act of 1916 established as the permanent source of the estate tax, this new progressive focus began to significantly diminish the estate tax’s status as an effective revenue generator.

The nation’s post-war prosperity came to a screeching halt in 1929 when the stock market crashed and the country entered into the Great Depression.\textsuperscript{29} The country was at its economic worst during this time period, as millions of people became unemployed, businesses failed, and banks closed.\textsuperscript{30} Although raising taxes was probably not the government’s first choice to deal with the situation, the country was in dire straits. Drastic action was necessary; the government needed a reliable revenue source.

Consequently, the government’s need for a solution only intensified as the country’s economic picture became bleaker. As other measures were considered and rejected by Congress or failed once implemented, tax policy was relied upon to deal with the financial crisis created by the Great Depression.\textsuperscript{31} Challenged to find a balance between addressing the rising deficit without sacrificing the economic growth of the country or its citizens,\textsuperscript{32} the

\begin{enumerate}
\item \textsuperscript{28} See infra text accompanying notes 227–90 for further discussion on wealth concentration.
\item \textsuperscript{29} See Frederick, supra note 10, at 206.
\item \textsuperscript{30} See Cooper, supra note 7, at 878 n.3 (“Between 1929 and 1932, the U.S. economy ‘went into a fatal tailspin’ as some 5,000 banks and 50,000 other businesses went bankrupt, unemployment rates soared from 3% to 25% and manufacturing activity declined by more than 50%.” (citing DON NARDO, TURNING POINTS IN WORLD HISTORY—THE GREAT DEPRESSION 3, 13 (Don Nardo ed., 2000))).
\item \textsuperscript{31} See id. at 878–88. Congress entertained the notion of a national sales tax. \textit{Id.} at 886. Congress also entertained the idea of borrowing the funds to finance the government but ultimately concluded that the United States was already highly leveraged and any more borrowing might weaken the U.S. dollar, thereby exacerbating the problem. \textit{Id.} at 889.
government ultimately raised taxes. In addition to using income
taxes, both individual and corporate, transfer taxes were used to
generate additional revenue.\footnote{Frederick, supra note 10, at 206–207. Part of this specific taxation plan raised the top marginal rate and reinstated the gift tax. Id. at 206.}

Under the Revenue Act of 1932, the top marginal rate for
the estate tax was increased to 45\%, and the applicable exclusion
amount was reduced from $100,000 to $50,000.\footnote{Cooper, supra note 7, at 898 tbl. 1.} By 1934, the
top marginal rate was further increased to 60\%, and by the time
World War II started, the top marginal rate was increased to over
increasing the amount includable per taxable estate, and adding
additional kinds of property subject to taxation, the government
increased revenue.\footnote{Cooper, supra note 7, at 896-97. The Revenue Act of 1932 accomplished the base-broadening for the estate tax by implementing the following methods: increased tax rates, narrowed tax brackets, and a reduced exemption. Id. The changes “exposed thousands of previously nontaxable estates to estate taxation . . . [and] produced a ripple effect, as all estates above [a certain] level were subject to estate taxation on a larger proportion of their assets.” Id. at 897.} For example, between 1930 and 1939, the
estate tax raised $2.1 billion, and with the benefit of amendments
and increases through World War II, it raised an additional $2.35
billion from 1941 to 1945.\footnote{See id. at 6-7 tbl. 6.3. The estate tax applicable exclusion amount remained at $60,000 from 1942 until 1977. Id.}

After the financial crisis ended, raising revenue had again
become a secondary objective for the estate tax. While other forms
of taxation made adjustments to continue the revenue raising ob­
jective as time passed, the estate tax was not able to maintain the
same pace.\footnote{Frederick, supra note 10, at 206-07.} In fact, the estate tax rates and applicable exclusion
amounts remained stagnant for many years, thereby becoming less
of a factor in the federal tax collections over time.\footnote{Joulfaian, supra note 35, at 2-2 to -3.} Furthermore,
there is little evidence that the estate tax, as it was being used, had
any impact on decreasing wealth concentration.
Nevertheless, when compared to other federal revenue sources, the estate tax has made important contributions to the country as a revenue source.\textsuperscript{40} By reviewing in more detail how the estate tax has served as a supplemental revenue source for the government, one can glean how to more effectively use the estate tax in that respect. Yet, before fully discussing how to successfully utilize the estate tax, it is prudent to first mention the role of the gift tax and how it may be used more effectively in a transfer tax system.

\textbf{B. Role of the Gift Tax}

With the imposition of an estate tax looming on transfers at death, the obvious solution to avoid estate taxation would be to make as many lifetime gifts as possible. To close this loophole, however, Congress has consistently enacted legislation which hinders such strategic planning. For example, under the Revenue Act of 1924, Congress instated the gift tax.\textsuperscript{41} Although the tax was repealed a short two years later,\textsuperscript{42} the country was in desperate need of revenue after the Great Depression.

To help raise funds, the government again turned to tax policy. The gift tax was reinstated as part of the Revenue Act of 1932, closely mirroring the income and estate tax in many aspects.\textsuperscript{43} Although the applicable exclusion amount for the gift tax was the same as that of the estate tax, the top marginal gift tax rate was set at 75\% of the top marginal rate set for the estate tax.\textsuperscript{44} Moreover, while the gift tax was reinstated during a time when the country needed additional financial resources, there is no claim that the gift tax was intended to be an independent revenue genera-

\begin{itemize}
  \item \textsuperscript{40} Frederick, \textit{supra} note 10, at 214 ("Moreover, if the estate tax were to be collected more stringently, without such measures as high initial exemptions and a progressive rate schedule, it could generate even more revenue. The money raised by the estate tax is not intrinsically insignificant and the tax by no means lacks substantial revenue potential.").
  \item \textsuperscript{41} Cooper, \textit{supra} note 7, at 883.
  \item \textsuperscript{42} \textit{Id}.
  \item \textsuperscript{43} \textit{Fleenor, supra} note 15, at 6. "The tax was due annually," and the marginal tax rate and exemption amount were based on cumulative gifts made.
  \item \textsuperscript{44} \textit{Id} at 6 fig. 2.
\end{itemize}
Instead, the gift tax was designed to backstop the estate tax and prevent the wealthy from avoiding the estate tax through inter vivos gifts. In addition, the gift tax provided a disincentive for the wealthy to make gifts of income-producing property to family members in a lower income tax bracket.

By implementing a gift tax rate at 75% of the estate tax rate, it is clear that Congress did not intend to make the gift tax punitive and may have even intended to encourage inter vivos gifts. After all, a gift tax can raise revenue immediately rather than waiting until death, as required under an estate tax. With the gift tax rate set at 75% of the estate tax rate and the tax base only including the value of the property actually transferred, the transferor has the motivation and opportunity to transfer wealth inter vivos at a reduced cost. The cost is reduced because of the tax-exclusive nature of the gift tax as opposed to the tax-inclusive nature of the estate tax.

45. See Gans & Soled, supra note 12, at 761 ("Congress designed [the gift tax] to protect the integrity of the estate tax and income tax.").
46. Id. at 761–62.
47. Id. at 762–63.
48. Cooper, supra note 7, at 912. If wealthy taxpayers could be induced to make gifts, then revenue generated as a result of the gift would be due the following year, the same as the income tax. Because making a gift is a voluntary act, there had to be an incentive for the person to make the gift, ergo the reduced tax rate for the transferred property. Id.
49. Id. ("Congress fully realized that this approach would provide wealthy taxpayers with a significant opportunity to reduce their overall tax burden but were willing to do so as a means of generating immediate federal revenue.").
50. Phyllis C. Smith, The Estate and Gift Tax Implications of Self-Settled Domestic Asset Protection Trusts: Can You Really Have Your Cake and Eat It Too? 44 NEW ENG. L. REV. 25, 44 (2009) ("The effective rate refers to the fact that the gift tax is ‘tax exclusive,’ and therefore the applicable tax is payable on the actual amount of the gift transferred, and the transferor will use other assets to pay the tax owed. On the other hand, the estate tax is ‘tax inclusive’ in that the assets used to pay the tax are included in the calculation to determine the applicable tax, so fewer assets are ultimately transferred." (footnote omitted)); see also REGIS W. CAMPFIELD ET AL., TAXATION OF ESTATES, GIFTS & TRUSTS 12 (23rd ed. 2006). See generally Kerry A. Ryan, Human Capital and Transfer Taxation, 62 OKLA. L. REV. 223 (2010) (discussing in detail other salient features of the gift tax).
Importantly, by receiving the revenue generated from the gift tax upfront, the government would, in turn, receive less revenue from the estate at the transferor's death from a transfer tax perspective. Considering the time value of money, the current revenue generated by the gift tax may well be more valuable than the anticipated revenue generated later through the estate. Consequently, the gift tax serves multiple purposes, not only as a backstop to the income and estate tax, but also as a revenue generator.\(^{51}\)

Moreover, by unifying the applicable exclusion amount with the estate tax and reducing the general rate of taxation, the government was able to bridge the gap to generate more revenue and preserve some of the estate tax base. Current tax policy should not lose sight of such success. By heeding tax policy measures used in prior government administrations, the government can endeavor to make the current system generate more revenue. Consider, for example, the current gift tax applicable exclusion amount. While the measure is temporary, the gift tax applicable exclusion amount is currently unified with the estate tax at $5 million.\(^{52}\) This gift tax exclusion amount exceeds the appropriate level, and as such, both the estate tax and gift tax applicable exclusion amounts should be reduced. Moreover, the gift tax rate should be 70% of the estate tax rate.\(^{53}\)

III. TRANSFER TAXES AS SOURCES OF REVENUE

A. Role of the Estate Tax as a Source of Revenue

The role of the estate tax as a source of revenue is well-established in the United States. Historically, the estate tax has been used to raise revenue when the country's financial needs have been great. For example, in anticipation of the expenses needed to

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\(^{51}\) See generally Gans & Soled, supra note 12 (providing a detailed discussion regarding enforcement and other reforms which make the gift tax even more effective at raising revenue and protecting the income and estate tax systems).

\(^{52}\) The estate and gift transfer taxes were decoupled in 2001 pursuant to EGTRRA. The transfer taxes were unified again in 2010 and set to remain so until December 31, 2012, as a result of Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296 (codified in scattered section of 26 U.S.C.).

\(^{53}\) See infra Part III.C.
fund World War I, Congress implemented what became the permanent estate tax in 1916; since that time, with exception of brief periods of repeal, transfer taxes have been important sources of revenue for the federal government.54 In 1918 alone, the government raised about 1.3% of the total federal revenue from transfer taxes.55

Of course, the income tax has always been the primary tax relied upon to generate revenue. Unless the estate tax applicable exclusion amounts were significantly reduced to include virtually all estates, the income tax pool would undoubtedly always exceed the estate tax pool. In addition, because of the reliance on the individual income tax to generate substantial revenue on an annual basis, the estate tax was never intended to become a major source of revenue.56

Be that as it may, the estate tax has still served an important purpose in the revenue raising agenda. For instance, during the years of the Great Depression, the estate tax applicable exclusion amount was reduced, and the tax rate was increased on both the estate and gift tax in order to collect additional revenue.57 Together, these transfer taxes garnered almost $379 million in 1936, an amount equaling almost 10% of the federal revenue raised during the year.58 Such revenue reflected the highest percentage of federal receipts the estate tax has ever collected, a feat especially signif-

54. Darien B. Jacobson et al., The Estate Tax: Ninety Years and Counting, SOI BULLETIN, Summer 2007, at 188, 118, http://www.irs.gov/pub/irs-soi/ninetyestate.pdf. The gift transfer tax was introduced in 1924 but then repealed in 1926. Id. at 121 fig. C. The gift tax was re-instated in 1932 and has become a permanent part of the taxing system since that time. See id.
55. FLEENOR, supra note 15, at 11.
56. Cong. Budget Office, Pub. No. 4130, THE LONG-TERM BUDGET OUTLOOK 53 (2010), http://www.cbo.gov/ftpdocs/115xx/doc11579/06-30-ltbo.pdf (indicating that the federal income tax accounts for 85% of the federal government's revenue and that the total federal government revenue has ranged from 15% to 21% of the gross domestic product over the past 40 years).
57. FLEENOR, supra note 15, at 5–6. The Great Depression and the upcoming conflict of World War II would lead to additional economic demands on the federal budget between 1930 and 1940. The years between 1932 and 1941 represented the highest revenue receipts for estate taxes because Congress raised the tax rates and reduced the exemption levels. Id. at 6.
58. Id. at 11; Joulfaian, supra note 35, at 6-1.
significant considering the country was suffering through its worst economic times.\footnote{59}

While the transfer tax system may not be the first choice for dealing with a budget shortfall, the government has consistently used the transfer tax system to augment the budget in a significant way. Doing so is quite sensible, for after one considers that hundreds of billions of dollars in wealth are estimated to pass at death each year, it is clear that an estate tax has the potential to be of high utility.\footnote{60} In fact, in one year, it was reported that the United States government collected almost $24 billion in transfer taxes.\footnote{61} With such success being evident, the only remaining query is whether the tax may be used more effectively to tap some of these estate assets in order to fund government programs or deal with the rising deficit.\footnote{62} In light of the amount of wealth that is transferred, it is remarkable that only a small fraction of it becomes revenue for the federal government.\footnote{63}

Although there was a short period of time during the estate tax's history when the amount of federal receipts increased, those receipts soon declined and have, in general, continued to decline ever since.\footnote{64} A combination of factors may be attributed to this poor revenue generation from the estate tax. The primary reason for such poor performance has ironically, or intentionally, been tax policy. Tax policy has impacted the amount subject to taxation,\footnote{59. Fleenor, supra note 15, at 6; see also Joulfaian, supra note 35, at 6-5 tbl. 6.1 (providing a record of the government's estate and gift tax revenues from 1917-2009). 60. See Mark L. Ascher, Curtailing Inherited Wealth, 89 Mich. L. Rev. 69, 72 (1990) (indicating $150 billion passes at death each year); see also Joulfaian, supra note 35, at 6-5 tbl. 6.1 (noting that approximately $229 billion was transferred in 2001). 61. Martha Britton Eller, Which Estates Are Affected by the Federal Estate Tax?: An Examination of the Filing Population for Year-of-Death 2001, SOI Bulletin, Summer 2005, at 1, 3, http://www.irs.gov/pub/irs-soi/01esyod.pdf ("[D]ecedents owned more than $229 billion in total assets and reported almost $23.7 billion in net estate tax liability."). 62. Ascher, supra note 60 at 72 (discussing the fact that billions of dollars still pass at death each year). 63. See Joulfaian, supra note 35, at 6-5 tbl. 6.1 (showing revenue generated from estates has been less than 3% of total federal receipts collected since 1942). 64. See id.}
the rate of taxation, and the amount ultimately receivable by the government; when these issues are analyzed over time, one can accurately trace how the estate tax’s revenue raising capability has been severely inhibited.

