

GIVE IT AWAY: A RESPONSE TO THE TRANSFER TAX

I. INTRODUCTION

Death and Taxes. Those two words do not exactly conjure up positive emotions. Death taxes. Put them together and they become downright negative, summoning feelings of unfairness in 85% of Americans.¹ As the popular saying goes, death and taxes are two things that one cannot avoid. There are those, however, who are trying to make it possible to avoid death taxes. Conflict surrounding the passage of wealth from one generation to the next has been a part of our human makeup since Jacob stole Esau's birthright.² Just as beneficiaries have tried to receive their share, those leaving their worldly wealth have had a desire to pass it to their heirs.³

Hand-in-hand with this desire to pass wealth has been a desire by the government to tax the transfer of it.⁴ The desire to use wealth transfer as a revenue generator, coupled with the unfavorable attitude most Americans have toward taxes, has caused much debate between those who believe that the taxes on wealth transfer are necessary⁵ and those who believe that the taxes are unnecessary and burdensome.⁶ The passage of The Economic Growth and Tax Relief Reconciliation Act of 2001 ("Tax Act of 2001")⁷ has perpetuated this friction by repealing the Transfer Taxes⁸ in 2010 for only one year and by adding to the mix the

¹ Mark Bernstein, *Should Governments Play Robin Hood? The Effects of the Repeal of the Estate Tax on Wealth Apportionment*, 12 *CARDOZO J. INT'L & COMP. L.* 187, 191 (2004). In response to the feelings of unfairness, United for a Fair Economy begs the question, "Unfair compared to what?" United for a Fair Economy, *America's Wealth Gap and the Case for Preserving the Estate Tax*, 8 (2004).

² *Genesis* 27:1-35 (all Bible verses cited in this comment are taken from the New International Version).

³ See *Proverbs* 13:22 ("A good man leaves an inheritance for his children's children . . .").

⁴ See Mary R. Wampler, *Repealing the Federal Estate Tax: Death to the Death Tax, or Will Reform Save the Day?*, 25 *SETON HALL LEGIS. J.* 525, 528 (2001) ("Although Emperor Caesar Augustus is usually credited with developing the first death tax, the Egyptians were actually the first civilization to institute [a Transfer Tax].") (footnote omitted).

⁵ See discussion *infra* Part III B.

⁶ See discussion *infra* Part III A.

⁷ See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 [hereinafter *Tax Act of 2001*] (codified as amended in scattered sections of 26 U.S.C.).

⁸ *Id.* § 901(a)(2), 115 Stat. at 150 (repealing the taxes in 2010 for one year). Transfer Taxes commonly refer to estate, gift, and generation-skipping taxes; however, in this comment Transfer Tax is exclusively used in reference to the estate tax. Gift and generation-skipping taxes are beyond the scope of this comment.

question of whether to make this repeal permanent.

By creating a federal government, our founding fathers created a need to raise revenue to operate that government. Having a federal government is not free. It takes money to operate a government.⁹ In the words of Oliver Wendell Holmes, “Taxes are what we pay for civilized society.”¹⁰ The main thrust of this paper is not to debate the amount of money needed to effectively run the federal government¹¹ but, rather, to examine the use of Transfer Taxes to help fund our government and, more specifically, the impact on charitable giving. While the Transfer Tax is not a significant source of revenue for the government,¹² revenue collection is only one part of the policy behind taxing wealth transfers at death; another part of the policy is to help redistribute¹³ wealth in America so that it is not concentrated in the hands of a few, thus preventing an aristocracy of the wealthy.¹⁴

One avenue that Americans have used to avoid paying Transfer Taxes is the use of charitable bequests to reduce the amount of the

⁹ Since 1960, the revenue collected by the federal government has averaged 18.1% of the gross domestic product (GDP). CONGRESSIONAL BUDGET OFFICE, REDUCING THE DEFICIT: SPENDING AND REVENUE OPTIONS 327 (1997), available at <http://www.cbo.gov/ftpdocs/0xx/doc6.pdf>. That percentage skyrocketed to 20.6% of the GDP in 2000 and is predicted to reach 20.7%, the highest percentage since World War II, in 2001. CONGRESSIONAL BUDGET OFFICE, BUDGET OPTIONS 375-76 (2001), available at <http://www.cbo.gov/ftpdocs/27xx/doc2731/ENTIRE-REPORT.pdf>.

¹⁰ *Compania General De Tabacos De Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).

¹¹ There is no doubt that the federal government could run on less revenue. While the choices of what to cut may not be easy or popular, there is little doubt that this great nation could continue to function as the greatest nation on Earth if it adhered to a budget. This comment’s purpose is not to debate how much money the government actually needs. Therefore, this comment does not look at the percentage of GDP, nor the amount of money generated. Instead, it looks at the sources as they relate to Transfer Taxes and the effect changes will have on the status quo without taking into account the notion that our government could actually function on less money.

¹² DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE DATA BOOK 2003 9, available at <http://www.irs.gov/pub/irs-soi/03datbk.pdf>. In 2003, the Transfer Tax accounted for about \$2.3 billion, or 1.2% of the revenue collected. *Id.*

¹³ See Stephanie A. Weber, *Re-thinking the Estate Tax; Should Farmers Bear the Burden of a Wealth Tax?*, 9 ELDER L.J. 109, 114-15 (2001). She writes:

Modern liberal economists and supporters of the estate tax agree with Roosevelt’s conviction that large concentrations of wealth should be collected and redistributed by the government. As a result, the estate tax is one of the highest taxes imposed upon American citizens. . . . The estate tax was targeted toward the riches of the rich and it is certainly hitting its mark in that respect. *Id.* (citations omitted).

¹⁴ See *United for a Fair Economy*, *supra* note 1, at 3 (quoting Louis Brandeis, “We can have democracy in this country, or we can have great wealth concentrated in the hands of a few, but we can’t have both.”).

decendent's gross estate.¹⁵ The combination of charitable bequests and charitable contributions¹⁶ amounted to nearly \$201 billion in 2003.¹⁷ However, giving is not fueled only by a desire to avoid taxes; there are also moral obligations that compel Americans to give to charities.¹⁸ A concern with any reformation or repeal of the Transfer Tax is the impact it will have on these contributions to charity.¹⁹

This paper will look first, in Part II, at the history of the Transfer Tax in America. Part III will examine the arguments surrounding the Transfer Tax, discussing arguments for its total repeal, for keeping it, or for modifying it. Part IV will explore charitable giving in America by, first, looking at the background to giving and the current status of giving; second, by addressing the effect of repealing or reforming the Transfer Tax; and third, by discussing the ability of charitable giving to rely on altruistic motives, as well as the role of giving and tithing by those in the church. Finally, in Part V, I will conclude by arguing that the Transfer Tax should not be totally repealed, but reformed, in order to continue encouraging American families to give to charity.

