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Valuation, Values, Norms: Proposals for Estate and Gift Tax Reform

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VALUATION, VALUES, NORMS: PROPOSALS FOR ESTATE AND GIFT TAX REFORM

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Abstract: In their contributions to this Symposium, Professor Joseph Dodge, Professor Wendy Gerzog, and Professor Kerry Ryan offer concrete proposals for improving the existing estate and gift tax system. Professor Dodge and Professor Gerzog are especially interested in accuracy in valuation, and advance specific proposals with respect to split-interest transfers and family limited partnerships. Professor Dodge makes an additional proposal to improve the generation-skipping transfer tax system, an understudied area of the law. Professor Gerzog's Symposium contribution draws particular attention to the legal fiction on which the estate and gift tax marital deductions rely. She would restrict the availability of the deduction to only meaningful economic transfers to a spouse, consistent with a desire that tax results reflect the underlying substantive results. Professor Ryan also focuses on the estate and gift tax marital deduction, along with other wealth transfer tax benefits available to spouses. She imagines an expansion of those rules, showing how easily the law can be separated from economic substance.

INTRODUCTION

Estate tax is a topic that inspires sharp debate in just about every context. Opponents call it a "death tax," telling all who will listen that the tax is unfair.[1] Proponents counter that the estate tax is a reasonable price to pay for robust and predictable economic, legal, and social systems.[2] Despite these divergent views about the structure and philosophical foundations of the existing system of wealth transfer taxation, both sides agree that the current sys-

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* Professor of Law, Pace University School of Law; B.A., Yale University; J.D., University of Pennsylvania Law School; Ph.D., Griffith University. For excellent conversations about wealth transfer taxation, thanks to Joseph Dodge, Wendy Gerzog, James Repetti, and Kerry Ryan. I gratefully acknowledge the role of the American College of Trust and Estate Counsel Foundation, the conference organizers, and the student editors of the *Boston College Law Review* in supporting, planning, and executing this Symposium.

[1] MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 6–7 (2006).

[2] WILLIAM H. GATES, SR. & CHUCK COLLINS, WEALTH AND OUR COMMONWEALTH: WHY AMERICA SHOULD TAX ACCUMULATED FORTUNES, at xi (2003).

tem is flawed.[3] Among both critics and proponents of the tax, there appears to be a consensus that there are simply too many loopholes that are easily exploited by well-advised, wealthy individuals. Enter into the reform conversation Professor Joseph Dodge, Professor Wendy Gerzog, and Professor Kerry Ryan. In their contributions to this Symposium, each explores specific problems with existing wealth transfer tax laws. Professor Dodge's contribution focuses primarily on split-interest gifts, family limited partnerships, and the generation-skipping transfer tax. He also flags as areas ripe for reform life insurance, *Crummey* trusts, certain charitable trusts, and Qualified Terminable Interest Property ("QTIP") trusts.[4] Professor Gerzog, who shares many of Professor Dodge's concerns about valuation issues, nominally advances six specific reform proposals. A close read of her article, though, reveals a wealth of ideas for improving the administration of the wealth transfer tax. Professor Gerzog focuses reader attention on the testamentary nature of life insurance, valuation problems with split-interest transfers, and the economic substance of marital deduction transfers. Professor Ryan takes up marital deduction transfers and focuses her attention on gift-splitting and estate tax portability. She examines how each is consistent or inconsistent with a marital sharing approach to wealth transfer tax exemption.

In considering the specific proposals that Professors Dodge, Gerzog, and Ryan advance, their goals are illuminated by the framework in which they work. Each (to a certain degree) accepts the existing wealth transfer tax system, with notably Professor Dodge being willing to engage in the reform project although he believes that an accessions tax would be more effective.[5] Each author looks at major techniques and fundamental principles that inform most sophisticated estate plans: transfers with retained interests (Professor Dodge and Professor Gerzog), valuation (Professor Dodge and Professor Gerzog), and the marital deduction (Professor Gerzog and Professor Ryan). With respect to family limited partnerships in particular, Professor Dodge and Professor Gerzog do not shy away from a position likely to be unpopular with practitioners and clients. They call for the end to

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[3] *See, e.g.*, Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 73–76 (1990) (arguing for limitations on ability to transfer wealth); Joel C. Dobris, *A Brief for the Abolition of All Transfer Taxes*, 35 SYRACUSE L. REV. 1215, 1216 (1984) ("In a sentence, the complaint is that the tax has lost its bite."); James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 827 (2001) ("Despite the many flaws in our system, the evidence suggests that the benefits of taxing wealth transfers outweigh any associated harms.").