B. Tax Policy Changes That Inhibit the Estate Tax’s Potential to Raise Revenue

While predicting the precise impact of tax policy changes is not an easy enterprise, it is oftentimes clear which measures will generally result in additional revenue for the government. For example, in the period between 1932 and 1940, tax policy changes were clearly designed to raise revenue. Over the course of that period, the applicable exclusion amount was reduced to as low as $40,000, an amount lower than even the inception level.65 Through these tax changes, the government was able to increase the pool of estates subject to the tax, thereby raising additional revenue.

As a result of the tax policy changes, over 13,000 estate tax returns were filed in 1936,66 the same year the estate tax generated approximately 10% of total receipts collected by the federal government.67 Because the country was in the middle of the Great Depression and the government’s need for revenue was serious, Congress responded by imposing tax increases, not reductions. As a matter of public policy, the country’s need for revenue outweighed individual wealth concerns.

The $40,000 applicable exclusion amount remained static until 1942, when $60,000 was implemented as the new applicable exclusion amount.68 This led to an increase in the number of estate tax returns filed between 1942 and 1977, and the $60,000 applicable exclusion amount remained in place through 1976.69 At that time, a new major tax act was implemented.

The Tax Reform Act of 1976 ("TRA 1976"),70 which took effect in 1977, lowered the estate tax top marginal rate and doubled

65. See id. at 2-6 tbl. 2.1.
66. Id. at 4-4 tbl. 4.1.
67. Id. at 6-1.
68. Id. at 2-6 tbl. 2.1.
69. Id. at 4-4 tbl. 4.1, 6-7 tbl. 6.3.
the estate tax applicable exclusion amount.\footnote{Joulfaian, supra note 35, at 2-4.} In addition, it unified the estate and gift tax.\footnote{\textit{Id.} (discussing that TRA 1976 lowered the maximum estate tax re-form rate from 77% to 70%, raised the exemption amount from $60,000 to $120,666, integrated the estate and gift tax under the Unified Transfer Tax, and modified the estate and gift taxes such that they were complemented with the generation skipping transfer tax, which was implemented to reduce tax avoidance by generation skipping transfers); see also \textsc{Fleenor, supra} note 15, at 7 ("Unification of these provisions kept the cumulative nature of the gift tax and treated distributions from a decedent’s estate as the final transfer.").} Considered comprehensively, TRA 1976 amounted to a substantial tax break and therefore a reduction in revenue generated for the government.\footnote{See Joulfaian, supra note 35, at 6-5 tbl. 6.1 (showing that in 1977, the estate tax generated 2.06% of the total federal receipts collected by the government, whereas the tax generated only 1.32% of total federal receipts the following year, amounting to a nominal reduction of approximately $2 billion and a reduction in approximately $9 billion in real money).}

Moreover, as the changes took effect, the number of transfer tax returns filed decreased significantly.\footnote{\textsc{Fleenor, supra} note 15, at 9 (arguing that this significant decrease “occurred because increases in the unified credit effectively raised the amount of the exemption six-fold").} In the years leading up to TRA 1976, the number of estate tax returns filed increased annually.\footnote{Joulfaian, supra note 35, at 4-4 tbl. 4.1 (noting that in 1971, the number of estate tax returns filed was approximately 149,432, but by 1977, that number had increased to as high as 248,316).}

Between the years 1977 and 1981, however, the number of transfer tax returns filed decreased by more than 45%.\footnote{\textsc{Fleenor, supra} note 15, at 9.} Interestingly, despite the fact that the amount of returns decreased, the amount of revenue generated decreased in the first year but then held steady, averaging around $6 billion per year; nonetheless, the overall share of receipts decreased.\footnote{See Joulfaian, supra note 35, at 6-5 tbl. 6.1. In 1977, the estate tax generated over $7 billion, and in the following year, the revenue had decreased to just over $5 billion. \textit{Id.} Between the years 1979 and 1981, the revenue generated increased from $5.4 billion up to $6.8 billion. \textit{Id.} In turn, the annual share of federal receipts was 2.06% in 1977 and decreased to 1.13% by 1981. \textit{Id.}}

TRA 1976 also provided for incremental increases of the estate tax applicable exclusion amount. As such, the applicable
exclusion amount increased from 1977 until the next major tax act, the Economic Recovery Tax Act of 1981 ("ERTA 1981"). With the passage of ERTA 1981, tax breaks were only heightened. The estate tax rate was reduced, the applicable exclusion amount was increased, and an unlimited marital deduction was introduced. These factors contributed to further reducing the revenue potential of the transfer tax system.

Over time, legislative trends have served to limit the estate tax’s ability to secure revenue for the federal government. As Congress has continued to reduce the top marginal rate and raise the applicable exclusion amount, estates that were once taxable no longer are. In fact, five years after ERTA 1981 was implemented, the number of estate tax returns had reduced by more than 50%.


79. Joulfaian, supra note 35, at 2-4. Prior to ERTA 1981, the marital deduction was limited to the greater of $250,000 or 50% of the adjusted gross estate. Id. at 3-4. The unlimited marital deduction was introduced primarily to place separate property and community property spouses in parity for tax purposes regarding property transferred between spouses at death; by treating the property owned by a husband and wife as one taxing unit for transfer tax purposes, the tax treatment between similarly situated spouses would be equalized. Id.

80. See id. at 2-4, 6-2. Between 1981 and 1985, the maximum rate was reduced incrementally from 70% down to 50%. Id. at 2-4. The exemption amount increased from approximately $175,000 up to $400,000. See id. at 6-7 tbl. 6.3. Between 1985 and 1997, the maximum rate was frozen at 55%, id. at 2-10 tbl. 2.5., and the exemption amount was further increased from $400,000 to $600,000. See id. at 6-7 tbl. 6.3. The estate tax share of the total government collections hovered just above 1% and never made it above the 2% mark. See id. 6-5 tbl. 6.1. In nominal dollars, the revenue generated between 1981 and 1985 remained around $6 billion per year, and between 1985 and 1997, the dollars generated per year increased up to as high as $19.8 billion. Id. It is worth noting that the revenue increase during this time span is in part a reflection of the deferral of estate taxes coming due because of the unlimited marital deduction; moreover, the national economy was especially strong during the early 1990s.

81. See FLEENOR, supra note 15, at 7 fig. 3 (indicating a reduction in transfer tax returns since the mid-1970s).

82. See Joulfaian, supra note 35, at 4-4 tbl. 4.1. In 1981, 145,617 estate tax returns were filed, and in the following year, that number reduced to
Further changes occurred in the late 1980s and early 1990s. Under the Omnibus Budget Reconciliation Act ("OBRA") of 1987, Congress extended the provisions for the top marginal rates for five years which delayed the onset of tax reductions due in accordance with ERTA 1981. As a result, while Congress intended to reduce the top marginal rate to 50% under TRA 1986, Congress instead retroactively extended the rate at 55% under the Revenue Reconciliation Act of 1993. After these tax provisions, the number of estate tax returns filed increased between 1989 and 1997.

With the passage of the Taxpayer Relief Act of 1997 ("TRA 1997"), the estate tax applicable exclusion amount was scheduled to increase again over a course of time and reach $1 million by 2006. Undoubtedly, the estate tax became less of a factor as a revenue generator with these changes, but when relating back to the original purpose of the estate tax, this was not entirely problematic. The changes occurred during a time when the economy was still booming, and as such, the estate tax was not needed to

134,965. Id. By 1986, the estate tax returns filed had plummeted to 71,518. Id. In 1988, 52,364 estate tax returns were filed, the lowest number of filings since 1959. Id. In 1981, the revenue generated was approximately $6.8 billion, totaling 1.13% of federal receipts. Id. at 6-5 tbl. 6.1. By 1988, the revenue generated had increased to $7.6 billion, but the share of total receipts had decreased to .84%, lower than it had ever been since 1918. Id.


84. FLEENOR, supra note 15, at 10 (noting that although "The Economic Recovery Tax Act of 1981 had intended to lower all marginal transfer tax rates below 50 percent by 1985," the "1987 Act[] postponed implementation of this provision until January 1, 1993," holding the top marginal rate at 55%).


86. Joulfaian, supra note 35, at 4-4 tbl. 4.1. In 1989, the number of estate tax returns filed was 54,700. Id. By 1997, the number of estate tax filings had increased to 97,267. Id. In 1989, the estate tax generated $8.7 billion, which represented .88% of the federal receipts collected. Id. at 6-5 tbl. 6.1. Between 1990 and 1997, the revenue generated continued to increase resulting in nearly $20 billion in revenue for the 1997 year, an amount which equaled 1.26% of the total federal receipts collected. Id.

87. Id. at 2-5 (stating that the applicable exclusion amount level was increased annually until the applicable exclusion amount reached the 2006 maximum of $1 million); see Pub. L. No. 105-34 111 Stat. 788 (codified as amended in scattered sections of 26 U.S.C.).
generate substantial revenue; in fact, there was a budget surplus.\textsuperscript{88} Even so, after the passage of TRA 1997, the number of estate tax returns increased, in addition to the amount of revenue generated.\textsuperscript{89}

While TRA 1997 signaled an important shift in tax policy, the most significant tax changes occurred with EGTRRA. In accordance with EGTRRA, the applicable exclusion amount was increased, and the top marginal tax rates were further reduced.\textsuperscript{90} Moreover, EGTRRA provided for a sunset of its provisions in 2009, with an estate tax repeal scheduled for 2010.\textsuperscript{91}

As the changes in tax policy have been consistently designed to reduce estate tax obligations over time, it is no surprise that the estate tax has not generated revenue as well as its income tax counterpart.\textsuperscript{92} Yet, notwithstanding the policies which have inhibited revenue growth, the estate tax has still produced useful revenue for the government. In fact, between 2001 and 2009, the estate tax generated over $233 billion.\textsuperscript{93} With the modifications proposed by this Article, the government has the potential to gen-

\textsuperscript{88} Earl Blumenauer, Business Law Forum Taxation and the Environment, 15 Lewis & Clark L. Rev. 315, 316 (2011) ("The last half of the administration of George H.W. Bush and Bill Clinton's first two years brought dramatic reductions in spending coupled with tax increases. These budget cuts and new revenues ushered in eight years of declining deficits, culminating in three consecutive years of budget surpluses." (footnote omitted)).

\textsuperscript{89} See Joulfaian, supra note 35, at 4-4 tbl. 4.1, 6-5 tbl. 6.1. By 1998, the revenue generated reached over $24 billion, representing 1.40% of the federal receipts collected. \textit{Id.} at 6-5 tbl. 6.1. By 2001, the revenue collected increased to over $28 billion, representing 1.42% of the total federal receipts. \textit{Id.}

\textsuperscript{90} Economic Growth and Tax Reconciliation Relief Act of 2001, Pub. L. No. 107-16, § 501(a), 115 Stat. 38, 69 (codified as amended in scattered sections of 26 U.S.C.). In accordance with EGTRRA, the applicable exclusion amount was set at $1 million for the years 2002–2003, $1.5 million for the years 2004–2005, $2 million for the years 2006–2008, and $3.5 million for 2009. \textit{Id.} The maximum tax rate decreased incrementally over the course of the same years. \textit{See id.} In 2002, the maximum rate was 50%, 49% in 2003, 48% in 2004, 47% in 2005, 46% in 2006, and 45% for 2007–2009. \textit{Id.}

\textsuperscript{91} Joulfaian, supra note 35, at 2-5.

\textsuperscript{92} See \textit{id.} at 6-5 tbl. 6.1. In 2002, the estate tax generated over $26 billion, representing 1.43% of the federal receipts collected. \textit{Id.} By the year 2009, the estate tax generated over $23 billion, representing 1.12% of the federal receipts. \textit{Id.}

\textsuperscript{93} \textit{See id.}
erate hundreds of billions—if not trillions—of dollars over the next decade.

C. Change We Can’t Believe In or Afford

It should be clear that the recent changes to our estate tax are not the kind of changes we can afford. First, by passing EGTRRA, the government sent a distinct message that the estate tax would have a decreasing role in generating revenue. In fact, at the time of EGTRRA’s passage, many speculated that the repeal of the estate tax would soon follow. The sunset provisions in 2009, which scheduled a temporary repeal for 2010, certainly bolstered the political discourse.