II. HISTORY OF THE TRANSFER TAX

“War, what is it good for?”²⁰ Answer: the beginning of the Transfer Tax in 1797.²¹ When the Transfer Tax made its debut, it was actually a “stamp tax on inventories of decedents.”²² The revenue generated by this stamp tax was directed to the United States Navy to help sustain the Navy during a “strained relationship with France.”²³

¹⁵ I.R.C. § 2055 (2000).

¹⁶ Charitable bequests are gifts given to charities after the donor has died. Charitable contributions are gifts given to charities during the life of the decedent.

¹⁷ CONGRESSIONAL BUDGET OFFICE, THE ESTATE TAX AND CHARITABLE GIVING 1 (2004) [hereinafter CHARITABLE GIVING] (“Nearly 90 percent of [charitable] giving occurs during donors lives”); available at <http://www.cbo.gov/ftpdocs/56xx/doc5650/07-15-CharitableGiving.pdf>. The studies that produced this data did not explore the possibility, or amount, of charitable contributions that were predicated on the same desire as charitable bequests: to avoid Transfer Tax.

¹⁸ See, e.g., *Luke* 6:38 (“Give and it will be given to you.”).

¹⁹ Forty-five percent of all charitable contributions in 2000 were made by families with an adjusted gross income in the top 5% of all Americans. CHARITABLE GIVING, *supra* note 17, at 2. This concern will be further explored in Part IV, pp. 11-19.

²⁰ BRUCE SPRINGSTEEN, *War, on LIVE 1975-1985* (Columbia Records 1986).

²¹ Agnes C. Powell, *Hocus-Pocus: The Federal Estate Tax—Now you see it, now you don't*, NAT'L B. ASS'N MAG., Sept.-Oct 2001 at 21.

²² *Id.* The widow and issue of the decedent did not pay the stamp tax, and although repealed by Congress, many states continued to use the stamp tax as a revenue source. Wampler, *supra* note 4, at 529-30.

²³ Powell, *supra* note 21, at 21.

Beginning with the Declaration of Independence, the natural law's²⁴ impact on the formation of this country is evident.²⁵ However, "[m]any influential jurists and political thinkers" during the founding of our country, including Thomas Jefferson, did not find the right to transfer wealth at death in the natural law; rather, they "regarded it as positivist in character."²⁶ Thomas Jefferson further argued that although "the use of property was a natural right, . . . [the] property ownership ended at death."²⁷ William Blackstone held similar beliefs even before Thomas Jefferson. Blackstone argued that "if [a man] had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for . . . ages after him; which would be highly absurd and inconvenient."²⁸

These views towards limiting a decedent's ability to freely transfer property and assets upon death, helped to shape a view toward the taxation of wealth transfers upon death. This led to the initial tax on a decedent's estate, which helped to strengthen the Navy in 1797.²⁹ After its debut in 1797, the Transfer Tax was repealed in 1802, after the war.³⁰ Following its repeal, the stamp tax lay dormant until financing of the Civil War was needed in 1862.³¹ Once again, after the war, the tax became unnecessary and was repealed in 1870.³² Resurrected again due to the Spanish-American War in 1898, the tax survived until the war's end in 1902.³³

In 1916, once again requiring revenue, Congress tapped into the resources of the American people by enacting both the modern income tax and the first official Transfer Tax.³⁴ The Transfer Tax was officially birthed in 1916, "in part, to finance World War I"³⁵ To avoid this new tax, most people gave their money away during their lifetimes.³⁶

²⁴ Natural law refers to the inner knowledge possessed by all men because they are created in the image of God.

²⁵ DOUGLAS W. KMIEC ET AL., *THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES, & PHILOSOPHY* 93 (2004).

²⁶ J.D. Trout & Shahid A. Buttar, *Resurrecting "Death Taxes": Inheritance, Redistribution, and the Science of Happiness*, 16 J.L. & POL. 765, 769 (2000).

²⁷ *Id.* at 772 (quoting Barry W. Johnson & Martha Britton Eller, *Federal Taxation of Inheritance and Wealth Transfers*, in *INHERITANCE AND WEALTH IN AMERICA* 63 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998) (internal quotations omitted)).

²⁸ *Id.* (quoting 2 WILLIAM BLACKSTONE, *COMMENTARIES* *10 (quotations omitted)).

²⁹ See Powell, *supra* note 21, at 21.

³⁰ *Id.* at 25 n.5.

³¹ *Id.* at 21.

³² *Id.*

³³ Wampler, *supra* note 4, at 530-31.

³⁴ *Id.* at 531.

³⁵ Powell, *supra* note 21, at 21.

³⁶ Wampler, *supra* note 4, at 531; see also I.R.C. § 2522.

This penchant for lifetime giving undercut the Transfer Tax, causing it to be a source of little revenue.³⁷ Not to be outdone, Congress countered by enacting the gift tax in 1926.³⁸ As taxpayers continued to find ways to avoid the estate and gift taxes, Congress again countered, in an effort to collect the maximum amount of revenue possible, by unifying the estate and gift taxes into one system in 1976.³⁹ Even though the Transfer Tax has officially existed for almost ninety years, Congress has been bent on its repeal.⁴⁰ Their most successful effort has come in the form of the Tax Act of 2001.

The Tax Act of 2001 calls for the maximum tax rates to decrease from 49% in 2003 to 45% in 2009.⁴¹ During the time that the rates are decreasing, the Tax Act of 2001 also increases the amount excludable from the decedent's estate from \$1 million in 2002 to \$3.5 million in 2009.⁴² The tax is repealed in 2010.⁴³

As the total repeal of the Transfer Tax looms on the horizon, the battle over whether to extend the 2010 repeal is starting to reach its crescendo.⁴⁴

³⁷ Wampler, *supra* note 4, at 531.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 533 n.55 (“After World War I some members of Congress wanted to leave the Transfer Tax in place, while others sought to repeal the ‘socialistic’ tax. Congress compromised by keeping the tax, but reducing rates.” (citations omitted)). The most current pending legislation to repeal the Transfer Tax is the Death Tax Repeal Permanency Act of 2005 (“2005 Act”). <http://thomas.loc.gov/cgi-bin/query/D?c109:3:/temp/~c109KmPCUn::>. The 2005 Act was passed by the House on April 14, 2005, and was read for a second time and placed on the Senate’s calendar on April 20, 2005. *Id.* The 2005 Act would prohibit the sunset provision of the Tax Act of 2001, which would keep the 2010 repeal of the Transfer Tax permanent. *Id.*

⁴¹ IRC § 2001(c)(2)(B) (Supp. 2001).

⁴² *Id.* § 2010(c).

⁴³ See *supra* note 8 and accompanying text.