[4] Joseph M. Dodge, *Three Whacks at Wealth Transfer Tax Reform: Retained-Interest Transfers, Generation-Skipping Trusts, and FLP Valuation Discounts*, 57 B.C. L. REV. 999, 1027 n.163 (2016).

[5] *See* Joseph M. Dodge, *Replacing the Estate Tax with a Re-Imagined Accessions Tax*, 60 HASTINGS L.J. 997, 1000–09 (2009) (providing reasons to change from an estate tax system to an accessions tax system); Dodge, *supra* note 4, at 999 (noting preference for accessions tax system).

all valuation discounts for family limited partnerships, except for those that operate actual businesses.[6] But it would be wrong to read these Symposium contributions as entirely iconoclastic. For example, Professor Gerzog and Professor Ryan accept the existence of generous wealth transfer tax deductions for marital transfers. Professor Gerzog would limit them to transfers of actual wealth to a spouse, and Professor Ryan would expand the deductions to permit even more deemed transfers. Because each of the three contributions accept (or at least are willing to work within the framework of) existing law, the work of Professors Dodge, Gerzog, and Ryan, taken together, represents a pragmatic—but not unified—approach to law improvement. What unifies the three articles is an interest in the behavior of taxpayers in response to complex wealth transfer tax laws.

I. Efficiency, Non-Distortion, and Accuracy

If there were a dream team of lawyers assembled to propose reforms to the wealth transfer tax laws, Professor Joseph Dodge would be a first-round draft pick. Actually, most of the contributors to this Symposium would be first-round draft picks and Joseph Dodge would be the MVP. In *Three Whacks at Wealth Transfer Tax Reform: Retained-Interest Transfers, Generation-Skipping Trusts, and FLP Valuation Discounts*,[7] Professor Dodge explains three clusters of desired reforms to existing wealth transfer tax laws. He begins his article with a discussion of the two primary goals of wealth transfer taxation: to raise revenue and to curb wealth accumulations.[8] The law has not achieved these goals especially well since 1980, he says, attributing the failure to legislation that has lowered rates and raised exemptions and the unwillingness of Congress to close loopholes that are far too easy to exploit.[9] Two of Professor Dodge's proposals go to closing those loopholes, and will be familiar to readers of his other scholarship.[10] He advocates postponement of taxation on certain split-interest transfers until actual transfer to the beneficiary (a proposal complemented by Professor Gerzog's Symposium contribution[11]) and reducing the availability of discounts for family limited partnerships. His third proposal, a plan to re-

[6] Dodge, *supra* note 4, at 1022–35; Wendy C. Gerzog, *Toward a Reality-Based Estate Tax*, 57 B.C. L. REV. 1037, 1053–55 (2016).

[7] Dodge, *supra* note 4.

[8] *Id.* at 1000.

[9] *Id.* at 999–1001.

[10] *See, e.g.*, Joseph M. Dodge, *Retained Interest Transfers Under the Estate and Gift Tax*, 133 TAX NOTES 235, 235 (2011) (providing a proposal to simplify the law on retained interest transfers under the estate and gift tax).

[11] *See* Gerzog, *supra* note 6 (offering six proposals to reform the estate and gift tax).

form the existing generation-skipping transfer ("GST") tax rules, is an utterly unique and significant contribution to the reform debate.

With respect to gratuitous transfers with retained interests, Professor Dodge identifies five separate categories of transfers that present particular problems under existing law: (1) retained current-enjoyment transfers,[12] (2) transfers that can be returned to the transferor,[13] (3) retained-reversion transfers,[14] (4) transfers with a retained power to alter, amend, or terminate,[15] and (5) employee survivor benefits and survivor annuities.[16] With respect to retained current-enjoyment transfers and retained-reversion transfers (commonly known as private annuities or self-cancelling installment notes), Professor Dodge proposes a hard-to-complete valuation rule: the imposition of tax upon the first to occur of the expiration of the retained interest or the transferor's death.[17] This more accurately would capture the value of the gratuitous transfer and abandon reliance on actuarial tables that are flawed because they are generic, fail to take into account actual events, and ignore appreciation.[18] He would impose a similar rule with respect to employee survivor benefits and commercial annuities, fully including them in the employee/purchaser's estate, without regard to the existence of a retained interest.[19] Professor Dodge's rationale is that these transfers are always gratuitous and valuation is most accurately determined at the time of death of the employee/purchaser.