When passing EGTRRA, however, the lawmakers did not anticipate the events of September 11, 2001, and the subsequent wars in Afghanistan and Iraq. In past years where military conflict ensued, an accompanying increase in tax liability followed to pay for anticipated costs; this was especially so with the estate tax. Yet, when this nation encountered huge financial obligations arising out of its conflict with both Afghanistan and Iraq, tax breaks, not tax increases, were the norm. As a result, the wars significantly increased the nation’s spending and saddled it with substantial debt.

By failing to act on the sunset provisions of EGTRRA, the lawmakers allowed the 2010 estate tax repeal to transpire, exacerbating the budget shortfall. This failure to take action is almost egregious considering that the country was in the heart of a great

94. Frederick, supra note 10, at 199–200. (detailing the use of the estate tax during the “Undeclared War” with France in the 1790s, the Civil War, and the Spanish-American War).

95. See Paul L. Caron, The Costs of Estate Tax Dithering, 43 CREIGHTON L. REV. 637, 647 (2010) (noting that efforts to repeal the estate tax “reached their apogee during the wars in Iraq and Afghanistan”).

economic recession. Historically, this would have been the perfect time to not only ensure an estate tax was in place, but also to raise the top marginal rate and reduce the exemption, an amount which had just increased in 2009 from $2 million to $3.5 million. Instead, lawmakers did the opposite through their inaction and lost the opportunity to raise much needed revenue. Because Congress failed to prevent the repeal, 2010 marked the first year the country did not have an estate tax in almost one hundred years.

Consider the case of a singular estate. In March of 2010, a multi-billionaire from Texas died, leaving a substantial portion of his estate to his wife and children. Even under normal circumstances, this would be newsworthy, but what makes the timing of his death more intriguing is the fact it occurred during a year in which the estate tax had been temporarily repealed. As a result of the timing, billions of dollars that may have been payable to the U.S. Treasury because of estate taxation were lost. Moreover, because the assets transferred through the billionaire’s estate were

97. James Sunshine, The Great Recession: Is It Time for a Name Change? HUFFINGTON POST (Sept. 25, 2011, 6:12 AM), http://www.huffingtonpost.com/2011/07/26/great-recession-name-change_n_908640.html#s315744&title=George_W_Bush (“In 2008, then-President George W. Bush announced that America was in the process of what he called an economic ‘slowdown.’ But by as early as that December, a new term to describe the weak economy had entered the public lexicon: The Great Recession.”).


100. Cf. Cooper, supra note 7, at 881–82 (noting that prior to the implementation of the permanent estate tax in 1916, the last estate tax was repealed in 1902).


not subject to the estate tax, they will not likely be subject to an estate tax until the death of his children.\textsuperscript{103}

Another noteworthy example is that of the George Steinbrenner estate, which was estimated at over $1 billion.\textsuperscript{104} Because the estate tax was repealed at the time of Mr. Steinbrenner’s death, the government received no revenue from his estate upon the transfer of property from the estate to beneficiaries.\textsuperscript{105} As a result, the estate is estimated to have saved at least $500 million in estate taxes.\textsuperscript{106}

Unfortunately, the 2010 repeal of the estate tax is not the only recent shortcoming of American tax policy. Another failure of our lawmakers came about as a result of the political “punt” represented by the 2011 Economic Stimulus Package (“ESP”).\textsuperscript{107} In this package, the estate tax exemption was increased to $5 million, and the gift tax exemption was concomitantly unified at $5

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\item[103.] Because of the temporary repeal, the decedent had the ability to transfer the entire estate, less a life estate to the surviving spouse, to the children, allowing the assets to be shielded from estate taxation until the death of his children. Under normal circumstances, he would have had the ability to shield the applicable exclusion amount from estate taxation, and the remaining estate would be not be taxed, if devised to the surviving spouse, because of the unlimited marital deduction if compliant with I.R.C. § 2056(b)(7) (2006). However, upon the surviving spouse’s death, the assets would be taxable to the surviving spouse’s estate because of the required inclusion in her estate according to I.R.C. § 2044 (2006). As a result of dying in the year 2010, the decedent did not have to comply with I.R.C. § 2056(b)(7) to leave his spouse a life estate; therefore, the estate may escape estate taxation at the death of the decedent and his surviving spouse.
\item[105.] This reference is limited strictly to estate taxes, not related income taxes that may be incurred upon the sale of the property from the estate.
\end{enumerate}
million.\textsuperscript{108} Not only were these exemption amounts too much given the economic climate of the country, but by making the new tax package temporary, a proposed permanent estate tax repeal remained at the forefront of the political discourse on tax policy.

While ESP is scheduled to sunset in two years, estate tax liability was reduced significantly for the wealthiest Americans during a time when the country was still suffering economically.\textsuperscript{109} Although historically the transfer tax system has been used effectively as a mechanism to raise revenue during times of economic crisis, our lawmakers made a decision to forego the additional revenue when they decreased individuals' financial obligations. This decision was unwise.

Instead of punting, the lawmakers should have seized the opportunity to make changes benefitting "Main Street" and not "Wall Street." With the 2010 repeal causing the government to forego billions, if not trillions, of dollars in revenue, it was not the time to further reduce taxes for the wealthiest Americans. By increasing the applicable exclusion amount of both the estate tax and the gift tax to $5 million and reducing the rates even lower than those stated in EGTRRA, lawmakers further reduced the tax burden for the wealthiest Americans.

To combat this recent change and achieve greater economic sustainability, the exemption amount should be reduced for both the estate tax and gift tax to $2 million per taxable estate. This is an appropriate amount given the economically depressed state of the country. At the previous $1 million estate tax exemption amount, there was no shortage of wealth created and saved.\textsuperscript{110} In


\textsuperscript{109} See Sunshine, supra note 97 ("Two years after the recession officially ended, many Americans continue to feel the downturn’s pain. The unemployment rate remains stuck above nine percent, wages are stagnant and home prices continue to decline—all of which have caused some to question whether The Great Recession is the best term to describe what the country has been through.").

fact, because of the economic state of the country and the fact that the increase was scheduled to exist for only one year, there was little economic justification for the increase to $3.5 million in 2009.

After a year of the wealthiest Americans passing billions of dollars of wealth free of the estate tax, there was every reason to decrease the exemption levels and try to fiscally recuperate from the foregone revenue of the 2010 repeal. By compromising and permitting even further tax breaks for the wealthy, however, the lawmakers acted in direct contradiction to the original purpose of the estate tax. Very simply, it was the wrong move, at the wrong time for the country.

As it stands now, many estates are exempt from the estate tax, contributing only further to the lackluster performance of the tax. When the economic state of the country has recovered, only then would it be appropriate to implement a moderate increase in the applicable exclusion amount. Yet, even in the absence of a pressing need for significant revenue, increases in the exclusion amount should nevertheless reflect the goal of curtailing wealth concentration. As such, any increase should not be substantial, and a complete repeal would be inappropriate.

Because tax policy directly impacts the potential of the estate tax to raise revenue, policies should be developed with sensitivity concerning the nation’s economic needs. While the aforementioned factors certainly remain key components of any prudent estate tax policy analysis, other factors also inhibit the potential of the estate tax to generate substantial revenue. Two such factors are the charitable bequest deduction and wealth concentration.

IV. CHARITABLE DEDUCTIONS

A. History of the Charitable Contribution Deduction

Within a year of the adoption of the permanent estate tax, the War Revenue Act implemented the charitable contribution de-

of millionaires with net worth between $1 million and $5 million grew by 15.4 percent between 1998 and 2001, while the number of millionaires in the higher wealth classes increased more rapidly, 41.3 percent for those with net worth between $5 million and $10 million, and 46.4 percent for those with net worth of $10 million or more.” (footnote omitted)).
duction.\textsuperscript{111} The legislative history indicates that members of Congress believed wealthier individuals would contribute to societal projects such as higher education and charities if provided the proper incentive to do so.\textsuperscript{112} By implementing the charitable contribution deduction, Congress sought to encourage charitable giving through the tax code.\textsuperscript{113}

The method seemingly created a “win” for the government no matter where the funds were directed. Either a tax would be paid directly to the government, or contributions would be paid to fund charitable organizations, subsidized by the government, to provide public services. Ultimately, therefore, the government’s objective in providing citizens’ services would be achieved either directly through taxes paid or indirectly through charitable organizations.

While some may question the government’s aims in this regard, it is clear that the government has an interest in ensuring sufficient social services are provided. Philanthropy, through organized charity, has been in existence since the beginning of established churches.\textsuperscript{114} While state governments initially had the responsibility to provide for the poor with the greatest need, charitable organizations have historically made up a majority of our charitable base.\textsuperscript{115} In fact, the United States has the largest number of

\begin{footnotes}
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\item[111.] Joulfaian, \textit{supra} note 35, at 3-5; see War Revenue Act, ch. 63, § 1201(2), 40 Stat. 300, 330 (1917); David E. Pozen, \textit{Remapping the Charitable Deduction}, 39 CONN. L. REV. 531, 537 (2006) (“Congress first adopted a charitable deduction in 1917 as part of a bill raising federal income tax rates to finance the costs of entering World War I. Concerned that these tax increases would suppress philanthropic giving, Congress allowed deductions for donations to public charities and private foundations . . . .” (footnotes omitted)).
\item[113.] See, e.g., Ellen P. April, \textit{Churches, Politics, and the Charitable Contribution Deduction}, 42 B.C. L. REV. 843, 849 (2001) (“Legislative history indicates that this provision was prompted by the concern that without a deduction, wealthy taxpayers . . . would no longer contribute to institutions of higher learning.”).
\item[114.] Thomas, \textit{supra} note 112, at 296.
\item[115.] \textit{Id.} at 296–97 (“The large presence of organizations in American civil society is a unique cultural phenomenon. No other nation in the world has the
charitable nonprofit organizations in the world today.\textsuperscript{116} Even so, in the late nineteenth and early twentieth century, the poverty rate soared, and charitable organizations no longer had the resources to be the primary caretaker of the poor.\textsuperscript{117} Although the government had its own limitations with providing resources, it assumed the responsibility to find a way to provide resources that had typically been provided by charitable organizations.

To help further these ends, Congress adopted a tax policy accommodating of charitable organizations. In addition to providing a tax exempt status for charitable organizations, the government subsidized charity by providing deductions for individuals and corporations who financially contributed to charitable organizations.\textsuperscript{118} While the tax exemption rule was already in existence when the first income tax provisions were instated,\textsuperscript{119} the charitable contribution deduction was introduced into the tax code in 1917, and contributions to charitable organizations have been fully deductible since 1918.\textsuperscript{120} Through such subsidization, the financial number and diversity of nonprofit organizations doing charity. In most of the world, government and religious organizations dole out charity to meet unmet public needs.” (footnote omitted)).


\textsuperscript{117} Thomas, supra note 112, at 295 (“The increased flow of immigrants, the rising complexities of living in an industrial society, and the Civil War and financial crises of the nineteenth and early twentieth centuries . . . fueled the flames of poverty in America.”).

\textsuperscript{118} Id. at 318.

\textsuperscript{119} Id. at 316–17 (“The broader Act, the first income tax law in the nation’s modern history, imposed a tax on the income of individuals and corporations. To counter this tax, a section of the Act provided that ‘nothing herein contained shall apply to . . . corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes.’ This was the first formal rule of federal tax-exemption in the history of U.S. tax law.” (alteration in original) (footnotes omitted)).

\textsuperscript{120} Miranda Perry Fleischer, Charitable Contributions in an Ideal Estate Tax, 60 TAX L. REV. 263, 263 (2007); see Revenue Act of 1918, Pub. L. No. 254, §403(a)(3), 40 Stat. 1057, 1098. The 1917 tax provision provided for a charitable tax deduction for donations made by individuals to specified organizations of up to 10% of taxable income.
The responsibility of providing for the poor was shared between the government and charitable organizations.

Initially, the charitable contribution deduction was enacted to balance the increase made to the income tax rate on account of the extra funding needed for World War I. \(^{121}\) Additionally, the charitable contribution deduction served the purpose of providing a direct incentive to individual members of society who had the means to donate to charitable causes. \(^{122}\) Moreover, in 1935, amidst the economic crisis caused by the Great Depression, Congress made provisions for corporations to receive the charitable contribution deduction, up to 5%, against taxable income. \(^{123}\) This move by Congress provided an incentive for corporations to contribute to charitable organizations in order to provide to the needy.

By providing such an incentive, Congress used tax policy to finance a specific objective while contemporaneously and indirectly providing a service that the government could or would not provide directly. Yet, despite the government’s motives for providing various tax incentives, there should be a corresponding benefit for the cost incurred to make these tax incentives justifiable. Whether these tax incentives really influence an individual’s or corporation’s motives to contribute to charitable causes will determine whether the deduction is appropriate to facilitate the government’s goal.

### B. History and Justifications of the Tax Favored Treatment

One of the main reasons posited in favor of giving tax-favored treatment to charitable organizations is the public benefit that our society receives as a result of the works of charitable organizations. Generally, the belief is that the government prefers to grant favorable tax treatment to charitable organizations in order to encourage them to do the work that the government cannot or will

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122. Thomas, supra note 112, at 325 (“When Congress enacted the charitable deduction in 1917, the legislative history reflects that one of the authors of the provision, Senator Henry Hollis, ‘contended that the imposition of heavy World War I taxes would hurt charitable institutions by tempting wealthy men . . . to economize . . . . They will say, [c]harity begins at home.’” (alterations in original) (internal quotation marks omitted)).