⁴⁴ While most of the debate centers on whether to make the repeal permanent, little debate has been over the Tax Act of 2001’s elimination of the step-up basis. The basis of property is the price that was paid when it was purchased. This amount is then used when the property is sold to calculate a gain or loss for payment of income tax. Currently, when a decedent leaves property, the beneficiary taking the property does not keep the same basis as the decedent; rather, the amount of the basis is “stepped up” to the fair-market value. Whether the beneficiaries are unfairly penalized by forcing them to bear the burden of the tax upon disposition of the inherited property is one issue revolving around the step-up basis. Another question is whether it is more equitable to have the estate bear the burden of any tax rather than pass potential tax burdens to the beneficiary who may or may not have the ability to pay such a tax. Further, the step-up in basis allows for potential income by the beneficiary to go untaxed. These questions are intriguing, but beyond the scope of this comment.

III. ARGUMENTS SURROUNDING THE TRANSFER TAX

A. Arguments for Repealing the Transfer Tax

Opponents of the Transfer Tax mockingly refer to it as the “death tax.”⁴⁵ However morbid this title is, their jest is an attempt to point out the absurdity of taxing someone for dying.⁴⁶ There are several reasons behind attributing such a shocking title to the Transfer Tax. The opponents’ mockery is partially driven by the extreme unpopularity of this particular tax.⁴⁷ Approximately 85% of the population supports the repeal of the Transfer Tax, even though only the wealthiest of Americans actually pay the tax.⁴⁸ Coinciding with its extreme unpopularity,⁴⁹ opponents of the Transfer Tax argue that the tax is inefficient due to the cost of its enforcement.⁵⁰ Some critics argue that the Transfer Tax may actually be running in the red due to the combination of administration costs by the IRS and compliance costs to tax payers.⁵¹ Opponents claim that the IRS spends about as much in administrative and enforcement costs as the Transfer Tax generates in revenue each year.⁵² Furthermore, the cost of the tax is not limited to the public arena. Private costs associated with the Transfer Tax are also disproportionately high. Unlike most income tax returns, the preparation of Transfer Tax returns are not usually done by the individual, but by experts.⁵³ The use of experts can be costly.⁵⁴

⁴⁵ Bernstein, *supra* note 1, at 191.

⁴⁶ *Id.* at 191 n22.

⁴⁷ Richard Schmalbeck, *Does the Death Tax Deserve the Death Penalty? An Overview of the Major Arguments for Repeal of Federal Wealth-Transfer Taxes*, 48 CLEV. ST. L. REV. 749, 764 (2000).

⁴⁸ Bernstein, *supra* note 1, at 191.

⁴⁹ See, e.g., United for a Fair Economy, *supra* note 1, at 5. Critics claim that once “voters hear all of the facts about the [Transfer Tax], 67% support reforming the tax, while only 27% support repealing it.” *Id.*

⁵⁰ Schmalbeck, *supra* note 47, at 754.

⁵¹ Tye J. Klooster, *Repeal of the Death Tax? Shoving Aside the Rhetoric to Determine the Consequences of the Economic Growth and Tax Relief Reconciliation Act of 2001*, 51 DRAKE L. REV. 633, 643 (2003).

⁵² Bernstein, *supra* note 1, at 191. Critics rebut this point by noting that in 2003 the entire budget for the IRS was approximately \$10 billion, and the revenue raised by the Transfer Tax was approximately \$20 billion. United for a Fair Economy, *supra* note 1, at 12.

⁵³ Christopher E. Erblich, *To Bury Federal Transfer Taxes Without Further Adieu*, 24 SETON HALL L. REV. 1931, 1941 (1994).

⁵⁴ *Id.* While opponents of the Transfer Tax have estimated the private cost of estate planning at \$32.3 billion, a more realistic estimate is closer to \$8 billion. Schmalbeck, *supra* note 47, at 766. The \$8 billion is based on estate planning every three years, constituting roughly forty hours of work by the planning expert at an average of \$250 per

Hand-in-hand with the inefficiency of the Transfer Tax is the issue of the tax not raising adequate revenue.⁵⁵ When first initiated in the form of a stamp tax, the Transfer Tax's intent was not only to provide a vehicle to redistribute the wealth in America, but also, to be a source of revenue. The revenue generated by the Transfer Tax has recently diminished to 1.1% of the total tax revenue and has "rarely exceeded two percent" since World War II.⁵⁶ By contrast, in 1992, the excise tax on alcohol and tobacco generated more revenue than the Transfer Tax by \$1 billion.⁵⁷

Another arrow in the quiver of opposition is the Transfer Tax's "offensive[ness] to capitalism."⁵⁸ Since capitalism allows those who are "more intelligent, more frugal, more innovative, more motivated, or greedier than others . . . to earn, save and accumulate more money than other people who value consumption and idleness,"⁵⁹ opponents of the Transfer Tax argue that it "seem[s] wrong to take money from the people who devoted their lives to earning and accumulating that wealth and give the money to those that chose not to pursue the same goals."⁶⁰ This tends to discourage saving and investing. By discouraging saving and investing, the Transfer Tax violates the neutrality principle.⁶¹ Furthermore, discouraging savings and investing causes a reduction in capital accumulation, which leads to a reduction in wages and employment, and ultimately lowers the GDP.⁶²

hour. *Id.* This has led critics to conclude "private compliance costs have been grossly exaggerated." *Id.*

⁵⁵ See Bernstein, *supra* note 1, at 191. The Transfer Tax raised "an estimated \$32.3 billion in fiscal year 2001." Schmalbeck, *supra* note 47, at 762. If repealed, distributing the \$32.3 billion to all income tax payers would increase the average income tax burden by \$323 annually. *Id.*

There can be little doubt that these revenues can be sacrificed without catastrophic losses of governmental services.

. . . [B]ut you can not expect to find \$30 billion lying under the cushions of the federal couch; some pain will have to be inflicted somewhere else in the tax system to permit this relief.

Id. at 762-63.

⁵⁶ Klooster, *supra* note 51, at 642-43.

⁵⁷ *Id.* at 643.

⁵⁸ Bernstein, *supra* note 1, at 192.

⁵⁹ *Id.* at 193.

⁶⁰ *Id.* "In a capitalistic regime where citizens are equal under the law, it is difficult to accept that people are actually not all created with equal abilities and earning power." *Id.* But see *Romans* 12:4-8 (stating that we are all members of Christ's body and were given different gifts).