With respect to revocable transfers, he would treat as incomplete even those transfers subject to a revocation power held jointly with an adverse party, on the grounds that the remainder beneficiary's interest is postponed whether the grantor retains the sole power or holds it jointly with another party.[20] Professor Dodge is concerned with the reality of who gets what when; only when a transfer has occurred in fact would he seek to impose a tax. Thus, in the case of transfers subject to a retained power to alter, amend, or terminate, Professor Dodge would assign no economic value to the retained power and instead treat the transfer as wholly complete when made. Fundamentally, Professor Dodge's proposal takes the focus off the form of a transfer and places it on a determination of who receives what economic benefit when. Only on receipt of a real economic benefit would he seek to impose a tax on the property's then-fair market value without

[12] Dodge, *supra* note 4, at 1002–09.
[13] *Id.* at 1009.
[14] *Id.* at 1009–10.
[15] *Id.* at 1011.
[16] *Id.*
[17] *Id.* at 1005–09.
[18] *Id.* at 1003–04.
[19] *Id.* at 1011.
[20] *Id.* at 1009.

resort to estimates or predictions. Professor Dodge wants the tax to reflect actual economic values.

With respect to family limited partnerships, Professor Dodge offers a full complement of solutions. One option would be to disregard a closely held investment entity such as a family limited partnership and treat, for transfer tax purposes, the entity's owners as the pro rata owners of the underlying assets.[21] This would have the practical impact of eliminating minority interest discounts at the entity level. Although Professor Dodge would allow a lack-of-marketability discount with respect to entities that operate businesses, he would aggregate spousal interests even with these entities, on the theory that spouses are likely to act in concert with each other. This author is less persuaded than Professor Dodge that destruction of value (as opposed to wealth) is against public policy,[22] but he does make a strong case for disregarding self-imposed restrictions that have no independent purpose other than the depression of value for wealth transfer tax purposes. The problem, as Professor Dodge sees it, is that the family limited partnerships would not exist in most cases but for the wealth transfer tax benefits. Thus they have a distortive effect that a well-designed law should not tolerate.

If Congress chooses to leave the existing law unchanged (thus permitting lack-of-marketability and minority interest discounts for investment-funded family limited partnerships), Professor Dodge would impose a recapture tax upon the removal of any previously recognized limitations.[23] Thus the removal, lapse, expiration, or other lifting of a restriction that had been imposed by means of a gratuitous transfer and that previously gave rise to a discount in value for gift or estate tax purposes would give rise to a tax to be paid by those who benefitted from the valuation discount.[24] Professor Dodge's rule would apply without regard to how or why any restriction is lifted. The strength of his proposal is that it is both principled and practical. He anticipates political or practical resistance to substantial change, and proposes an elegant recapture tax modeled on other recapture provisions in the existing law.

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[21] *Id.* at 1031–32.

[22] *Id.* at 1028 ("The destruction of economic value is, as a general matter, contrary to sound public and economic policy. Accordingly, tax rules that encourage the willful destruction of value should be eliminated." (footnotes omitted)). The problem with this logic is that it conflates the concepts of wealth and value. Indeed, absent a restrictive covenant or homeowners' association agreement, people are free to paint their homes an undesirable, unmarketable, or ugly color, even if doing so will depress the home's value.

[23] *Id.* at 1033–35.

[24] *Id.* at 1034–35.

Professor Dodge has previously critiqued the generation-skipping transfer tax as having a somewhat shaky intellectual foundation.[25] In this Symposium contribution, he brackets those concerns to show that even if one accepts the need for a generation-skipping transfer tax, the existing system is unnecessarily complex. To simplify, Professor Dodge would impose a GST tax only on distributions to skip persons, defined as those persons two or more generations removed from the transferor.[26] Eliminating taxable terminations from the definition of generation-skipping transfers under § 2611 is more consistent, he believes, with taxing only actual transfers and not hypothetical ones. This seems like an entirely sound proposal. He would also exclude direct-skip transfers from the definition of a generation-skipping transfer on the grounds that they represent less of a tax avoidance opportunity compared to long-term trusts. Wealthy individuals are far less likely to transfer substantial wealth outright to grandchildren than to transfer interests in trust.[27] Against that backdrop, Professor Dodge makes alternate proposals for how such a "transferee-oriented"[28] GST tax would operate. A flat forty percent rate would apply to all GST transfers.[29] Transfers would "count against" the estate and gift tax exemption amount of the deemed transferor (in Professor Dodge's first iteration)[30] or the distributee himself or herself (in Professor Dodge's second iteration).[31] Alternately, the third iteration would impose a flat tax on taxable terminations and taxable distributions.[32]