123. Id. at 320.
not perform on its own. The primary authority in support of this public benefit position is evident from the United States Supreme Court's opinion in *Bob Jones University v. United States.*

The Court stated:

Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues. History buttresses logic to make clear that, to warrant exemption under § 501(c)(3), an institution must fall within a category specified in that section and must demonstrably serve and be in harmony with the public interest.

Ever since the charitable contribution deduction and charitable bequest deduction were implemented, the presumed goal of the government has been to encourage charitable works and relieve some of the pressure from the government to provide assistance to the needy. Such a goal is a sound one, for the plight of the poor has remained a consistent societal issue. Since 1959, the poverty rate has been consistently above 10%, and between 2007 and 2009, the number of people in poverty increased by more than 6.3 million people. Moreover, as recently as 2009, the official poverty rate was 14.3%, the highest rate since 1994. Given such stark statistics, the question remains whether charitable organiza-

125. *Id.* at 591–92 (footnote omitted).
126. *See Carmen DeNavas-Walt et al., U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2009* tbl. B-1 (2009), http://www.census.gov/prod/2010pubs/p60-238.pdf. In 2009, there were nearly 43.6 million people in poverty, the largest number of people living in poverty in the fifty-one years that the poverty rate has been recorded. *See id.* “If a family’s total money income is less than the applicable threshold, then that family and every individual in it are considered in poverty.” *Id.* at 55. “The official poverty definition uses money income before taxes and tax credits and excludes capital gains and non-cash benefits . . . .” *Id.*
127. *Id.* at 14.
128. *Id.* at 56.
tions have done enough to assist the government with providing goods and services to the poor.

If the government's motivation to subsidize charitable organizations was based on the premise of sharing responsibility to assist the poor, the foregone revenue should match the value of the goods or services provided to the poor. Absent the provision of public services commensurate to what the government could have provided with a tax, the charitable deduction should be disallowed. Under the estate tax, for example, the merits of the unlimited charitable bequest deduction are deserving of particular scrutiny. While it is difficult to trace the benefit of the charitable bequest deduction proper, one may begin to determine whether the current unlimited deduction is a good investment by inquiring how charitable bequest dollars are allocated and how charitable organizations allocate resources in general.

C. Motivations for Making Charitable Gifts

Although tax policy has been attributed significant credit for charitable giving, a short perusal into factors that motivate individuals to make charitable gifts is warranted to determine whether a change in tax policy actually influences the behavior of givers. While economists have attempted to conduct studies to determine whether tax policy has had an effect on individual behavior to make charitable contributions, the individual reasons for making contributions often vary and are difficult to determine. Nevertheless, an inspection of who contributes and where they contribute may provide some guidance.

129. CONG. BUDGET OFFICE, THE ESTATE TAX AND CHARITABLE GIVING 3 (2004) [hereinafter THE ESTATE TAX AND CHARITABLE GIVING], http://www.cbo.gov/ftpdocs/56xx/doc5650/07-15-CharitableGiving.pdf ("People make charitable gifts for a variety of reasons. Over and above those reasons, the tax code may influence the level of giving by affecting both its 'cost' (relative to that of other possible uses for the money) and the amount of resources available to individuals to give.").

Historically, individuals make more charitable gifts in a
given year than any other source, and nearly 90% of their chari-
table gifts are made during their lifetimes. In deciding whether
these individuals had a tax motivated reason for giving, it is helpful
to categorize the donors to determine where the different types of
donors contributed. Such analysis is required because individual
tax returns are not available freely for public viewing.

In reviewing the potential reasons for giving, it is useful to
determine the income level of donors who were making charitable
ccontributions and where they made such contributions. One study
conducted at Indiana University has already done so, specifically
categorizing its findings by household income levels. For ex-
ample, of the households with income levels under $100,000, rep-
resentative of 90% of the U.S. population, 42% contribute to reli-
gious causes, accounting for almost 60% of overall contributions to
religious organizations. In specifically analyzing the contributions to religious
organizations, the same study provided information indicating how
funds were allocated. Of the estimated $101 billion contributed to
religious organizations, approximately 20% is estimated to have
been used to provide directly for the poor. Of the remaining

131. See e.g., AAFRC TRUST FOR PHILANTHROPY, GIVING USA 2000 22
133. See CTR. ON PHILANTHROPY AT IND. UNIV., PATTERNS OF
HOUSEHOLD GIVING BY INCOME GROUP, 2005 (2007) [hereinafter PATTERNS OF
HOUSEHOLD GIVING], http://www.philanthropy.iupui.edu/research/giving%20
focused%20on%20meeting%20needs%20of%20the%20poor%20july%20
2007.pdf. The study is restricted to the impact of private charities and private
foundations. The data sets used for the study were based on the data provided
by the Center on Philanthropy Panel Study (“COPPS”) 2003 to estimate giving
for households with annual incomes below $200,000. Id. at 2. Households
earning an annual income below $100,000 have contributed almost $60 billion
to religious organizations while households earning between $100,000 and
$200,000 donated $11 billion. Id. at 5. Households earning between $200,000
and $1,000,000 donated $21 billion while households with income in excess of
$1,000,000 gave just under $9 billion. Id.
134. Id. 4–5.
135. Id. at 18. This percentage was based on the benevolent services re-
ported by religious organizations. Benevolent services include—but are not
funds contributed, 76% is estimated to have funded congregational operations. At first glance, it would appear that the majority of the contributions are used to operate basic facilities.

While the study’s data made it impossible for the researchers to determine how much of the operational funds were used to directly assist the poor, generalized conclusions may be drawn. Although congregational operations may appear to provide indirect support, and in some instances that will be true, when a church operates or specifically directs its services to low-income communities to provide poverty-relief services, this may be counted as having provided direct support.

In a similar vein, the study’s researchers looked further into funds categorized as “benevolent expenditures.” Because a benevolent act is not necessarily designated for the poor, the researchers found it prudent to determine how the benevolent expenditures were made and who benefitted from them. To further this analysis and specifically determine how much of the offerings were used to assist the poor, the researchers consulted data gathered by the National Council of Churches (“NCC”) that provided an allocation of how benevolent offerings were reported as used. Based on the information provided by the NCC, as much as 84% of the funds categorized as benevolent offerings were focused on providing assistance to the poor. As these findings show, contributions to religious organizations have the greatest chance of being used to provide assistance to the poor.

limited to—food banks, overseas ministries, special offerings, and gifts by churches. *Id.* at 19.

136. *Id.* at 18.

137. *Id.* at 19.

138. *Id.*

139. *Id.*

140. *Id.* at 3. The report also consulted the 2006 edition of the *Yearbook of American and Canadian Churches*—published by NCC—which provides information regarding the total contributions and benevolent contributions to Protestant denominations. *Id.* at 18. The NCC was established in 1950 and includes member faith groups of Protestant, Anglican, Orthodox, Evangelical, historic African American and Living Peace churches, and includes “45 million persons in more than 100,000 local congregations in communities across the nation.” *NCC at a Glance*, NCCUSA.ORG, http://www.nccusa.org/about/about_ncc.html (last visited Apr. 24, 2012).

When evaluating the contributions made to charitable organizations designed to help meet basic needs, the study deemed all contributions to have been used to help the poor. As previously mentioned, the category of households with incomes less than $100,000 contributed substantially more to religious organizations and charitable organizations designed to help meet basic needs. As the research demonstrates, these two organizational types are more likely to provide a greater percentage of contributions received to provide consistent assistance to the needy.

The category of households with annual income levels below $100,000 also out-contributed the higher income levels when measuring contributions to charitable organizations assisting with meeting basic needs of the poor. These households contributed 49% of all household giving to charitable organizations that are perceived to be providing assistance to the poor.

When the type of service provided by the charity changes, however, so too does the likely donor. For instance, when measuring donations to education-related charities, the contribution sources are almost completely opposite to that of the religious organizations. Just consider the contributions made by households earning $200,000 or more: such households provided over $42 billion in charitable contributions, and nearly 82% of those households gave to education-related charitable organizations. Conversely, households earning less than $100,000 provided almost $2.7 billion to education, an amount representing 6% of all giving to education-related organizations.

This trend also holds true for health-related charitable organizations as well as combined purpose charities. For example,
households with annual income levels of $200,000 or more contributed almost $18 billion, an amount representing 81% of contributions made to health-related charitable organizations. The same households contributed $12.25 billion to combined purpose organizations, an amount representing 55.4% of total giving to combined purpose organizations. On the other hand, households earning less than $100,000 contributed about $3 billion to health-related organizations, an amount representing almost 14% of all contributions made to such organizations. Similarly, these households contributed $7.7 billion to combined purpose organizations, an amount representing approximately 35% of contributions made to such organizations.

With respect to education-related and health-related organizations, the resources used to assist the poor were dedicated on a much smaller scale. For example, of the approximately $22 billion contributed to health-related organizations, an estimated 10% was used to help the poor. Therefore, the vast majority of the contributions to health organizations were not expended or redistributed in direct service to the poor. For instance, more than half of the allocations were designated to hospital operations and diseasespecific organizations. Similar results are reflected in the donations to education-related organizations. Although such organizations received an estimated $45.92 billion according to the financial institutions, and the National Philanthropic Trust. These organizations collect funds for distribution to other charities. To determine whether the organization was deemed to assist the poor, the researchers looked at the purpose for which the recipient organization was founded. With respect to charities that help terminally ill children, assist with hospice care, and provide services for the elderly, half of the amount contributed was deemed to assist the poor. Health care clinics were also deemed to serve the poor. Disease specific organizations, which include research, treatment, and prevention facilities, received 25% of all giving, and hospitals received 35.7%. Hospital foundations received the next largest benefit at 16.6%.
study,\textsuperscript{154} a mere 15.7\% of that sum was deemed as dedicated to assisting the poor.\textsuperscript{155} With these factors considered, the extensive subsidization levels provided by the government become more suspect. While these organizations clearly provide a service for the general population, it is difficult to determine what, if any, impact they may have in providing for the poor.

For combined purpose organizations, the study found that the largest percentage of funding was made to organizations assisting at-risk youth and families in crisis,\textsuperscript{156} and the study determined that 64.8\% was focused on assisting the poor.\textsuperscript{157} Of the remaining funds, 24\% could not be determined, and 11\% was dedicated to community-based needs.\textsuperscript{158} For the undetermined 24\%, the study attributed half of the amount to assisting the poor.\textsuperscript{159} Yet, even with the most generous allocations, less than one-third of overall charitable giving was estimated as providing focused need for the poor.\textsuperscript{160}

Reviewing the data, a number of inferences can be made about the motivations of the donors. For instance, donors with household incomes of less than $100,000 were more likely to give to causes and organizations that were perceived to serve the needs of the poor. In addition, one would tend to believe that these donors were less likely to have a tax-motivated reason for giving. Lower income contributors were not likely to have taxable estates, and thus, if a tax-motivated reason for contributing did exist, then it would have been income tax-related.

\textsuperscript{154} Id. at 24.

\textsuperscript{155} Id. ("Donations estimated to be helping the poor were those made to higher education endowments with the restricted purpose of student financial aid, those made to private schools with the restricted purpose of student financial aid, and a proportion (1/2) of those made to all other educational funds (libraries, tutoring, literacy programs, etc.).").

\textsuperscript{156} Id. at 20.

\textsuperscript{157} Id.

\textsuperscript{158} Id.

\textsuperscript{159} Id. at 21. Some of the organizations, though not dedicated to the needs of the poor, are highly likely to serve the needs of the poor even though they may also serve the other income levels. Id. (providing examples such as health organizations, civil rights organizations, and education causes). As a result, such organizations were designated as uncertain but estimated to provide half the services to the poor. Id.

\textsuperscript{160} Id. at 30 & fig. 3.
On the other hand, donors with high household incomes were more likely to contribute to organizations and causes with which they had a relationship or a personal affinity. If the organization also benefitted the poor, that was seemingly a secondary consideration.\textsuperscript{161} By evaluating where these donors contributed, it is clear that this inference is not an unfair one. For instance, of the categories discussed thus far, health and education were the dominant recipients of donors with household incomes of $200,000 or above, and these organizations were amongst the lowest in providing assistance to the poor.\textsuperscript{162}

Individuals who donate to educational organizations tend to have a relationship, past or present, that motivates the contribution to that particular organization. The same inference can be made for contributions to health-related organizations. Recall the contributions made to health-related organizations. Other than hospitals, the major recipients of contributions were organizations connected to disease-related health care.\textsuperscript{163} Donors to these types of organizations are less likely to be random donors.