⁶¹ Erblich, *supra* note 53, at 1945. "The principle of economic neutrality states that an ideal tax system should interfere with private economic decisions as little as possible." *Id.*

⁶² *Id.* One model predicts that eliminating the Transfer Tax would

Finally, opponents argue that the Transfer Tax is a double (or even triple) tax,⁶³ and its oppressiveness tends to break up family farms and other small businesses.⁶⁴ The need to raise cash to pay the Transfer Tax was one reason cited by 98% of respondents to a survey when asked “why family businesses fail.”⁶⁵ When asked what they would do if the Transfer Taxes were due tomorrow, 37% of farms polled stated that they would have to liquidate to meet the demands of the tax.⁶⁶ The Transfer Tax itself is not the only burden on the family farm and small business. To plan for the Transfer Taxes, these entities spend an average of \$33,000.⁶⁷ One proposal, backed by the Farm Bureau to relieve the small farms and businesses but still tax owners of big corporate farms, is to increase the excluded amount to \$5 million.⁶⁸

As evidenced by the Farm Bureau’s proposal, opponents of the Transfer Tax do not always advocate a total repeal, leaving a void where the Transfer Tax once stood; they point to alternatives to the current taxation of estates.⁶⁹ Investigation of these alternatives is beyond the scope of this comment.

B. Arguments for Retaining or Reforming the Transfer Tax

Surprisingly, many of America’s wealthy have come out against the

(1) increase Gross Domestic Product by \$79 billion more by the year 2000 than it would be with the tax; (2) increase the stock of capital by \$639 billion more than the amount projected for the year 2000; and (3) create 228,000 more jobs than if the [Transfer Tax] remained (through the labor productivity enhancing effect of a larger stock of capital).

Id. (using a model from RICHARD E. WAGNER, THE CENTER FOR THE STUDY OF TAXATION, FEDERAL TRANSFER TAXATION: A STUDY IN SOCIAL COST (1993)).

⁶³ Schmalbeck, *supra* note 47, at 760. The argument that the Transfer Tax imposes a double tax is based on the individual paying tax on the money during his lifetime and the remaining value being taxed again at death; thus, creating a double tax (triple if the money was generated through a corporation). *Id.* However, “multiple taxation is the rule rather than the exception.” *Id.* at 761. One example is in the purchase of real estate, where the government taxes the income used to purchase the property, and subsequently the government continually taxes the property via the annual property tax. *Id.*

⁶⁴ Weber, *supra* note 13, at 127.

⁶⁵ *Id.* at 118.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 135. The \$5 million credit also coincides with critics who question whether we should be worried about “someone with \$5 million in farm or small business assets [being] able to pass only \$3.5 million or so to the next generation [because] the individuals in that generation will still be wealthier than all but a tiny fraction of the population.” Schmalbeck, *supra* note 47, at 767.

⁶⁹ See Wampler, *supra* note 4, at 542-48 (listing the taxation of capital gains at death, elimination of the stepped-up basis at death, and inclusion of the inheritance as income to the recipient as alternatives to the current Transfer Tax).

abolition of the Transfer Tax. Responsible Wealth⁷⁰ has issued a public statement, entitled Call to Preserve the Transfer Tax, which some of America's wealthiest people have signed.⁷¹ One reason espoused by proponents of the Transfer Tax is that it helps to re-distribute the wealth in America.⁷² As stated earlier in this comment, the redistribution of wealth⁷³ to prevent a wealth aristocracy was part of the policy reasoning behind implementation of the Transfer Tax.⁷⁴ In addition to the fear of creating a wealth aristocracy, there is an economic rationale behind keeping the Transfer Tax: it "is the least damaging of all our taxation because it does not interfere with wealth creation."⁷⁵ It "does not prevent a person from earning, saving, or consuming lavishly, . . . it merely prevents . . . children from automatically reaping the benefits of their predecessors."⁷⁶ Reaping a substantial inheritance would produce laziness by encouraging the beneficiary to drop out of the work force.⁷⁷

Additionally, proponents argue against the abandonment of the Transfer Tax because it raises revenue that is necessary in the current debt crisis.⁷⁸ The proponents look beyond the \$20 billion raised by the Transfer Tax in 2003 to the estimated \$1 trillion that would be lost over the next two decades.⁷⁹ In addition to the revenue raised, proponents allege that the Transfer Tax helps to keep our overall tax system

⁷⁰ Responsible Wealth, <http://www.responsiblewealth.org> (last visited Sept. 5, 2005) ("Responsible Wealth is a national network of businesspeople, investors and affluent Americans who are concerned about deepening economic inequality and are working for widespread prosperity.").

⁷¹ Responsible Wealth, Signers of the Call to Preserve the Estate Tax, http://www.responsiblewealth.org/estatetax/ETCall_Signers.html (last visited Sept. 5, 2005). Signers include William H. Gates, Sr., Paul Newman, Ted Turner, and Bill Joy. *Id.*

⁷² *But cf.* Klooster, *supra* note 51, at 640 (stating that nearly half of all wealth accumulations are by inter vivos gifts and bequests, and the taxing of these wealth transfers has been ineffective in breaking up wealth concentrations).

⁷³ *See supra* Part III.A. Critics dispel this policy argument by pointing to the percentage of wealth held by the top 0.5% increasing from 25% to 28.8% despite the Transfer Taxes. Erblich, *supra* note 53, at 1965.

⁷⁴ *See* Schmalbeck, *supra* note 47, at 753. "Wealth concentration can create pressures on democratic institutions, especially within the framework of the American democracy, where free speech considerations have made it difficult to constrain the ability of the wealthy to use their wealth to influence the outcome of political contests."

⁷⁵ Sarah Laitner, *The Americas & International Economy—Soros Warns on Estate Tax Repeal*, FIN. TIMES, Jan. 14, 2003, at P8. (quoting George Soros).

⁷⁶ Bernstein, *supra* note 1, at 194; *cf.* 2 *Thessalonians* 3:10 ("If a man will not work, he shall not eat.").

⁷⁷ Wampler, *supra* note 4, at 540-41. Critics argue the opposite. They feel that "the desire to pass on money to one's children is a strong incentive to work." *Id.* at 541 (citation omitted).

⁷⁸ Erblich, *supra* note 53, at 1956.

⁷⁹ United for a Fair Economy, *supra* note 1, at 12.

progressive.⁸⁰

As an alternative to a total repeal, proponents of the Transfer Tax advocate reforming the current system by increasing the marginal rates of the Transfer Tax or raising the decedent's excludable amount. Proponents point out that even if the current Transfer Tax were modified so that the highest marginal rate was increased to as high as 75%, "[t]here is the argument that anyone inheriting an exorbitant sum could afford to pay 75% and still inherit substantial wealth."⁸¹ Additionally, immediately raising the amount excludable from the decedent's estate to \$3.5 million would still keep the Transfer Tax, and it would exempt approximately 88% of the estates currently paying the Transfer Tax.⁸²

Some purport that the Transfer Tax helps "churn the economy . . . [by making] society more open to economic opportunity . . .,"⁸³ and prevents a person's birth from determining his economic status; allowing "those of modest means an incentive to become wealthy . . ."⁸⁴ Furthermore, the Transfer Tax signals to the entire population that the wealthy are being taxed, which is "essential to taxpayer morale."⁸⁵

Proponents of the Transfer Tax, mindful of their moral obligation to help the poor,⁸⁶ are also concerned about the effect repealing the Transfer Tax will have on charitable giving.⁸⁷ "Do not accepted moral principles call for continuing and strengthening the death tax system?"⁸⁸ Those moral principles are coupled with a call for increasing incentives toward charitable giving by the recent support of the Transfer Tax by "George Soros, William H. Gates, David Rockefeller, and Warren

⁸⁰ Erblich, *supra* note 53, at 1961-62. The small amount of revenue generated and the few taxpayers that are affected by the tax are reasons why critics feel that the Transfer Tax does not affect the progressivity of the tax system. *Id.* at 1962.