Professor Dodge's proposals take aim at curbing tax-driven behavior, although substantial administrative challenges arise with respect to each of his alternatives, a critique that Professor Dodge acknowledges.[33] Specifically the proposal to impose a GST tax on deemed transferors, where the deemed transferor is always the distributee's parent who is related to the transferor, raises a threshold question of fairness. It may be that the transferee's parent had no say in the creation of the trust or is estranged from the

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[25] *See* Joseph M. Dodge, *Comparing a Reformed Estate Tax with an Accessions Tax and an Income-Inclusion System, and Abandoning the Generation-Skipping Tax*, 56 SMU L. REV. 551, 578–86 (2003) (asserting that existing generation-skipping tax rules are profoundly flawed).

[26] Dodge, *supra* note 4, at 1012, 1016.

[27] *See, e.g.*, Eric Rakowski, *Transferring Wealth Liberally*, 51 TAX L. REV. 419, 442 n.60 (1996) (describing use of sophisticated trusts to transfer wealth to grandchildren).

[28] Dodge, *supra* note 4, at 1016.

[29] *Id.* at 1017.

[30] *Id.* at 1017–19.

[31] *Id.* at 1019–20.

[32] *Id.* at 1020–21.

[33] Bos. Coll. Law Sch., The Centennial of the Estate and Gift Tax: Perspectives and Recommendations, YOUTUBE (Oct. 2, 2015), https://youtu.be/4xBWvXUWo3g (showing Professor Dodge's response to commentary at the *Boston College Law Review* Symposium on the centennial of the estate and gift tax); *see also* Dodge, *supra* note 4, at 1019 (noting the administrative problems associated with the deemed transferor approach).

trust's grantor. Imposing a tax on a deemed (as opposed to actual) transferor raises potential problems. To the extent that the deemed transferor/transferee's parent has not otherwise used his or her exemption and will not do so, the rule change would have no practical impact. The exemption would fully absorb any tax and no amount would need to be paid to the government. But in a few circumstances, it is possible that some amount would be due. Logistically, Professor Dodge's system would require the trustee to inform the deemed transferor of any taxable distribution, the deemed transferor would then have to file a gift tax return, and the trustee would then withhold from the distribution the appropriate GST tax calculated at the flat rate.[34] Professor Dodge would allow the filing of the gift tax return to constitute the distributee's refund claim, but that requires the deemed transferor to disclose the gift tax return to the trustee and/or the distributee, which raises privacy and logistical considerations. It is unclear what recourse a distributee would have in the event that the deemed transferor failed to file, incorrectly filed, or refused to share any gift tax returns. For in-kind distributions, Professor Dodge would have the transferee pay the GST tax, but it is unclear how the transferee could take proper account of the deemed transferor's unused exemption. And in the case of deceased deemed transferors, complications would arise where taxable distribution happens in a different year than the deemed transferor's death, if the notion would be to include taxable distributions in the estate of the deemed transferor.[35]

With these problems, it is easy to see that an accessions tax—or at least an accessions-based approach to GST tax—would be easier to administer than either the existing system or the proposed treatment of the distributee's parent as the deemed transferor. For that reason, Professor Dodge proposes an alternate system that would treat the distributee as the taxpayer for GST purposes, obviating the need to rely on another person to file tax returns or provide information. A distributee clearly knows whether (and when) a taxable distribution has occurred and how much prior exemption he or she has used. Professor Dodge imagines a rate structure that is either flat or graduated,[36] although given a high exemption and a desire for simplicity, it is not clear that there is a strong argument for a graduated rate system.

Professor Dodge tends to favor such an accessions-based approach, as it is more administratively convenient. It avoids all of the administrative problems he identifies with a deemed transferor approach: information gathering, a withholding system, and differential treatment for in-kind and

[34] Dodge, *supra* note 4, at 1018.

[35] *See id.* at 1018–19 (noting the complications involved in accounting for the exemption if the taxable distribution occurs in different years).

[36] *Id.* at 1019.

cash distributions.[37] An accessions-like system is also more in keeping with the underlying purposes of the wealth transfer tax, such as the dissipation of wealth concentrations. Professor Dodge importantly articulates another, typically unstated, purpose of the GST tax: treating direct transfers the same as transfers in trust.[38] This is an aspect of the GST that has been under-theorized, and Professor Dodge's Symposium contribution certainly will inspire future consideration of how to improve an existing system that fails to meet its stated and unstated purposes.