Even so, tax motivations may well be a factor in making charitable gifts.\textsuperscript{164} For example, because the taxpayer receives a greater tax benefit by contributing to public charities over private foundations, charitable contribution deduction tax policy can be highly influential as to where donors contribute.\textsuperscript{165} Significantly,

\begin{itemize}
\item \textsuperscript{161} See CTR. ON PHILANTHROPY AT IND. UNIV., SIGNIFICANT GIFTS: WHERE DONORS DIRECT THEIR LARGEST GIFTS AND WHY 41 (2009), http://www.campbellcompany.com/Portals/22807/docs/Signficant.Gifts.Report_FINAL_09-22-09.pdf (“Higher income households had slightly different motivations for their giving compared with the general population. The goal reported by most higher income households was to make their community a better place to live (39.5 percent), followed by a sense that it was the responsibility of those with more to give to those with less (36.9 percent).”).
\item \textsuperscript{162} PATTERNS OF HOUSEHOLD GIVING, \textit{supra} note 133, at 8, 24.
\item \textsuperscript{163} \textit{Id.} at 23.
\item \textsuperscript{164} THE ESTATE TAX AND CHARITABLE GIVING, \textit{supra} note 129, at 3 (“People make charitable gifts for a variety of reasons. Over and above those reasons, the tax code may influence the level of giving by affecting both its ‘cost’ (relative to that of other possible uses for the money) and the amount of resources available to individuals to give. Provisions in the individual income tax and the estate tax affect both factors.”).
\end{itemize}
the same is not true for the charitable bequest deduction, as the taxpayer receives the same tax benefit whether he contributes to a public charity or a private foundation.\textsuperscript{166}

On the whole, it is largely difficult to determine what motivates an individual donor to make contributions, for at its core, the decision to donate is a highly personal one. Even when tax motivations might be uncovered, it is clear that the tax benefit is only available to those taxpayers who itemize deductions.\textsuperscript{167} Nevertheless, while deciphering motivations is an arduous process, some predictable, albeit inconclusive, trends for charitable giving may be established. For example, lower income taxpayers are more prone to contribute to charitable organizations focused on assisting the poor. Because programs that assist the poor are likely the type of charitable organizations the government anticipated subsidizing when it provided tax breaks, the law should more strongly countenance the type of charity that predominates among low income households. The same cannot be said for the charity exhibited by high income tax earners; in general, high income households do not appear to favor charitable organizations that are focused on providing for the poor. Rather, charitable giving among high earners appears to be primarily motivated by personal relationships and a desire to benefit the community at large rather than to bestow a direct benefit to the poor. This trend also holds true for charitable bequest gifts, clearly demonstrating that the unlimited deduction cannot be justified as a matter of public policy.

\textbf{D. Impact of Philanthropy on the Poor}

To determine how much charitable capital has been expended in assisting the poor, the Center on Philanthropy at Indiana University has conducted several studies to determine the impact of formal philanthropy.\textsuperscript{168} In addition, other scholars and studies

\textsuperscript{166.} I.R.C. § 2055(a), (d) (2006).

\textsuperscript{167.} Charitable contributions are below the line deductions and therefore will not be eligible for deduction unless the taxpayer itemizes his deductions.

\textsuperscript{168.} PATTERNS OF HOUSEHOLD GIVING, supra note 133. As previously stated, these studies are restricted to the impact of private charities and private foundations and use data sets based on the data provided by COPPS 2003 to estimate giving for households with annual incomes below $200,000. \textit{Id.} at 2. COPPPS surveys are conducted every two years of approximately "8,000 households that make up a national representative sample of the U.S. popula-
have weighed in to examine the impact charitable dollars have made on the poor, as well as the general public. By integrating the insights and comments from these studies, one may more easily conclude what framework is needed for a modern estate tax.

In the early years of the estate tax, the unlimited charitable bequest deduction may have been justified for purely motivational purposes, despite the fact that no other satisfactory explanation could be supplied for its unlimited nature. By providing individuals the motivation to contribute to charitable organizations which would then support social programs, Congress could also help the government to subsidize services it did not want to or could not provide. Even so, justification for an unlimited deduction does not ordinarily flow from this rationale because the charitable contribution deduction provides the same incentive and yet has limitations.

In reviewing the data, a significant share of charitable bequest dollars are distributed to private foundations. As such, following the private foundation dollars may provide good insight as to how charitable bequest dollars are expended. Despite the need for a detailed analysis, there should be no dispute that foundations play an important role in our society. Foundations have the ability to impact the community in ways and in amounts that the government has not and will not be able to match.

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169. Fleischer, supra note 120, at 264.
170. Thomas, supra note 112, at 319.
171. Fleischer supra note 120, at 272; see also CTR. ON PHILANTHROPY AT IND. UNIV., GIVING USA 2009: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2008 53 (2009) [hereinafter GIVING USA 2009] (“Since at least 2001, according to estate tax returns, on average 45 percent of the amount contributed by [charitable] bequests has gone to foundations. The balance is divided among all other types of charities. If the percentage of bequest dollars going to foundations holds for 2008, then approximately $12.5 billion in 2008 was bequeathed to charities other than foundations.”).
172. See Carl J. Schramm, Law Outside the Market: The Social Utility of the Private Foundation, 30 HARV. J.L. & PUB. POL’Y 355, 360 (2006) (“Private foundations play this role in society. Creations of successful entrepreneurs who seek the reconstitution of wealth, foundations are conceived as having the par-
On the other hand, the government may be giving up much needed revenue without receiving much benefit if foundations only provide a minimum benefit to assist the government in aiding the poor. For instance, in 1952, foundations received in excess of $3 billion from individuals and paid out only $300 million in grants that year.173 Moreover, in 1975, charitable bequest giving was estimated at $2.23 billion, with most of the bequests being granted to education, health, and cultural causes.174

By 2004, total charitable gifts were estimated at $249 billion, of which almost $20 billion was made in charitable bequests.175 Most of the bequests were granted to private foundations, education, health, and cultural causes.176 While these causes certainly contribute to society at large, they do not necessarily provide a specific benefit to the poor.

By 2008, total charitable gifts were estimated at $308 billion dollars.177 Of the charitable gifts for the year, charitable bequest giving was estimated at $22.66 billion.178 Almost half of the bequests were devised to private foundations—recipients that are not inherently dedicated to assisting the poor.179 Because the presumed original intent for the unlimited deduction is not fulfilled through such giving, reform to the deduction is needed. Very

ticularistic entrepreneurial role of challenging other institutions to continuous renewal. In this way, foundations break the static equilibrium toward which social institutions gravitate and allow the economy’s welfare-generating capabilities to continue to expand efficiently and effectively.

173. AM. ASS’N OF FUND-RAISING COUNSEL, GIVING USA: FACTS ABOUT PHILANTHROPY 6 (1956) [hereinafter FACTS ABOUT PHILANTHROPY].


176. Id. at 70 & tbl. 1. Most charitable bequests gifts were given to large organizations. Health organizations received an average of 186 gifts averaging $82,705 each, education organizations received an average of 55 gifts averaging $131,009 each, and international organizations received an average of 76 bequests averaging $123,454 each. Id.

177. See GIVING USA 2009, supra note 171, at 53.

178. Id.

179. See id.
simply, the range of the deduction should be dependent on its ability to redirect resources to the poor.

E. Charitable Bequest Deduction

1. History and Overview

While the Revenue Act of 1916 enacted what became the permanent estate tax, it notably did not make a provision for charitable bequest deductions. In fact, it was not until the Revenue Act of 1918 that the charitable bequest deduction was enacted. Although the charitable contribution deduction was enacted to offset increased income tax liability, there has been little discussion regarding the reason the charitable bequest deduction was enacted and why the deduction is unlimited.

If one may assume justifications for the charitable bequest deduction mirror those for the charitable contribution deduction, then the charitable bequest deduction was intended as an additional incentive for the wealthy to make contributions to charitable organizations which could provide some relief to the government in assisting the poor. Yet, charitable bequests also produce an ancillary benefit to their bolstering of charitable organizations; by making charitable bequests for the tax benefit, the wealthy voluntarily divert some of their riches to the public, thereby facilitating some redistribution of wealth. Because the charitable contribution deduction and the charitable bequest deduction advance similar societal objectives, however, it is questionable why the charitable bequest deduction is unlimited when the charitable contribution deduction is not.

2. Private Foundations and Their Resources

In addition to analyzing the gifts received by private foundations and comparing how resources were expended in a giving year, it is also helpful to compare the charitable bequest funds received by private foundations to the federal receipts collected by the estate tax in a given year. By making such a comparison, the

numbers may shed some light on how much revenue may be available for redirection.

In 1937, private foundations reported capital assets to the tune of over $945 million. On the other hand, the government reported $306 million in transfer tax receipts. By 1954, capital assets for private foundations were reported at $5.4 billion, whereas the transfer taxes reported a mere $934 million in federal receipts.

In recent years, these comparisons have reflected much closer amounts. In the year 2004, private foundations received approximately $20 billion in gifts and made $29 billion in grants. The transfer taxes generated approximately $25 billion. In the year 2008, private foundations received almost $33 billion in charitable gifts and made $41.2 billion in grants, while the transfer taxes generated $29 billion.

These numbers indicate how private foundation wealth has developed over the years and how substantial the contributions to foundations were during the selected years. Although it is clear that charitable bequest dollars make up a small amount of foundation wealth, one would surmise that private foundations would

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183. FACTS ABOUT PHILANTHROPY, supra note 173, at 6.
185. GIVING USA 2005, supra note 175, at 16. Foundations are not the only recipients of charitable bequests but charitable bequests contribute most of their resources to funding foundations. See GIVING USA 2009, supra note 171, at 53. Measuring how foundations support societal goals is a good way of determining the public benefit of the charitable bequest deduction because public charities receive their significant gift from individuals during their lifetimes. See THE ESTATE TAX AND CHARITABLE GIVING, supra note 129, at 1. In some cases a significant gift may be announced but the distribution schedule for payments may be over a period of years. It is important to note that charitable bequest giving in a given year may not necessarily correlate with the distribution schedule of estates so the reporting date may not necessarily be in the year the gift was given.
187. GIVING USA 2009, supra note 171, at 1, 59; Joulaian, supra note 35, at 6-5 tbl. 6.1.
188. GIVING USA 2009, supra note 171, at 18 (noting that bequest contributions were 9.8% of total contributions from 1969 to 1973).
have a substantial impact on the community given the substantial amount of gifts that are made to them.

Although private foundation grants may certainly have a substantial impact on the community at large, the majority of that impact is concentrated on select demographics that do not concentrate on assisting the poor.\(^{189}\) Even more, in comparison to charitable bequest funding, the estate tax has not developed nearly as well in generating revenue. Thus, redirecting funds from a charitable bequest to the government may have a minor effect on charitable organizations given that the vast majority of charitable gifts are made during the taxpayer’s lifetime.

On the other hand, diverted revenue may still have a significant impact on the government receipts when coupled with an increase in estate tax liability. As a result, it would appear that those estates large enough to pay taxes take advantage of the charitable bequest deduction to pay fewer taxes to the government and more money towards the charitable organization of their choosing. Because the diversion of funds has not necessarily been reducing the government’s burden to provide for the poor, however, it would be inefficient to continue to permit the substantial government subsidization of these charities in this manner.

3. Challenges to the Unlimited Deduction

Assuming the “incentivized giving” motive, the unlimited nature of the charitable bequest deduction would be justified if donors made substantial contributions and those recipient charitable organizations provided a benefit to the public that is both necessary and more efficient than if the government used the tax dollars to provide the same. In addition, if a correlating restraint on wealth concentration existed, then the charitable bequest deduction would serve a purpose that the charitable contribution deduction would not match.

Therefore, in order to justify the expense of the charitable bequest deduction, the government should yield the same or similar rate of return on the investment. In other words, the revenue

\(^{189}\) Id. at 67, fig. 1. Private foundations make large numbers of grants in the fields of education, health and arts, which provide a general benefit to the public at large.
lost should match the value of the goods and services provided by the organization. Of course, the goods and services provided should be necessary to the public if the government is to use its own policies to foster them. The government should not forego revenue from otherwise taxable assets unless it is in the public’s interest to do so.

Fortunately, scholars have already begun to scrutinize the policy inherent in the current charitable bequest deduction. For example, Professor Miranda Fleischer has questioned the justifications behind the deduction and its unlimited nature under the estate taxation scheme. In addition to analyzing the normative justifications for the estate tax charitable deduction and its structure, Professor Fleischer raises a question as to whether a charitable deduction should be included or excluded in an “ideal” estate tax base, and if included, “whether the deduction should be limited.”

Under her analysis, Professor Fleischer argues that private foundations are the real “winners” of the charitable bequest deduction because they receive the lion’s share of the bequests. For tax purposes, a private foundation is any entity that files for tax exempt status that is not specifically excluded from being a private foundation. Generally, those organizations that qualify as public charities are specifically excluded, such that private foundations tend to be organizations with a single major source of funding.

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191. Fleischer, supra note 120, at 268 (arguing the case for the unlimited deduction is “weak”).

192. Id. at 267–68.

193. Id. at 268.

194. Id. at 271–72. In 2004, private foundations received 43% of the charitable bequests made. Id. at 272.

which engage in making grants as opposed to providing goods or direct services. 196

While a societal benefit generally accompanies most charitable acts, private foundations raise the question of whether the government should subsidize work that has a limited pool as beneficiaries. After all, why should the government subsidize something that does not greatly impact the public positively? Under a proposal by Professor Fleischer, the deductibility of a bequest should be based on whether the recipient charitable organization targets the wealthy or poor and disadvantaged. 197

Such limited deductibility is based on the concept that the estate tax should enhance equality of opportunity. 198 If the recipient organization’s target clients are the poor and disadvantaged, then the deduction would be fully deductible. 199 If the recipient organization targets both wealthy and poor clients, then the deduction would be around 50%. 200

If the recipient organization is a private foundation, then the deduction would be based on where the grants are awarded. 201 If the grants are solely awarded to organizations that target the poor and disadvantaged, then the deduction would be fully deduct-

196. Cynthia Belmonte & Melissa Ludlum, Domestic Private Foundations Tax Years 2003–2007, SOI BULLETIN, Winter 2011, at 173, 173, http://www.irs.gov/pub/irs-soi/11pfdomwinbull.pdf (“Several characteristics distinguish a private foundation from other types of tax-exempt organizations, including its narrow sphere of support and control. A private foundation may be organized as a corporation, association, or trust. Typically, a private foundation is funded by a small number of private donors. Additionally, control of the private foundation is generally limited to an individual, family, or corporation. . . . A nonoperating foundation supports charitable programs indirectly, providing grants to other charitable organizations, rather than operating programs of its own.”).