⁸¹ Bernstein, *supra* note 1, at 194.

⁸² United for a Fair Economy, *supra* note 1, at 5.

⁸³ Erblich, *supra* note 53, at 1966. Critics argue that the evidence shows the taxes have almost no effect on the concentration of wealth in America, and that the Transfer Tax doesn't churn the economy, rather it creates a disincentive to work. *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 1963. Opponents of the tax feel that a taxpayer may become disheartened by perceptions that the wealthy avoid taxes, or even illegally evade the taxes, causing decreased taxpayer compliance. *Id.* at 1964.

⁸⁶ *Id.* at 1967; see also James 1:27 ("[L]ook after the orphans and widows in their distress . . .").

⁸⁷ See Alana J. Darnell, *Toward an Integrated Tax Treatment of Gifts and Inheritances*, 34 SETON HALL L. REV. 671, 687-88 (2004).

⁸⁸ Erblich, *supra* note 53, at 1967 (quoting William Pedrick, *Through the Glass Darkly: Transfer Taxes Tomorrow*, 19 INST. ON EST. PLAN. 1900, 1903.3 (1985), reprinted in REGIS W. CAMPFIELD ET AL., TAXATION OF ESTATES, GIFTS AND TRUSTS 1991-1993 (1991)).

Buffet.⁸⁹ The moral obligation to help the poor is an obligation of all Americans, not only the wealthy.⁹⁰ However, the wealthy are right to be concerned with their moral obligation to help the poor because they are held to a higher standard due to the blessings that they have been given.⁹¹ That concern, regarding the effect a repeal of the Transfer Tax would have on charitable giving, is the focus of this comment and will be examined next.

IV. CHARITABLE GIVING

A. Background and Current Status of Giving

To quote the psalmist David, “The earth is the Lord’s, and everything in it, the world, and all who live in it”⁹² When approaching the subject of giving our wealth away, it is important that we realize that when we enter this world we bring nothing with us, and likewise, when we leave this world we take nothing with us.⁹³ As we realize that we take nothing with us when we depart from this earth, our desire is to transfer any wealth that we have accumulated to those natural objects of our bounty. If this desire to transfer wealth upon death were problem free, this paper would not have been written. A major stumbling block to that transfer of wealth is the Transfer Tax. One mechanism that reduces the amount of the taxable estate is charitable giving.⁹⁴

Charitable giving is not always a decision made merely for tax avoidance. Often, the donor realizes that man has been given a moral charge to bestow charity on certain members of society.⁹⁵ Because of the

⁸⁹ Carolyn C. Jones, *The Moral Hazard of the Estate Tax*, 48 CLEV. ST. L. REV. 729, 747 (2000).

⁹⁰ *Proverbs* 22:9 (“A generous man will himself be blessed, for he shares his food with the poor.”).

⁹¹ *Luke* 12:48 (“From everyone who has been given much, much will be demanded . . .”).

⁹² *Psalms* 24:1.

⁹³ *Job* 1:24 (“Naked I came from my mother’s womb, and naked I will depart.”).

⁹⁴ References to charities are those charities that are recognized by the IRS under § 501(c)(3).

⁹⁵ *2 Corinthians* 9:6-7 (“Whoever sows sparingly will also reap sparingly, and whoever sows generously will also reap generously. Each man should give what he has decided in his heart to give, not reluctantly or under compulsion, for God loves a cheerful giver.”); *Deuteronomy* 15:7-8 (“If there is a poor man among your brothers in any of the towns of the land that the Lord your God is giving you, do not be hardhearted or tightfisted toward your poor brother. Rather be openhanded and *freely lend him whatever he needs.*”) (emphasis added); *Galatians* 2:10 (“All they asked was that we should continue to remember the poor, the very thing I was eager to do.”); *Leviticus* 23:22 (“When you reap the harvest of your land, do not reap to the very edges of your field or gather the gleanings of

moral obligation to give, charities and foundations that play an integral role in bringing aid to those in need should not be forgotten. Giving to those charities and foundations is one responsibility that we should not abrogate to the federal government, expecting them to pick up the slack. Realizing this, Americans have traditionally been givers. For example, the level of giving by Americans compared with that of our Canadian neighbors reveals that Americans have given more to nonprofit organizations over the past thirty years.⁹⁶ Past numbers aside, the moral basis for giving will only provide us with some of the motivation to continue giving. Although some research suggests that tax savings are not generally the motivating factor behind charitable gifts,⁹⁷ other analysis of IRS data shows otherwise. Taxpayers who were allowed to take a deduction for their charitable gifts gave more than taxpayers who could not deduct the gift; regardless of income level.⁹⁸ Congress encourages us, with regard to our responsibility to give to charity, by allowing charitable gifts to be deducted from both income tax and from the gross estate used to determine the Transfer Tax.⁹⁹ Furthermore, the current deductibility of gifts to charity works as a tax expenditure.¹⁰⁰ In this situation, Congress uses the tax expenditure to advance the social policy of giving to charities so Congress does not need to raise additional funds to provide services currently provided by charities.

In 2003, Americans gave an estimated \$201 billion to charities.¹⁰¹ The giving was not limited to a few wealthy families, as nearly 90% of American families gave that \$201 billion.¹⁰² Furthermore, a breakdown between the two different types of gifts, charitable gifts¹⁰³ and charitable bequests,¹⁰⁴ revealed that “nearly 90 percent of . . . giving occurs during [a] donor’s [life].”¹⁰⁵ One could argue that gifts given by the donor during

your harvest. Leave them for the poor and the alien. I am the Lord your God.”); *see also* I.R.C. §§ 2055, 2522 (2000).

⁹⁶ Klooster, *supra* note 51, at 659. Some attribute the American superiority in giving to the lack of tax deductions that Canadians are allowed for charitable gifts. *Id.*

⁹⁷ *Id.*

⁹⁸ Independent Sector, *Fact Sheet: Giving in America*, <http://www.independentsector.org/media/factsheet.html> (last visited Aug. 27, 2005).

⁹⁹ *See* I.R.C. § 170 (providing a deduction for charitable contributions up to 50% of adjusted gross income); *id.* § 2055 (2000) (unlimited deduction for transfers to charities allowed in determining the value of the taxable estate).