II. THE ECONOMIC SUBSTANCE OF REAL WEALTH TRANSFERS

Professor Wendy Gerzog is an estate tax realist. She accepts the basic premise and structure of the wealth transfer tax laws. Professor Gerzog understands the political reality that some form of wealth transfer taxation is likely to be part of the legal landscape for some years to come. In her Symposium contribution, *Toward a Reality Based Estate Tax*,[39] one does not find attenuated arguments about family farms and small businesses,[40] discussion of disincentives to hard work,[41] or calculations of the comparatively little revenue generated by the wealth transfer tax system.[42] Nor does one find paeans to the ability of the estate tax to break up concentrations of wealth and create a more level playing field.[43] In place of these is Professor Gerzog's deep, abiding, and pragmatic interest in a well-functioning and fair system. She applies her considerable technical expertise to propose wealth transfer tax laws that reflect reality—the underlying economic reality of what taxpayers do in the face of overly complex rules. Professor Ger-

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[37] *Id.*

[38] *Id.* at 1018–19 ("A distributee-oriented tax accords with various rationales of wealth-transfer and GST taxes: (1) to curb undue accumulations of inherited (and, therefore, unearned) wealth, (2) to encourage the dispersion of wealth, (3) to reduce the appeal of long-term dynastic trusts, and (4) to achieve after-tax outcome equity between direct and successive-interest transfers." (footnotes omitted)).

[39] Gerzog, *supra* note 6.

[40] *Cf.* William W. Beach, *Time to Repeal Federal Death Taxes: The Nightmare of the American Dream*, HERITAGE FOUND. (Apr. 4, 2001), http://www.heritage.org/Research/Taxes/BG1428ES.cfm [https://perma.cc/Y6E2-CK93] (claiming that in an uncertain estate tax climate "[s]mall-business owners, particularly minority owners, suffer anxious moments wondering whether the business they hope to hand down to their children will be destroyed by the death tax bill").

[41] *Cf.* Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283, 359 (1994) ("It is too simplistic to say that the estate tax has no disincentive effects on those who pay it.").

[42] *Cf.* Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 279 (1983) (asserting that the estate tax brings in only a small amount of revenue and has little effect on savings and investment).

[43] *Cf.* McCaffery, *supra* note 41, at 294 ("The actual gift and estate tax regime, however, encourages frequent, large, *inter vivos* gifts, systematically excluded from the income tax base, and it thus can dramatically undermine the pursuit of equal opportunity and level playing fields.").

zog invites attention to various legal fictions that that allow taxpayers to postpone, minimize, or avoid tax liability altogether. She makes a convincing case for why these fictions should not be tolerated, as they have a distortive effect on behavior, causing taxpayers to engage in transactions that have little or no independent significance apart from their tax consequences.

In her quest for a more "real" system, Gerzog makes six specific proposals: (1) limit the income tax exclusion for life insurance proceeds,[44] (2) include in a decedent's gross estate certain split-interest transfers where the transferee does not receive full and adequate consideration in money or money's worth for the full fair market value of the underlying fee interest in the property,[45] (3) eliminate the use of actuarial tables in valuing certain split-interest transfers,[46] (4) eliminate most valuation discounts for family limited partnerships and limited liability companies,[47] (5) repeal the QTIP provisions, and (6) disallow a deduction for most split-interest charitable transfers.[48]

Professor Gerzog's proposal to include life insurance in a decedent's gross estate is a bold one. The crux of her proposal is a return to the legal regime in effect between 1942 and 1954: where the decedent either paid the premiums or had incidents of ownership over a life insurance policy, the gross estate included the proceeds under § 2042.[49] Professor Gerzog would be willing to accept as second-best an amended § 2035 that would include life insurance proceeds in the decedent's gross estate to the extent the decedent has paid insurance premiums within three years of death.[50] Practically speaking, adopting such a rule would have devastating consequences for the life insurance industry. Individuals would no longer have any tax incentive to purchase many insurance policies. Instead of the estate planning "sure thing" that much insurance currently is (that is, as long as the appropriate procedures are followed, any sized death benefit will be excluded from the decedent's gross estate), life insurance would become instead just that—a matter of betting on the death of the insured. That bet either would or would not turn out to be a good investment, depending on whether, taking into account the time value of money and if the insurance remains in effect at the decedent's date of death, the total premiums paid compare favorably to the death benefit. If Professor Gerzog's proposed rule were adopted, many standard estate plans (i.e., for those individuals who own any or substantial