197. Fleischer, supra note 120, at 297.

198. See id. at 292.

199. Id. at 297.

200. Id. at 307. Professor Fleischer provides an in-depth justification for the proposed limitation of around 50%. Ideally, the deduction would be based on the percentage the organization used to target assistance to the non-wealthy. See id. By acknowledging the difficulty in making the determination of how much assistance is targeted for the non-wealthy, she ultimately proposes 50% as a compromise because some assistance benefits the non-wealthy and should therefore qualify for deduction. See id. at 307–09.

201. Id. at 310.
If the grants are awarded to a mixed-clientele-type organization, then the corresponding deduction would likely be 50%. Very simply, the system should function to ensure that organizations that are subsidized create new opportunities for the poor and disadvantaged. The only difficulty of implementing such a law would be in deciding which organizations qualify for the full deduction and which organizations would not qualify.

When determining how to categorize which charities qualify for the full deduction, a determination would have to be made of each organization based on the services provided. In addition, once categorized, these organizations would be limited to providing the same or similar services; otherwise, they would risk being placed in another category which may no longer permit the full deduction.

In theory, a charity could qualify in one year for the full deduction and be disqualified in the next year. Conceptually, the notion that an organization may lose its status because of its behavior is not troubling; what is troubling is the lack of predictability that may result depending on who defines the criteria. Depending on the governing body, it may be difficult to determine which services qualify for the full deduction and which services qualify for a lesser one. Once qualified, moreover, there would have to be some kind of recertification process to verify the level of deduction available for the contribution. Clearly, these factors make the situation ripe for an administrative nightmare, and in the end, the benefits of change may only be negligible if organizations narrowly tailor their behavior only so far as is required to qualify for deduction status. Even with reform, the government could still be without the additional revenue and may only receive a small percentage of additional assistance with assisting the poor.

Notwithstanding the difficulties that accompany such tax reform, other scholars have made the same inquiries advanced by Professor Fleischer. For example, Professor Mark Ascher has also questioned the unlimited nature of the charitable bequest deduction. The purposes of his proposal are twofold: create opportu-

202. Id.
203. Id.
204. See id. at 298.
205. See Ascher, supra note 60, at 136.
nities for the non-wealthy and raise revenue for the government. As a result, Professor Ascher has proposed to make the charitable bequest deduction limited to 20% of the taxable estate, after expenses.206

Although Professors Fleischer and Ascher make excellent points regarding the need for an evaluation of the unlimited nature of the charitable bequest deduction,207 both proposals have limitations. For instance, Professor Fleischer focuses on creating opportunities for the non-wealthy and does not make much provision for raising revenue. Therefore, her proposal redirects the unlimited deduction, creates more administrative burden for the government, and captures no additional revenue to justify the modification. Moreover, while Professor Ascher’s proposal incorporates the limitation on the deduction as a backstop to create some additional revenue for the government, his approach treats all charities in the same manner by imposing a 20% deduction limitation for all charities. Both scholars may have persuasive arguments, but there is still a better way to further societal goals and raise revenue without sacrificing harmony in the taxing system.

4. The Current Proposal

This Article’s proposal for reforming the system incorporates a combination of the proposals advanced by Professor Fleischer and Professor Ascher. While I believe that the charitable bequest deduction should be limited to charities that provide services that target the poor and disadvantaged,208 certain limitations on the deduction remain sensible.209 Specifically, my current proposal modifies the charitable bequest deduction to mirror the income tax charitable contribution deduction. First, the charitable bequest deduction should be limited to 50% of the adjusted gross estate when contributing to public charities. Moreover, when mak-

206. Id. Professor Ascher has a number of proposals focused on wealth concentration that will be discussed later in this Article. Consistent with the revenue-raising objective of his proposal, he would limit the charitable bequest deduction to 20%. Therefore, this section of his article serves a minor purpose.
207. See generally Ascher, supra note 60; Fleischer, supra note 120.
208. See Fleischer, supra note 120, at 297.
209. See Ascher, supra note 60, at 136.
ing contributions to private organizations, the deduction should be limited to 20% of the adjusted gross estate.

Using the charitable contribution deduction, the government created an incentive for charitable giving using a percentage-based model and made it clear that it was effectively partnering with these organizations. By foregoing the additional income tax, the government was counting on charitable organizations to provide public goods and services to the needy. If societal goals are to be furthered, a similar focus should accompany any analysis of the charitable bequest deduction.

My current proposal would be efficient to administer because the criteria concerning which organizations qualify for varying levels of deductions have already been established. Public charities would receive a 50% deduction while private organizations would receive a 20% deduction of the contribution base. As such, administrative burdens that accompany other proposals would be taken out of the equation. There is no need to waste administrative resources and manpower determining the deductibility of mixed purpose charities and organizations under the donor advised funds umbrella, and there is little utility in deliberating whether charities which support the arts qualify for a deduction. Such efforts require the kind of micro-management the government, from a practical standpoint, does not have the resources or desire in which to engage.

210. Understanding that I.R.C. § 170(b)(1)(B) (2006) provides for a 30% deduction, this Article’s suggestion offers less of a deduction because the taxpayer has had the benefit of the lifetime use of his or her funds.

211. See e.g., NAT’L ASS’N OF COLL. AND UNIV. BUS. OFFICERS, SUMMARY OF CHANGES TO TAX RULES GOVERNING DONOR ADVISED FUNDS AND SUPPORTING ORGANIZATIONS INCLUDED IN H.R. 4, THE PENSION PROTECTION ACT OF 2006 (2006), http://www.nacubo.org/documents/DAFsandSupportingOrgsProvsofHR4.pdf (detailing the intricacies of determining the deductibility of certain charitable contributions). A charity is a mixed purpose investment where it cannot be purely a financial investment. A mixed purpose charity involves applying the financial investment rules to parts of an investment. Also, a donor-advised fund allows people to give money, stock, and other assets to special accounts. Donors may claim a deduction at the time of the gift, and the institution administering the fund gains full control over the contribution. Some organizations use these to ease administration of large donations.
In many respects, the arts, as a category, is an easy target to use as an example. While the opportunities to enjoy museums and art festivals may be open to the public, the most likely patrons will be those in the higher economic classes. Yet, although the arts may do little to create opportunities for the disadvantaged, they provide a valuable service to the community. As such, it is beneficial to permit their continued subsidization by the government. Deductibility is well-established under the income tax charitable contribution provision, and a similar treatment should be afforded under the estate tax. Under my proposal, an organization will either qualify for public charity status or private foundation status, and the deductibility of the bequest will be determined accordingly.

Of course, while the arts, hospitals, and private education facilities offer valuable benefits to the community, the government should not heavily subsidize those public benefits when there is little government benefit received. In other words, because the government’s burden to assist the poor has not been adequately relieved by the diverted revenue, the charitable bequest deduction should be limited and the additional tax dollars re-diverted to the government.

By allocating a different percentage based on the type of charitable organization recipient, the government will make a distinction between the kinds of goods and services provided by public charities versus those provided by private foundations. With the charitable contribution deduction, the government recognized that both organizations offer something of value to the public, and yet public charities were still given preferential tax treatment, providing an additional incentive for the wealthy to support public charitable organizations. That same preferential treatment was not afforded to public charities when the charitable bequest deduction was enacted.

With the current proposal, however, preferential treatment will be afforded to public charities. Although it is difficult to determine whether any tax policy actually affects an individual’s choice to give, it is likely that a person inclined to make contributions will take the additional tax benefit under consideration. Of course, a natural concern regarding any modifications to the unlimited nature of the charitable bequest deduction is whether there will be a corresponding harm to charitable organizations.
F. The Impact of the Charitable Bequest Deduction on the Estate Tax

As previously discussed, tax policy changes stemming from TRA 1976 negatively impacted the estate tax’s ability to raise revenue.212 After the passage of TRA 1976, both the revenue generated and the number of transfer tax returns filed decreased.213 Nevertheless, although transfer tax revenues were decreasing, the same was not true for charitable bequest giving.

In 1977, charitable bequest giving was estimated at $2 billion,214 whereas the transfer tax generated $7 billion.215 Even though the transfer tax receipts were substantial, a significant amount of revenue was still foregone. When the transfer tax revenue decreased to an estimated $5 billion in 1978, charitable bequest giving reported an increase to an estimated $2.6 billion.216

By 2000, the Congressional Budget Office (“CBO”) estimated that $196 billion was contributed to charities and of that number, about $16 billion was made as charitable bequests.217 During the same year, the transfer tax generated an estimated $29 billion.218 Moreover, in 2003, a reported $241 billion was contributed to charities, and charitable bequests were an estimated $21.6 billion of those contributions.219 During the same year, the transfer tax generated an estimated $22 billion.220 By comparing the statistical figures, one can see that the charitable bequest contribution increased at a rate that clearly outpaced the transfer tax.

In 2008, overall charitable giving was estimated at $308 billion, and charitable bequest giving was estimated at $23 bil-

212. See supra notes 70–75 and accompanying text.
213. See supra notes 70–75 and accompanying text.
lion.\textsuperscript{221} The transfer tax generated $29 billion.\textsuperscript{222} Even though there was an increase in tax by 2008, when viewed as a whole, there was as much tax revenue as charitable bequests. As the data demonstrates, a substantial amount of revenue has been diverted to charitable organizations through the charitable bequest deduction over the years.

The government should reduce the unlimited deduction to a 50\% limitation for public charities and a 20\% limitation for private foundations. If tax policy does influence behavior, as many have proposed, then the new percentage limitations would encourage more contributions to public charities because of the tax savings. This would be desirable because public charities better represent the organizations the government probably intended to subsidize given that they benefit a wider range of the poor population. Even if this is not the case, however, the government would collect more revenue through the estate tax to reduce some of the government debt and provide for the needy through existing programs.

By modifying the charitable bequest deduction, the government would gain an additional revenue stream without technically raising taxes.\textsuperscript{223} Even if the proposed percentage limitation were to negatively affect charitable bequest giving, the current structure does not incentivize contributing to those organizations that primarily assist the poor. As such, it should not receive such substantial favorable tax treatment.

When the economic needs of the country are great, this Article proposes eliminating the charitable bequest deduction altogether. In the absence of a charitable bequest deduction, a donor may be more motivated to make substantial lifetime gifts to charities. By making a lifetime charitable gift, he or she would be able to take advantage of the charitable contribution deduction, thereby

\textsuperscript{221} \textit{Giving USA 2009}, supra note 171, at 1. The report indicates that charitable giving decreased across-the-board and 2008 was the first time charitable giving had decreased since 1987. \textit{Id.} at 3. The report further speculates that perhaps EGTTRA was a factor with the reductions in estate taxes since 2001. \textit{Id.} at 53.

\textsuperscript{222} Joulfaian \textit{supra} note 35, at 6-5 tbl. 6.1.

\textsuperscript{223} This author recognizes that some may deem these modifications as raising taxes because of the taxes the government would collect as a result of these changes that is currently not collected.
reducing the income tax obligation, diminishing the estate tax base, and avoiding the gift tax altogether.

Inevitably, a potential challenge to my proposal is that charities would be harmed by modifying the current unlimited deduction. A similar argument was raised in the CBO report which addressed the concern of raising the estate tax exemption level.\footnote{224} The authors of the report indicated that when a taxpayer’s estate tax liability is reduced to zero, his or her incentive to contribute to charity is diminished.\footnote{225} A similar argument can be made that a reduction of the charitable bequest deduction will leave donors with no incentive to make the charitable gift.\footnote{226} As a result, charitable bequest gifts may fall. While these concerns are valid, the total societal well-being outweighs any potential harm to the charitable sector. Professor Ascher addressed this concern by indicating that whatever the amount received by the charitable organization from a bequest, it would still net an increase of funding to the charity.\footnote{227} Thus, there is no reason to be distressed. Another potential challenge to this Article’s proposal is the uncertainty caused by the unpredictable availability of the deduction. While this Article recognizes this to be a legitimate concern, estate planning has survived many years of uncertainty in other areas.

Moreover, because the charitable bequest deduction is a privilege, the proposed modifications only dictate where the funds will be directed. While there will be a greater tax liability for donors if the deduction is limited, that reality alone is not enough of a reason for the nation to forego additional revenue when extra funding is needed. For the potential charitable organizations, the funds should not be relied upon until received because there is always a chance the donor could change his or her mind or spend the funds elsewhere.

In the end, society will be better served by the proposed modifications because the proposed deduction system would encourage that more charitable giving be diverted to public charities.

\footnote{224} The Estate Tax and Charitable Giving 3, supra note 129, at 4–8.  
\footnote{225} Id. at 6–7.  
\footnote{226} Id. at 3 (“A charitable bequest of a dollar from an estate facing a 45 percent estate tax yields a 45-cent reduction in the estate’s tax bill and thus cuts bequests to other beneficiaries by only 55 cents. The reduction effectively lowers the cost of the charitable bequest in terms of what heirs receive.”).  
\footnote{227} Ascher, supra note 60, at 136.
In addition, it would generate additional revenue for the government. Ultimately, the proposal will lead to the provision of greater assistance to the poor by public charities, thereby relieving government resources and benefitting society as a whole.