¹⁰⁰ A tax expenditure is a tax deduction or credit whose rationale lies in encouragement of some social policy.

¹⁰¹ CHARITABLE GIVING, *supra* note 17, at 1.

¹⁰² Independent Sector, *supra* note 98.

¹⁰³ Gifts given to charity during the lifetime of the donor.

¹⁰⁴ Gifts given to charity from the donor’s estate. BLACK’S LAW DICTIONARY 123 (7th ed. 2000).

¹⁰⁵ CHARITABLE GIVING, *supra* note 17, at 1.

his or her lifetime can be indirectly related to escaping the payment of Transfer Tax upon death. This paper limits its analysis to the actual amount given to charity upon death in avoidance of Transfer Tax.¹⁰⁶

While the overall giving to charities is shouldered by nearly 90% of the population, it is a different story when solely examining the charitable bequests. Looking at the charitable bequests made in 2001, a mere 5% of all Transfer Tax filers accounted for 64% of all bequests.¹⁰⁷ Additionally, the Survey of Consumer Finances, conducted by the Congressional Budget Office, which found that the wealthiest 0.2% of all American families gave approximately 85% of the contributions to charity.¹⁰⁸ Looking at the year 2000, just before the passage of the Tax Act of 2001, nearly 17% of estates that filed Transfer Tax returns left something to charity.¹⁰⁹ Those bequests to charity were heavily concentrated in the wealthiest estates: estates worth more than \$3.5 million accounted for over 70% of the bequests;¹¹⁰ estates worth over \$7 million contributed over 60%; and estates worth over \$20 million accounted for 40%.¹¹¹ Those numbers, at least anecdotally, show that the higher the Transfer Tax burden, the greater the gift. In light of the enactment of the Tax Act of 2001, the question that needs to be

¹⁰⁶ By giving inter vivos gifts to charities, the taxpayer not only reduces the amount in the current estate, but also eliminates any potential growth from the transfer. (e.g. If donor transfers stock to a charity, not only is the value of the stock removed from the estate, but the estate will also not accumulate the growth in value of the stock.) Furthermore, there is at least anecdotal evidence that deductibility of charitable gifts does inspire the taxpayer to avoid as much tax as possible. "History indicates that enabling all givers to claim a charitable deduction stimulates giving. In 1986, when the tax code allowed nonitemizers to claim a deduction for the full amount of their charitable gifts, charitable contributions by nonitemizers increased by 40% or \$4 billion from the previous year." Independent Sector, *supra* note 98 (emphasis omitted).

¹⁰⁷ United for a Fair Economy, *supra* note 1, at 11.

¹⁰⁸ CHARITABLE GIVING, *supra* note 17, at 2.

Families' Wealth and Their Contributions to Charity

Net Worth	Millions of Families	Percentage of Families Giving at Least \$500	Average Contribution from Families Giving at Least \$500
< \$0.5 M	90.79	32	\$2,300
>\$0.5 M to \$1 M	8.26	73	\$3,000
>\$1 M to \$3 M	5.21	82	\$5,900
>\$3 M to \$5 M	0.93	90	\$19,200
>\$5 M to \$50 M	1.28	95	\$37,500
\$50 M or More	0.02	95	\$391,400

Id.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 2-3.

answered then is: What will charitable giving look like if the Transfer Tax is repealed?

As proponents of the Transfer Tax argue, its repeal will decrease the amount given to charities, but opponents argue it will have no effect and may even allow for an increase in giving. One thing is sure: there is no consensus regarding how a total repeal of the Transfer Tax will impact charitable giving.¹¹²

B. Effect of Total Repeal of the Transfer Tax

The Tax Act of 2001 raises the level of the excludable amount from \$1 million to \$3.5 million before the total repeal of the Transfer Tax in 2010.¹¹³ As this happens, the number of estates experiencing a tax-free transfer of wealth will rise. Proponents of repeal argue that this will put more money in the pockets of wealthy Americans, which in turn may actually increase charitable contributions.¹¹⁴ Although a windfall to America's wealthy may induce charitable giving, "[o]ne study found that for every thousand dollars of *earned* wealth, an entrepreneur will give \$4.56 to charity. For every thousand dollars of *inherited* wealth, an heir will give only 76 cents."¹¹⁵ Furthermore, charitable bequests would be more costly to the decedent's estate. Since there is no longer a tax advantage to the gift,¹¹⁶ any giving at this point would raise the cost of the bequest to 100% of the amount given, necessitating giving for reasons other than tax avoidance.¹¹⁷

A total repeal of the Transfer Tax in 2000, the year before the Tax Act of 2001 started to affect Transfer Taxes, would have caused a total estimated decrease in combined charitable gifts and bequests between \$13 billion to \$25 billion.¹¹⁸ These numbers are given even more weight in light of the fact that even a reduction of \$10 billion would eliminate

¹¹² Klooster, *supra* note 51, at 660.

¹¹³ I.R.C. § 2010(c) (Supp. 2001).

¹¹⁴ Wampler, *supra* note 4, at 542. "If the government truly wants to meet a moral obligation to help the poor, then it need only step aside and let the free market work." Erbllich, *supra* note 53, at 1967.

¹¹⁵ UNITED FOR A FAIR ECONOMY, *supra* note 1, at 11.

¹¹⁶ When the donor gives the gift to lower the tax burden, the cost of the gift to the donor is the percentage equal to the tax rate paid by the estate. Once Congress repeals the Transfer Tax, the gift would then cost the donor 100% since the tax rate is zero. To illustrate, suppose a donor gives \$100 to a charity. If that donor is taxed at 45% then the \$100 gift only costs the donor \$55 since \$45 would have gone to taxes regardless of the gift. If that same donor is not taxed, then the gift costs the donor the entire \$100 since none would have been going to pay for any tax.

¹¹⁷ CHARITABLE GIVING, *supra* note 17, at 3.

¹¹⁸ DAVID KAMIN, CTR. ON BUDGET & POLICY PRIORITIES, NEW CBO STUDY FINDS THAT ESTATE TAX REPEAL WOULD SUBSTANTIALLY REDUCE CHARITABLE GIVING 1 (2004), <http://www.cbpp.org/8-3-04tax.pdf>.

the equivalent of all the grant-making that is currently done by America's 110 largest foundations.¹¹⁹ Who would fill the void? Congress? Allowing Congress to fill that void would be forgetting the personal moral obligation to help those in need. Furthermore, waiting idly by as Congress fills the void left by our failure to give does not account for the fact that the money will have to come from somewhere. That place is most likely taxes paid by all taxpayers rather than the charitable giving currently done by the wealthiest of Americans.