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[44] Gerzog, *supra* note 39, at 1038–44.
[45] *Id.* at 1044–49.
[46] *Id.* at 1050–53.
[47] *Id.* at 1054–56.
[48] *Id.* at 1056–60.
[49] *Id.* at 1039–43.
[50] *Id.* at 1042.

life insurance) would have no need for irrevocable life insurance trusts ("ILITs"). The surrounding administrative costs associated with sending annual *Crummey* notices and the like would disappear automatically.

Professor Gerzog's life insurance proposal is grounded in her characterization of life insurance as inherently testamentary. She writes:

> In an ILIT, the trust holds a life insurance policy on decedent's life, proceeds are paid to beneficiaries of the trust irrevocably named by the decedent, and the proceeds are paid to the ILIT at the decedent's death. As a result, the ILIT is clearly a testamentary device and the value of the proceeds should be includable in the decedent's estate.[51]

In other words, a testamentary transfer occurs when post-death benefits are paid to beneficiaries selected by the decedent. But if this were the core of Professor Gerzog's objection, then one could imagine a rule that pulled back into the decedent's gross estate all of the insurance premiums transferred during lifetime, not just transfers within three years of death, as in Professor Gerzog's second-best alternative. In other words, bring back into the decedent's estate the estate-depleting transfers that are transformed into tax-free gifts at death under existing law.

Professor Gerzog's real objection to life insurance may run deeper than the fact that it involves death-time transfers to a decedent's beneficiaries. More concerning to her is what she calls the "valuation freezing" aspect of life insurance.[52] She refers to the legislative history of the 1981 amendments to § 2035 and Congress's decision to retain the rule including in the decedent's estate transfers within three years of death of life insurance policies or any incident of ownership with respect to a life insurance policy.[53]

What troubled Congress then and what underlies Professor Gerzog's proposal is not just the fact that a decedent's selected beneficiaries receive post-mortem benefits, but rather that they receive *so many* benefits. In other words, the insurance death benefit far exceeds the amounts paid in premiums. Perhaps, though, this objection is best understood without recourse to the language of estate freezes—which accurately describes techniques like grantor-retained annuity trusts ("GRATs") in which taxpayers take strategic advantage of valuation rules to fix the value of a particular asset at the lowest transfer tax value possible, even when actual asset performances "beat" the valuation tables and greater wealth can transferred to the beneficiaries at the lower value. Estate planning with life insurance by definition never in-

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[51] *Id.* at 1043.

[52] *Id.* at 1040.

[53] JOINT COMM. ON TAXATION, 97TH CONG., GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981, at 262 (Comm. Print 1981).

volves a decedent's transfer of an asset that he or she owns for less than its fair market value. Rather, life insurance involves a promise by the insurance company to pay death benefits to the policy owner's beneficiaries if all premiums are paid and other policy terms are followed. Life insurance is a commercially sanctioned bet. Because the vast majority of life insurance policies lapse during lifetime,[54] the payment of an insurance premium is not like an irrevocable transfer of, say, a remainder interest in a trust. It is far from obvious that all or even most insurance premium payments result in a transfer to anyone other than the insurance company.

None of this is to say that Professor Gerzog's proposal lacks coherence. Rather, it is an attempt to articulate the principles of fairness that are violated by the existing estate tax laws that allow most life insurance benefits to escape taxation. Professor Gerzog's proposal is helpful because it focuses attention on how the market for life insurance would differ if policy proceeds were includable in a decedent's gross estate. If the current market would not exist (or would not exist in its robust current form) but for the estate tax benefits, then current rules have a distortive effect and should be reformed. Outside of the estate tax system, a similar result to the one Professor Gerzog proposes could be accomplished through a revision to the income tax rules. This alternative has purchase if one is unconvinced by the estate freeze rationale for the inclusion of life insurance in a decedent's gross estate, or if one seeks a simple fix through the repeal of § 101, causing income tax inclusion for life insurance beneficiaries.