V. WEALTH CONCENTRATION

A. Brief History

While the estate tax had its start as a temporary revenue source, a social justice movement by progressives to combat wealth concentration gained momentum shortly after the end of World War I.228 These progressives sought to have government leaders consider the inequities of the social and political power held by the wealthy. At the time, there was particular concern about the growing financial disparity between the rich and the poor. For instance, in the 1920s, over a seven year period, Americans earning annual incomes over $1 million increased from 21 to 511.229

Taking into consideration more than just the revenue aspect of estate taxation, the progressives primarily wanted our leaders to reduce wealth concentration.230 There was a pervasive belief that the accumulation of wealth in the hands of a concentrated segment of society was inefficient, perhaps a threat to our democracy, and as this view became paramount, the support for a permanent estate tax was successful. Specifically, the progressives desired to control the undesirable societal effects believed to be associated with concentration of wealth in private non-governmental organizations.231 The estate tax has long been believed to be the most ef-

228. Frederick, supra note 10, at 204 ("Though Progressives frequently differed over how to achieve a greater equality of wealth distribution, their goal was unmistakable and became a powerful political force in the years between 1890 and 1929.").
229. Cooper, supra note 7, at 885.
230. Frederick, supra note 10, at 203–04 ("Leveling the distribution of wealth, whether through taxation or other mechanisms such as the Sherman Antitrust Act of 1890, was one of the primary ideals that defined the Progressive Era in the United States. Progressive theorists like Henry George argued that there was no reason that industrialist tycoons should be allowed to so completely enjoy the fruits of others' labor just because they owned the property that was being labored upon." (footnote omitted)).
231. Jacobson et al., supra note 54, at 120.
fective way of reducing concentration of wealth. Over the years, however, the estate tax has been ineffective in curtailing such wealth as a result of the same tax policies that have made the estate tax less effective as a revenue source.\textsuperscript{232} Thus, in addition to raising revenue, this Article's proposals may have an impact in curtailing wealth concentration.

\textbf{B. The Impact of Wealth Concentration and the Estate Tax}

While it may not be difficult to conduct and track data regarding wealth concentration, it is difficult to determine what impact any particular variable may have on it.\textsuperscript{233} Nevertheless, there are empirical studies that track certain aspects of wealth concentration, and by inference we may draw certain conclusions from the data.\textsuperscript{234} Interestingly, there are arguments both in support of and against decreasing wealth concentration.

One theory advanced for the cause of wealth concentration is linked to the concept of redistribution of wealth. For instance, some scholars and researchers argue that poor growth rates are attributed to the progressive nature of the income tax.\textsuperscript{235} As higher income earners are burdened with more taxes, they are discouraged from making capital investments, thereby stunting economic growth. In other words, the rich are fearful of investing and increasing their own wealth because as they earn more, they are fraught with more taxes, which in turn subsidizes the less fortunate. As a result, the wealthy hold on to their money. This posi-

\begin{itemize}
  \item \textsuperscript{232} Caron, \textit{supra} note 95, at 648 ("Similarly, today the tax system is less progressive, and there is a greater concentration of wealth, than in 2001.").
  \item \textsuperscript{234} See id. at 1494–1500.
  \item \textsuperscript{235} See, e.g., James R. Repetti, \textit{Democracy, Taxes, and Wealth}, 76 N.Y.U. L. Rev. 825, 825–26 ("The share of the country's net worth held by the top one percent of the wealthiest households declined from more than 44.2\% in 1929 to 20.5\% in 1979."); see also Repetti, \textit{supra} note 233, at 1498 ("Since the wealth transfer taxes are assessed on transfers of \textit{wealth}, not income, the relevant issue is whether the estate tax has affected wealth concentration, not income concentration.").
  \item \textsuperscript{236} Repetti, \textit{supra} note 235, at 837 (noting the common theory that higher taxes discourage capital investment and economic growth).
\end{itemize}
tion, however, does not have the empirical support to back it up. In fact, because substantial wealth is held by an elite minority, it is difficult to add to the wealth pool. The elite minority has a vested interest in keeping the economic picture in its current state.

Some claim that the disparity in wealth suggests a failure to invest in education for the poor, for the majority of the people working hard to attain that “American dream” will never reach their goal. Part of the reason for such disparate results is due to the lack of educational opportunities for those in the lower economic

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237. *Id.* ("[S]tudies that directly have included tax rates in their regression models have found that high tax rates do not play a negative role in growth.").

238. Lisa A. Keister et al., Conference Transcript, *Rising Wealth Inequality: Why We Should Care*, 15 GEO. J. ON POVERTY L. & POL'y 437, 460 (2008) ("1 percent of the U.S. population currently own approximately half of the entire financial wealth in this country. Financial wealth includes your assets minus your debts but does not include your home equity. So 1 percent of the U.S. population currently holds half of the entire financial wealth (stocks, bonds, savings, and so on). The bottom 60 percent of Americans hold less than 1 percent of the country’s financial wealth, while the bottom 40 percent are actually in debt. As a result of these and many other patterns, the United States currently leads the developed world in terms of the extent and degree of its economic inequality. With respect to poverty, the story is much the same. Whether we look at overall levels of poverty, children’s poverty, or poverty among the elderly, the pattern is similar. That is, of all the advanced industrialized nations in the world today, the United States ranks at the top in terms of poverty.” (footnotes omitted)).

239. See *David Cay Johnston, Perfectly Legal: The Covert Campaign to Rig Our Tax System to Benefit the Super Rich—And Cheat Everybody Else* 19 (2003) (“For a nation that has debated for years whether the tax rate cuts begun by President Reagan in 1981 are ‘trickle-down economics,’ it may be startling to read that the reality of these changes has been just the reverse. The tax system is causing the benefit of American society to flow up and pool at the top.”).

240. *James Truslow Adams, The Epic of America* 415 (Taylor & Francis 1938) (1931) ("[The American Dream is] that dream of a land in which life should be better and richer and fuller for every man, with opportunity for each according to his ability or achievement. It is a difficult dream for the European upper classes to interpret adequately, and too many of us ourselves have grown weary and mistrustful of it. It is not a dream of motor cars and high wages merely, but a dream of a social order in which each man and each woman shall be able to attain to the fullest stature of which they are innately capable, and be recognized by others for what they are, regardless of the fortuitous circumstances of birth or position.”).
Without the availability of or access to higher education, people who live in poverty have little to no hope of gaining enough ground to reach higher income levels. Thus, the impact of wealth concentration is far-reaching.

When the playing field is so dramatically skewed to one side, it is of little surprise that the average person will never actually move beyond his or her current economic state. Moreover, it is especially difficult to advance to the top echelon of societal wealth. Even if we attribute some credit to a lack of investment in education, it is difficult to determine the impact on economic growth because there are scant few empirical studies that make the connection.

Whatever the reason for the disparity in wealth, the estate tax has long been charged to lead the battle against wealth concentration. In reviewing some of the data that tracks wealth concentration, the studies show that, from 1929 until 1979, there was some decrease in wealth concentration. Specifically, there is some evidence that demonstrates a reduction in the amount of wealth transferred from within a family and that the combination of the estate tax liability and charitable contribution deduction may have been a factor in that reduction.

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242. Id. at 181. The failure to invest in education and tax policy both inhibit access to higher education. For instance, the Taxpayer Relief Act of 1997 was adopted to make higher education available to any family that wanted to send their child to college. Id. at 185. But when the provisions adopted were tax credits, which required the student to have enough taxable income and pay the money upfront, those provisions created a barrier to those who did not have the ability to save the money, even if they held jobs where they earned enough taxable income. Id. at 186.


244. Repetti, supra note 235, at 825–26 ("The share of our country’s net worth held by the top one percent of wealthiest households declined from more than 44.2% in 1929 to 20.5% in 1979." (citing EDWARD N. WOLFF, TOP HEAVY: A STUDY OF INCREASING INEQUALITY OF WEALTH IN AMERICA 62 tbl. A-1 (1995))).

245. Id. at 856–57.
For example, an important 1994 study conducted by David Joulfaian that examined the tax returns for persons who died in 1982 found that “[t]he combination of charitable bequests, estate expenses, and taxes accounted on average for . . . 41 percent of the net worth of decedents with gross estate[s] over $10 million.”246 Yet, soon thereafter, the tax provisions in TRA 1997 undermined that effort by increasing the applicable exclusion amount. Moreover, under EGTRRA, the applicable exclusion amount was increased further and the tax rates were reduced.247

While they may not agree on what causes such wealth concentration, the experts in the field consistently agree on the effect of wealth concentration. The reports indicate that wealth concentration is not only harmful to the economy, but may also be harmful for political environments.248 When the majority of wealth is held by a numerical few, the political system and political climate may be compromised.249 The concern is based on the theory that the wealthy may use their power and influence to support political candidates who will provide the wealthy with direct access to support their agendas.250 While some studies are mixed on whether elected officials are influenced on issues of high visibility, research supports the notion that elected officials have been influenced on less visible issues.251

247. See Joulfaian, supra note 35, at 3-8.
249. Id. at 843–49.
250. Fleischer, supra note 120, at 278 & n.71 (citing Repetti, supra note 235, at 843–49).
251. Repetti, supra note 235, at 846 (“The studies have been mixed in finding a direct relationship between contributions and how senators or members of the House actually vote in highly visible roll calls on the floor. However, the studies are much more consistent in finding evidence that the contributions do play a significant role in influencing the activities of legislators outside the limelight of roll call votes on the floor. There is some evidence that contributions influence roll call votes on issues that do not attract significant publicity. For example, contributions appear to have influenced votes on trucking legislation about which there was little publicity. Similarly, contributions seem to have influenced votes on the Bank Underwriting Bill, which received less publicity
According to Professor Fleischer, the influence held by the wealthy is not exercised just by making contributions. In reality, the wealthy, propertied citizens are generally either the community leaders who have a lot of political capital, or they may even be political leaders. By using their influence and leverage—and sometimes even their votes—the wealthy have the ability to sway the political system in a way that will not be available to the average citizen. Such results clearly run afoul of the democratic principles upon which this nation was founded.

Moreover, Professor Fleischer makes a valid point that when these wealthy individuals are business leaders in the community, they may have the ear of political leaders as a result of their ability to both bring and keep jobs in the area. This type of access and influence may be benign in some cases, but the potential for corruption is too much of a risk to ignore and could ultimately cause the public to lose confidence in the political leadership if the corruption were exposed. Again, to have this kind of political persuasion and power passed on from generation to generation is unfair and inconsistent with democratic principles.

Professor Fleischer is also concerned with the efforts of charitable organizations to lobby for certain political positions. In this respect, a charitable organization may be used as a pawn by the decedent’s family to pursue political agendas in a purportedly than other bills affecting the financial sector. There also have been studies of state proceedings that found direct evidence that campaign contributions influence the voting records of state legislators.” (footnotes omitted)).

252. Fleischer, supra note 120, at 278–79 (noting that wealth concentration enables individuals “to influence the political process, both directly and indirectly”).

253. Id. at 279.

254. Id. at 280–81.

255. Daniel Hays Lowenstein, Political Bribery and the Intermediate Theory of Politics, 32 UCLA L. Rev. 784, 805 (1985) (“[T]o the extent that we regard being governed by democratic processes as a good, we are harmed each time policy choices are made outside those processes.”).

256. See Fleischer, supra note 120, at 278–281. If it could somehow be shown that corrupt political pressures cancel each other out or that for some other reason policy outcomes resulting from corrupt pressures are the same as they would be without those pressures, the corruption still would impair the benefits that citizens obtain from participation in politics.

257. Id. at 288–90.
neutral way. In addition, Professor Fleischer notes that political power can be used by these organizations to influence the behavior of political leaders.\textsuperscript{258} For instance, a charity could threaten to leave the community and relocate because of the way a political leader might vote; when politicians’ votes are influenced by such threats, democratic governance is directly compromised. In this way, charities can be used in order to gain political favors in a manner that is almost impossible to prove or regulate.

In general, wealth concentration has a negative impact on society as whole. With such a vast disparity of wealth, there may be no single sustainable measure to combat its concentration. The estate tax, over time, has not been a formidable weapon primarily because of legislation designed to make the estate tax ineffective. Even with current proposals to make the estate tax a stronger revenue source, there should be other measures implemented to assist in the battle against wealth concentration. The following proposals discuss other measures that may be used in concert with the estate tax to effectively and efficiently curtail wealth concentration.

\textbf{C. Proposals to Diminish Wealth Concentration}

Over time, abolition of wealth concentration has clearly not been achieved. In fact, a look at the wealth concentration literature over the years demonstrates that wealth has become even more concentrated. In the 1990s, approximately 20% of the nation’s wealth was held by the top 1% of the wealthy.\textsuperscript{259} Even now, the majority of the nation’s wealth is held by the elite minority with the top 1% owning almost half of the country’s wealth.\textsuperscript{260}

The studies conducted on philanthropy support this position. Individuals and families in the top 5% income bracket represent 45% of all charitable contributions made in 2000.\textsuperscript{261} Looking a little deeper into the numbers, more than 60% of the contributions were made by the taxpayers in the top 20% income bracket.\textsuperscript{262} The data supports the position that a majority of the wealth

\begin{itemize}
\item \textsuperscript{258} \textit{Id.} at 290.
\item \textsuperscript{259} Frederick, \textit{supra} note 10, at 209.
\item \textsuperscript{260} See \textit{supra} note 238 and accompanying text.
\item \textsuperscript{261} \textit{The Estate Tax and Charitable Giving, supra} note 129, at 2.
\item \textsuperscript{262} \textit{Id.}
\end{itemize}
is held by a minority group and that tax policy may impact the
ability of the government to raise revenue through the estate tax.