Reformation of the Transfer Tax will also impact giving to charities; however, it will be at much lower levels. If the Transfer Tax in 2000 had an excludable amount of \$2 million, as it will in the years 2006-2008,¹²⁰ the combined total amount of charitable gifts and bequests would still be reduced by about \$6.4 billion.¹²¹ Raising that exemption to \$3.5 million would have had a similar impact.¹²²

To offset those losses, proponents of a repeal propose using the income tax system to provide the necessary incentive for charitable giving. Proponents of repeal offer that the increase of capital from repealing the Transfer Tax would help create more jobs, which would benefit the poor and place more income into the economy.¹²³ This argument is only persuasive if those benefiting from the influx of income into the economy, due to the repeal of the Transfer Tax, are taxpayers who itemize deductions on their income tax returns. Taxpayers who itemize give 37% more to charity; yet over two-thirds of all taxpayers do not itemize, placing the burden of making up the loss in charitable giving on those taxpayers who itemize.¹²⁴ Any downturn in the economy would further influence the giving to charities. Half of all Americans would discontinue giving to charity if the economy were to worsen.¹²⁵

¹¹⁹ United for a Fair Economy, *supra* note 1, at 11.

¹²⁰ I.R.C. § 2010(c) (Supp. 2001).

¹²¹ CHARITABLE GIVING, *supra* note 17, at 8. The total amounts collected in 2000 were \$196 billion in charitable gifts and \$16 billion in charitable bequests. *Id.* at 1-2.

Estimated Effects on Charitable Bequests in 2000 from Changes in the Transfer Tax

Alternative Tax Law	Percent Change
\$ 2 Million Exemption	-8 to -14
3.5 Million Exemption	-8 to -15
Repeal of the Transfer Tax	-16 to -28

Id.

¹²² *Id.*

¹²³ See Erblich, *supra* note 53, at 1967; Klooster, *supra* note 51, at 659.

¹²⁴ Independent Sector, *Report Details Influence of Tax Itemizing Status on Charitable Giving* (Apr. 15, 2003), <http://www.independentsector.org/media/deductingPR.html>.

¹²⁵ *Id.*

C. Reliance on Altruistic Motives for Charitable Giving

Proponents of repeal advocate that the majority of decisions to give to charitable organizations are not borne of the desire to escape a tax burden; rather they are initiated by “one’s desire to give.”¹²⁶ If this is a valid argument, then the reduction in charitable giving due to the repeal of the Transfer Tax will be made up by taxpayers’ altruistic motives. This will be particularly important to religious organizations, as collectively they receive the largest share of the gifts to charity; over one-third of all charitable donations go to such organizations.¹²⁷

In light of the large amount of charitable giving currently directed toward religious organizations, a good measure of the validity of reliance on altruistic motives to generate the current level of charitable giving is to look at giving to places of worship. Approximately 63% of all households reflect their altruistic motivation by giving some money to their place of worship.¹²⁸ It would speak well for altruistic motives if a majority of that 63% held to their altruistic motivations to the point of tithing¹²⁹ 10% of their income (“tithing”); yet, only 5% of American households tithed in 2003.¹³⁰ What is even more telling about our inability to rely on altruistic motives to fill the void in charitable giving caused by the repeal of the Transfer Tax is the response to tithing by those who should be leaders when it comes to altruistic motives: born-again Christians.¹³¹ Surprisingly, this group could not even claim 10% born-again adult tithers; they fell short with only 7% of all households tithing in 2003.¹³²

Clearly relying on our own altruistic motives is a risky proposition to say the least. Additionally, half of all Americans would cease giving to charity if the economy made a turn for the worse.¹³³ Furthermore, those that ascribe to following the Bible, arguably the best basis of altruistic motives, fail to break into double digits in the arena of tithing. In

¹²⁶ Klooster, *supra* note 51, at 659.

¹²⁷ Press Release, Am. Ass’n of Fundraising Council, Americans Give \$241 Billion to Charity in 2003 (June 21, 2004), <http://www.aafrc.org/gusa/Masterkit.pdf>.

¹²⁸ Press Release, The Barna Group, Giving to Churches Rose Substantially in 2003 (Apr. 13, 2004), <http://www.barna.org/FlexPage.aspx?Page=BarnaUpdate&BarnaUpdateID=161>.

¹²⁹ *Malachi* 3:10 (Bring the whole tithe into the storehouse, that there may be food in my house. Test me in this . . . and see if I will not throw open the floodgates of heaven and pour out so much blessing that you will not have room enough for it.”).

¹³⁰ The Barna Group, *supra* note 128.

¹³¹ Born-again Christians are persons “who have made a significant personal commitment to Jesus Christ and who believe they will experience eternal life because of their confession of sins and acceptance of Jesus Christ as their savior.” *Id.*

¹³² *Id.*

¹³³ Independent Sector, *supra* note 98.

addition to our moral obligation to give, which in theory should not need tax deductibility as a means of motivation, increasing charitable giving can potentially decrease the tax burden on all taxpayers—not a bad deal when the wealthiest Americans are providing relief for the rest.¹³⁴

D. Need for Charitable Giving

On January 29, 2001, President George W. Bush created the Faith-Based and Community Initiative (“FBCI”) by his executive order.¹³⁵ The purpose behind the FBCI was to “help the Federal Government coordinate a national effort to expand opportunities for faith-based and other community organizations and to strengthen their capacity to better meet social needs in America’s communities”¹³⁶ President Bush felt that these organizations were “indispensable in meeting the needs of poor Americans and distressed neighborhoods.”¹³⁷ The “White House Office of Faith-Based and Community Initiatives (“White House OFBCI”) was formed within the Executive Office of the President” to help in the coordination of providing funding to the many faith-based and community organizations.¹³⁸ The White House OFBCI is composed of seven different agencies.¹³⁹ The federal government distributes the money either directly or through grants to the states.¹⁴⁰ The states set up their own rules for distributing over \$50 billion to “grassroots and other organizations.”¹⁴¹ A comparison of fiscal year 2002 and fiscal year 2003 revealed that the Department of Health and Human Services increased its grants to faith-based organizations 41%.¹⁴² That increase in grants accounted for a 19% budget increase—from \$477 million to \$568

¹³⁴ This decrease in tax burden is based on the weak assumption that as the level of charitable contributions increase, and charities are able to provide more services that are currently being provided by the federal government, our governmental leaders would have the wherewithal to decrease the budget accordingly.

¹³⁵ Exec. Order No. 18,199, 3 C.F.R. 752 (2001), *reprinted in* 3 U.S.C.S. prec. § 101 (LexisNexis 2005).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, FEDERAL FUNDS FOR ORGANIZATIONS THAT HELP THOSE IN NEED 3 (2004), *available at* [http://www/whitehouse.gov/government/fbci.GrantCatalogue2004.pdf](http://www.whitehouse.gov/government/fbci.GrantCatalogue2004.pdf). The agencies are: Department of Justice, Department of Labor, Department of Health and Human Services, Department of Housing and Urban Development, Department of Education, Department of Agriculture, and Agency for International Development. *Id.*

¹⁴⁰ *Id.* at 2.