After her discussion of life insurance, Professor Gerzog shifts her focus to the marital deduction and QTIP trusts. Professor Gerzog has been working for over twenty years on building practitioner and academic awareness of the abusive nature of these trusts.[55] In this Symposium contribution, Professor Gerzog proposes the repeal of the QTIP and reverse-QTIP

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[54] Jilian Mincer, *10 Things Life Insurers Won't Tell You*, MARKETWATCH (June 19, 2011 8:08 PM), http://www.marketwatch.com/story/10-things-life-insurers-wont-tell-you-1308333194735 [https://perma.cc/XW5K-G7UY]. As one commentator noted:

> One in every 14 of customers with term life-insurance policies stop paying the premiums each year, according to life insurance industry group Limra. For those with permanent policies, which may have a cash value long before the death of the insured, some 25% of policyholders stop making premium payments within the first three years of owning the policies; within 10 years, 40% have let the policies lapse.

Id.

[55] *See* Wendy C. Gerzog, *The Illogical and Sexist QTIP Provisions: I Just Can't Say It Ain't So*, 76 N.C. L. REV. 1597, 1597 (1998) (asserting that "the QTIP provisions are degrading to women, sexist, and financially unrewarding to widows"); Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L.J. 301, 326–27 (1995) (explaining how the QTIP demeans women and advocating for the repeal of the QTIP provisions).

rules that allow a full marital deduction for assets that do not pass in any meaningful economic sense to a surviving spouse.[56] In another article,[57] Professor Gerzog sets forth her detailed proposal to limit the marital deduction to either outright transfers or what she calls a "super-charged" power of appointment trust ("PAT") where the surviving spouse has an annual income interest in the trust and the ability to determine who ultimately receives the trust property.[58] To Professor Gerzog, the power of appointment trust has the advantage of being a truly marital transfer: via the income interest, the trust property benefits only the surviving spouse during his or her continued lifetime; and via the appointive power over the trust corpus, the surviving spouse has the same ability to dispose of the trust property as with property owned outright.

This author shares Professor Gerzog's intuition that such a "super-charged" PAT" is close enough to an outright transfer that it merits qualification for the marital deduction. Yet it is worthwhile to pose a more basic question: why is it that *any* transfer in trust should qualify for the marital deduction? One's answer to that question likely will depend on whether one views trusts as fundamentally infantilizing or uniquely protective of wealth. To those who treat trusts as an indication of a stated or unstated assessment by the grantor that the beneficiary is not fit to manage assets himself or herself, objections to the super-charged PAT would remain. But for those who view trusts as an effort by the grantor to make sure that assets will be available for the beneficiary—notwithstanding any spendthrift habits or creditor problems that the beneficiary might have—then the eligibility of the power of appointment trust for the marital deduction makes abundant sense.

With respect to split-interest transfers, Professor Gerzog proposes a valuation-upon-receipt rule for split-interest transfers in trust such as GRATs and charitable lead trusts. The problem, as Professor Gerzog points out, is that the tables upon which wealth transfer tax values are based are inaccurate.[59] Although it would be possible to tweak the tables to be somewhat more accurate under the existing economic climate, as Professor Gerzog points out, any valuation table would remain subject to manipulation.[60] Therefore her proposed rule of waiting until property passes into possession of (or into continued trust for the benefit of) the successor interest brings certainty in valuation. Administratively, Professor Gerzog would make it the responsibility of the trustee to pay the transfer tax at the highest appli-

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[56] Gerzog, *supra* note 6, at 1057–58.

[57] Wendy C. Gerzog, *The New Super-Charged PAT (Power of Appointment Trust)*, 48 HOUS. L. REV. 507 (2011).

[58] *Id.* at 535.

[59] Gerzog, *supra* note 6, at 1050–51, 1060.

[60] *Id.* at 1050–51.

cable rate before any distribution to or for the benefit of the successor beneficiaries.[61] With respect to split-interest charitable transfers, such a rule is preferable to an absolute repeal of the charitable lead annuity trust provisions, as there are some taxpayers who create such trusts with genuine philanthropic motives and, to the extent that assets actually pass to charity, that reality should be taken into account. After all, if one is concerned, as Professor Gerzog is, about realness in application of the wealth transfer tax rules, one's rules should take into account the reality of assets actually transferred to charity.

Stepping back from any specific proposal she makes, one might ask how loss of revenue factors into Professor Gerzog's concerns. No doubt, her revenue concerns are measurable and well researched. Professor Gerzog cites to an estimated $42 billion in lost tax revenue in 2009 on account of marital deduction transfers alone.[62] Several of her proposals likely would generate additional revenue, especially the valuation-upon-succession rules. But one suspects that just as Professor Gerzog seeks realness from the tax rules, she is realistic herself about the wealth transfer tax laws' limited ability to generate revenue, especially given the relatively high estate tax exemption.[63] Rather, she brings into sharp focus the loopholes and incentives under current law that cause taxpayers to engage in transactions that they otherwise would not undertake in the absence of the law.