In 1988, almost 68,000 estate tax returns were filed, and
although the number of returns filed decreased in 1989, the number
of estate returns filed steadily increased until 2001.\textsuperscript{263} By 2001,
the number of estate tax returns filed had increased to almost
124,000.\textsuperscript{264} By 2004, the number of returns filed had decreased to
almost 87,000, and by 2008, they had further decreased to almost
47,000.\textsuperscript{265} The significant tax policy change that reversed the trend
was EGTRRA. Beginning in 2002, the effects of EGTRRA were
realized as the applicable exclusion amount increased from $1 mil­
lion to $1.5 million, later increasing to $2 million by 2006.\textsuperscript{266} As
the exemptions increased, the wealth pool became more concen­
trated, and the taxes generated decreased.

In order to level the playing field and bring some sem­
blance of balance to the political and economical inequities, a
number of multi-level approaches should be implemented to com­
batt wealth concentration. One proposal suggested for dealing with
wealth concentration is to limit inheritance rights.\textsuperscript{267} For instance,
Professor Ascher argues that inheritance should only be tolerated
when necessary, positing narrow circumstances under which ex­
ceptions should be made.\textsuperscript{268} In addition, he argues greatly in favor
of leveling out the playing field in order to make opportunities

\textsuperscript{263} See Joulfaian, supra note 35, at 6-8 tbl. 6.4. In 1989, the number
of returns filed had decreased to 52,000. \textit{Id.} In 1991, the number of returns filed
had increased to almost 61,000 but still remained below the number filed in
1988. \textit{Id.} By 1993, the number of estate returns filed had increased to 70,000.
\textit{Id.} Over the next few years, the number of estate returns continued to increase.
\textit{See id.} In 1982 almost $8 billion was generated by the estate tax. \textit{Id.} at 6-6 tbl.
6.2; \textit{see also} AM. ASS’N OF FUND-RAISING COUNSEL, GIVING USA: 1983
ANNUAL REPORT 7 (Fred Schnaue ed., 1983) (reporting charitable bequest giv­
ing in 1982 was $5.45 billion and individual charitable contributions were re­
ported at almost $49 billion).

\textsuperscript{264} Joulfaian, supra note 35, at 6-8 tbl. 6.4.

\textsuperscript{265} \textit{Id.}

\textsuperscript{266} Economic Growth and Tax Reconciliation Relief Act of 2001, Pub. L.
No. 107-16, § 501(a), 115 Stat. 38, 69 (codified as amended in scattered sections

\textsuperscript{267} Ascher, supra note 60, at 88–91.

\textsuperscript{268} \textit{Id.} at 73.
more equalized.269 In this respect, his position is closely aligned with the views of Thomas Jefferson, who remarked, "[T]he earth belongs in usufruct to the living; the dead have neither powers nor rights over it. The portion occupied by any individual ceases to be his when he himself ceases to be, and reverts to society..."270

While Congress could pass legislation that would tax 100% of property at death, leaving nothing for a taxpayer to pass to his family, most would agree that such an approach is too harsh. In fact, it would only trade one problem for another, as the government would then have to assume responsibility for the family that may be impoverished as a result of such a tax, particularly if the breadwinner was the decedent. Nonetheless, efforts to remove wealth concentration are not wholly unwise. When Congress initially enacted the estate tax, albeit as a temporary revenue source, it took a more balanced approach by taxing only that portion of the wealthier estates necessary to generate enough revenue to deal with the government’s revenue shortfall. This approach permitted the decedent to leave a portion of his wealth to care for his family or sustain his legacy if he so desired. As the government later recognized that the need to deal with wealth concentration accompanied the need to develop social programs for the poor, these combined purposes lead to the implementation of the estate tax and the charitable contribution/bequest deduction.

Creating harmony between these multiple goals is lost when the solution is a total forfeiture. Under Professor Ascher’s position, inheritance is only permitted where public policy justifies it.271 While such an approach is undoubtedly not widely embraced, Ascher notes that no natural right to inheritance exists.272 In addition, he notes that the need to deal with the federal deficit justifies an interference with traditional conceptions of inheritance.273 Absent six public policy exceptions that would justify permitting in-

269. Id. at 88–91.
270. Id. at 80 (citing Letter from Thomas Jefferson to James Madison, (Sept. 6, 1789)).
271. Id. at 122.
272. Id. at 121.
273. Id.
heritance, the decedent’s property should be sold, with the proceeds payable to the government.

Professor Ascher’s policy exceptions include the following: martial exemption, exemption for dependent lineal descendants, exemption for disabled lineal descendants, and exemption for lineal ascendants when support is needed. With the aforementioned four exemptions, Professor Ascher posits that providing for immediate family members who need support is clearly a public policy justification that is easy to support.

He proposes limitations even where immediate family members are beneficiaries, thereby focusing on the limitations that would curtail wealth passed down through the generations and reduce wealth concentration. For instance, Professor Ascher has proposed a sliding scale of marital exemption in certain cases, not the full unlimited inter-spousal transfers under the current system. Under his system, at certain intervals, the surviving spouse would gain the right to receive more of the decedent’s estate, with the right to inherit the full estate after twenty years of marriage.

While this exemption seems entitlement-based, it is in some sense also support-based on account of time in marriage being used as the basis for a sliding scale to determine the marital share. By basing the marital rights on time invested in the marriage, his proposal seeks to give proper respect to the contributions of the surviving spouse to the acquisition of property to the marriage, even when the contribution was non-monetary.

The other family exemptions are clearly support-based, unlike the marital exemption. Professor Ascher suggests that if the

274. Id. at 122.
275. Id.
276. Id.
277. See id. (describing these four exceptions as resting “on relatively indisputable grounds”).
278. Id. at 127.
279. Id. at 124–26.
280. Id. After one year of marriage, the surviving spouse would be entitled to 24% of the estate. Id. at 126. After seven years of marriage, the surviving spouse would be entitled to 48% of the estate. Id. At the fourteen-year mark, the surviving spouse would be entitled to 76%, and after twenty years of marriage, the surviving spouse would be entitled to the full estate. Id.
281. Id.
children are healthy adults, then passing wealth to those children is essentially passing an unearned financial advantage to the next generation. 282 He instead suggests a sliding scale based on the age of the child and expectations of the parent to the child, with a cut off age of twenty-five for any adult, healthy non-dependent child. 283 This proposition is based on the premise that once a child has been provided an opportunity to achieve a higher education, that child should be in a position to pursue a career and support himself or herself financially. 284

Aside from the administrative costs, it is difficult to determine where to draw the inheritance line where gray areas exist. Under Professor Ascher’s plan, courts would be in the business of managing and monitoring relationships. There should be limitations, but not to the point of micro-managing marital relationships. Fortunately, this Article’s proposal does not encompass these administrative burdens. By setting the estate tax applicable exclusion amount at $2 million per taxpayer, without analyzing the family and marital situations, the government receives revenue from taxation when the decedent’s property exceeds this amount. In addition, whether a person is married or unmarried, has children—adult or not—or has no children, he would be well within his rights to pass his property to the person or entity of his choosing as it stands under our current system.

Professor Fleischer has also examined the notion of using the estate tax to minimize wealth concentration. 285 Specifically, she has placed the focus on the charitable bequest deduction, proposing that charitable bequests should only be deductible if the deduction would minimize the wealth concentration. 286 For example, a charitable bequest would be deductible if the bequest would remove assets from the family’s control. 287 If the recipient charitable organization has no personal connection to the donor, then

282. Id. at 127.
283. Id. at 128.
284. Id. at 127.
285. Fleischer, supra note 120.
286. Id. at 283.
287. Id. at 284. For example, if the bequest were made to the Humane Society, a college, or other public charity and control of such organization was by someone other than a family member, then the contribution to that organization would be fully deductible. Id.
neither the donor nor a family member would still be in control of the assets.\textsuperscript{288} If those assets are outside the control of the donor and his or her family members, then the donor would not be able to use those assets to maintain economic and political power.\textsuperscript{289} If, on the other hand, the contribution is made to a public or private charitable organization that is controlled by the family, the contribution would not be deductible.\textsuperscript{290} Since the donor would still have influence over who to benefit and how they would be benefitted, that amounts to having an undesirable control over the fates of others.\textsuperscript{291}

This Article agrees that a donor’s continued control in the charitable organization should bring some limitation on the donor’s ability to receive a charitable deduction for having made such a contribution. More pointedly, this Article also agrees that the donor’s family would ultimately be the beneficiaries of the transferred political and economical power. Nevertheless, this Article disagrees with Professor Fleischer’s method to combat this retained control.

After all, the truth is that any organization that provides services to others—particularly those with limited resources—will be influenced. No matter who is making the decisions, there will always be some level of influence and coercion at play. Therefore, detailed attempts to regulate behavior would bring about disputes that would likely have to be determined on a case-by-case basis, requiring the kinds of government resources and manpower that may not necessarily bring about a wealth reduction.

Under Professor Fleischer’s proposal, deductibility of a contribution is based on the control of the donor, or really the donor’s family, over the recipient charitable organization. In situations where private foundations demonstrated a lack of control by the donor’s family, these foundations would receive the same tax treatment as the public charities. In my opinion, this is not a better result given that most private foundations serve a specialized segment of the population.

\textsuperscript{288} Id.  
\textsuperscript{289} Id.  
\textsuperscript{290} Id.  
\textsuperscript{291} Id.
Although this Article agrees with the fact that it is harmful to society to have such generational political power passed through generations, my conflict with Professor Fleischer’s proposal is that it vests the government with undesirable control over human behavior. While this Article is not challenging the merits of the proposal to fund certain charities, there is a more efficient way to bring about a similar result.

Rather than deciding which organizations are worthy of a full deduction and which organizations are not, the better approach is to treat all similarly-situated organizations in a similar manner. Consistent with prior arguments, a proven method has already been established in the income tax system. Modeling the income tax provisions, the charitable bequest deduction should be limited to 50% of the estate tax base for public charities that qualify under sections 501(c)(3) and 170(a) of the Internal Revenue Code. Moreover, when making charitable bequests to private foundations, the deduction would be limited to 20% of the estate tax base.

By using this method, revenue may be generated while retaining the incentive to encourage charitable giving. While limiting the amount that is deductible might not necessarily limit a donor’s power and influence over the organization, it would limit some of the family’s resources because a portion of the estate that would have gone to the foundation would now be diverted as taxes. Therefore, coupled with the recommendation to reduce the applicable exclusion amount to $2 million and set the top marginal rate at 55%, the estate tax could lead to a revenue raising change we have not seen since the early history of its implementation.

Because of these reasons, the case for setting limits to the charitable bequest deduction is strong. In years past, the estate tax has not been a big revenue raiser, and it certainly has not been effective in curtailing wealth concentration. By implementing my proposals, however, the government could generate the kind of additional revenue that is needed to address the U.S. economic situation. Rather than placing the burden on the backs of the non-wealthy, this Article’s proposals soundly place the burden on the citizens who have the ability to pay. Moreover, by limiting the charitable bequest deduction to 50% of the gross estate to public charities and 20% of the gross estate to private foundations, this Article’s proposals could bring about a good source of revenue for the government and more resources to the general population.
Our government should not sacrifice revenue in favor of benefitting the economic elite. Yet, while we want our government to raise revenue to sustain our economy, we also want to balance that goal with that of individuals to transfer a generous estate to the natural objects of their bounty. There is a balance, and it is up to our government to implement what is appropriate.

Although many purposes were reflected in the decision to make the estate tax permanent, the current focus of the tax, as with most other taxes, should be on its revenue potential. While the progressives’ pursuit against wealth concentration may have lost support over the years, that is no reason to stop seeking needed tax policy reforms. Most opponents of the estate tax do not currently have a taxable estate, and despite the belief that they one day will, such a notion does not justify proposals to repeal the tax. Nevertheless, while the estate tax has the potential to serve valuable objectives, it is of little utility in the absence of thoughtful and progressive tax policies.

VI. CONCLUSION

During the later part of 2008, the United States came face-to-face with its own economic reckoning. Still, despite all of the economic turmoil, the government refused to implement revenue raising measures, even though historically that had been an effective way to deal with the situation. This Article demonstrates how to make the estate tax more effective in its revenue potential and endeavors to show why the changes are crucial to the economic recovery of the country. Given our high debt, economical slump, and ongoing military conflicts, the right move for the country is to use our progressive system of taxation to place the financial burdens on those most financially capable of paying.

By raising the applicable exclusion amount and reducing the top marginal rate to 35%, the government provided a tax break to the wealthy at a time when the majority of Americans were suffering economically. Moreover, less revenue was raised at a time when, historically, the opposite should have occurred. The estate tax has been a consistent revenue source during times of economic crisis, and it should be used for that purpose in a way that brings about a maximum result. By simply increasing the top marginal rate to 55% and reducing the applicable exclusion amount to $2 million per taxpayer, while contemporaneously reducing the un-
limited charitable bequest deduction to 50% for contributions to public charities and 20% for contributions to private foundations, the government has the potential to generate a substantial amount of revenue.

History, economists, and the economy all point to the fact that the estate tax should remain permanent. Moreover, by viewing the estate tax as a revenue source, the tax may be used most effectively. By reducing wealth concentration and bolstering government revenues, the proposals in this Article may serve to bring harmony between our tax system and social public policy. Such is the type of change in which we can believe.