¹⁴¹ *Id.*

¹⁴² The White House, Fact Sheet: Compassion in Action: Helping America’s Charities Serve Those Most in Need (March 3, 2004), <http://www.whitehouse.gov/news/releases/2004/03/20040303-2.html>.

million.¹⁴³ Similarly, the Department of Housing and Urban Development reported a budget increase of 11% for the same period.¹⁴⁴ President Bush has also pledged at least an additional \$350 million to various programs that provide grants to faith-based and community organizations for the fiscal year 2005.¹⁴⁵ The grants provided to the various faith-based and community organizations represent money that is going to provide much needed help to those who are in need. However, this money has to come from somewhere. That place is from current tax revenue. Even with the current level of charitable giving, the federal government is planning to increase its role in giving. If charitable giving goes down, as anticipated by a repeal of the Transfer Tax, then revenue streams that charities are currently relying on will dry up and they will be forced to turn to the White House OFBCI. This will necessitate an increase in funding to the agencies involved, which in turn will mean that the overall tax burden will increase for all Americans.¹⁴⁶ However, if charitable giving can be increased, it could, theoretically, relegate the federal government's involvement to zero.¹⁴⁷ If the federal government's involvement in providing grant monies to faith-based and community organizations becomes nonexistent, then the tax burden on all taxpayers would theoretically decrease.¹⁴⁸

E. Ways to Increase Charitable Giving

Charitable giving can be increased in a number of ways: 1) retain or reform the Transfer Tax; 2) allow a deduction for charitable giving for all tax payers, not just those who itemize; 3) eliminate or increase the income tax's 50% ceiling on charitable giving; or 4) use of a tax credit for charitable gifts.

First, the Transfer Tax may or may not be achieving its purported goal of wealth distribution; however, the study done by the Congressional Budget office indicates that elimination of the Transfer Tax will decrease the amount given to charity by up to 28%.¹⁴⁹ Retaining the Transfer Tax, or only slightly modifying it, will help to avoid this loss. Furthermore, by retaining the Transfer Tax, an incentive remains for the donor to give contributions to charities during his or her lifetime,

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ The White House, Fact Sheet: Compassion for Americans in Need (Aug. 3, 2004), <http://www.whitehouse.gov/news/releases/2004/08/20040803-6.html>.

¹⁴⁶ By contrast, half of all revenue generated by the Transfer Tax is generated by taxes on the top 0.14% of Americans. United for a Fair Economy, *supra* note 1, at 7.

¹⁴⁷ I say theoretically because history has shown that lawmakers have a unique way of turning any surplus into yet another opportunity to experience greater debt.

¹⁴⁸ *Id.*

¹⁴⁹ CHARITABLE GIVING, *supra* note 17, at 8.

as this still reduces the assets that will be subject to the Transfer Tax when the donor passes away.¹⁵⁰

Second, taxpayers who are able to itemize their deductions, and thus incorporate their charitable deductions into their tax return, give 37% more to charities.¹⁵¹ Allowing all taxpayers to deduct their charitable contributions has the potential to substantially increase tax revenue. In 1986, all taxpayers, not just those who itemized, were permitted a charitable deduction on their tax return. That deduction increased the charitable contributions by taxpayers who could not itemize by 40%, resulting in a \$4 billion increase in charitable gifts.¹⁵² The moral call to give, combined with a realistic opportunity to alleviate the necessity of the White House OFBCI to provide funding to faith-based and community organizations, makes increasing gifts to charity a worthy goal.

Third, increases in charitable giving can be achieved by increasing or eliminating the current ceiling on imposed income tax returns for deductible charitable gifts. As shown in the preceding paragraph, taxpayers will increase charitable giving when given tax advantages to do so. Anecdotally, an argument could be made that taxpayers would also increase their charitable giving if it was made more advantageous by increasing the current ceiling on the deductibility of charitable gifts from 50%.¹⁵³ This would encourage those with the greatest income, and hence, the highest marginal tax rate, to give even more since they reap the most tax benefit for each dollar given to charity.¹⁵⁴

Alternatively, a credit could be given for charitable gifts. This credit could be given on both income tax and Transfer Tax returns to create an incentive to give to charity. As shown by the lack of tithing by born-again Christians and echoed by the entire population's penchant to stop giving in the face of an economic downturn, altruistic motives alone are not enough to sustain charitable giving.

V. CONCLUSION

The Transfer Tax should not be repealed. Rather, it needs to be retained in some form to provide the necessary incentive to keep Americans giving to charity.

The Transfer Tax has been a source of controversy from its humble beginnings as a stamp tax used to finance the Navy. Most desire to work

¹⁵⁰ *Id.* at 3.

¹⁵¹ Independent Sector, *supra* note 98.

¹⁵² *Id.*

¹⁵³ I.R.C. § 170(b)(1)(A) (2000).

¹⁵⁴ For every dollar given to charity, the taxpayer reaps a benefit equal to their marginal tax rate. For example, if a taxpayer has a marginal rate of 35%, every \$1 given to charity only costs the taxpayer \$.65 because \$.35 would go to taxes anyway.

hard and then pass their wealth to their loved ones, usually their family. As a major roadblock to those desires, the Transfer Tax is looked upon with much disdain.

Both sides of the argument surrounding the Transfer Tax state numerous reasons in support of their respective positions, stating why it should be retained in some form or repealed completely. Both sides predictably look at the effect the Transfer Tax has on wealth distribution from diametrically opposed stances. Additionally, both sides contradict each other as to the effect that the Transfer Tax has on charitable gifts. Wealth distribution aside, charitable giving is an important part of our national economy.

Our moral obligation is clear. We are to give to those in need. Charitable organizations provide many services to those who need it most. The federal government has recently recognized the exemplary job that faith-based and community organizations do in providing services to the needy, and it has responded by creationing the White House OFBCI. Although providing money to worthy organizations, the White House OFCBI has to get its funding from some source. That source is the American taxpayer.

Retaining the Transfer Tax, in some form will provide a vehicle to alleviate some of the burden currently on all taxpayers. The wealthiest Americans currently pay the lion's share of the Transfer Taxes. Elimination of these taxes will cause a depletion in the giving to charity, which will force charities to turn to the White House OFBCI for more grant money to provide services to those in need. This has the potential to raise taxes on all Americans.

More importantly, altruistic motives will not provide the necessary incentives to keep Americans giving to charity. Past actions by taxpayers have shown that deductibility of gifts is a major motivating force behind charitable giving. Furthermore, if less than 10% of those professing faith in the Bible offer a tithe to their church, how can the population-at-large be expected to give more generously?

We need as much help as we can get to prompt us to give the way we should be giving. Congress should keep the Transfer Tax, in some form, because it helps to provide a great incentive to prompt giving.

*Aric D. Burch**

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