III. Fair Structures, Families, and Fiction

Professor Kerry Ryan's Symposium contribution considers the estate and gift tax marital deduction and other marital tax benefits. From an estate and gift tax perspective, marriage is the best planning technique available. The U.S. Supreme Court decisions *United States v. Windsor*,[64] in 2013, and *Obergefell v. Hodges*,[65] in 2015, allow same-sex couples to be treated for tax purposes the same as their opposite-sex counterparts. Spouses—same-sex and opposite-sex—may transfer assets to each other tax-free during lifetime and at death.[66] Practically speaking, this is accomplished by means of intricate marital deduction rules,[67] rules permitting spouses to split gifts for

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[61] *Id.* at 1053, 1060.

[62] *Id.* at 1056 n.98.

[63] The estate tax applies to roughly only 0.12% of the population. Dodge, *supra* note 4, at 1000 n.7.

[64] United States v. Windsor, 133 S. Ct. 2675 (2013).

[65] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[66] This assumes that both members of the couple are citizens of the United States. Different rules apply with respect to transfers to non-U.S. spouses. *See* I.R.C. § 2056(d) (2012) (disallowance of estate tax marital deduction where surviving spouse not U.S. citizen); I.R.C. § 2523(i) (2012) (disallowance of gift tax marital deduction where spouse is not U.S. citizen).

[67] *See* I.R.C. § 2056 (estate tax marital deduction); I.R.C. § 2523 (gift tax marital deduction).

gift tax purposes,[68] and the portability rules, which were temporarily enacted in 2010 and made permanent with the enactment of the American Taxpayer Relief Act of 2012.[69] All of these rules are grounded in a theoretical approach that, to a certain extent, and arguably in a profoundly flawed way, treats spouses as one economic unit for wealth transfer tax purposes.

In her article *Marital Sharing of Transfer Tax Exemptions*, Professor Ryan explores the legislative history and operation of these rules. She explains the evolution of the estate and gift tax marital deduction from fifty percent of the decedent's gross estate in 1948 to an unlimited exemption in 1981.[70] Gift-splitting entered the law at the same time as the fifty percent marital deduction and thus should be understood as "akin to the marital deduction method of accessing a spouse's effective exemption amount,"[71] insofar as operation of § 2513 treats a split gift as if half had been first transferred by one spouse to the other, and then by the second spouse to the ultimate recipient. Professor Ryan understands estate tax portability as being fundamentally different from both the estate and gift tax marital deduction and gift-splitting. This is because portability puts taxpayers in a better position than they would have been had they done no planning. In other words, the surviving spouse can make full use of the deceased spouse's unused exemption, even if at the time of the first decedent's death, the value of the couple's combined estates do not "need" each spouse's exemption to achieve a zero tax liability.

All of this sets the stage for Professor Ryan's proposal that she calls a "positive account" of marital wealth transfers.[72] By this she means that spouses should have the ability to share their marital exemptions in any proportions. In such a system, spouses could gift-split in any percentage (as opposed to fifty-fifty, as under current law)[73] and share during lifetime or at death their unused exemption amounts in any proportion (as opposed to the entire amount of the decedent's unused exemption amount, as under current law).[74] Most notably, this would permit a surviving spouse to allow the first spouse to die to use some of the survivor's exemption or allow the first decedent's exemption to carry forward to the surviving spouse (as opposed to limiting the sharing in one direction, i.e., from the decedent spouse to the surviving spouse). Advantages of Professor Ryan's proposal, as she articu-

[68] *See* I.R.C. § 2513 (2012) (gift by husband or wife to third party).

[69] *See* American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 101, 126 Stat. 2313, 2314–18 (2013).

[70] Kerry A. Ryan, *Marital Sharing of Transfer Tax Exemptions*, 57 B.C. L. REV. 1061, 1063–64 (2016).

[71] *Id.* at 1070–71.

[72] *Id.* at 1071.

[73] *Id.* at 1071–72.

[74] *Id.* at 1073.

lates them, include a reduction in purely tax-motivated transfers between spouses[75] and possible enhancement of bargaining position of the less-moneyed spouse in any marital negotiations.[76] Disadvantages, which Professor Ryan acknowledges, include increased complexity[77] and increased reliance on tax professionals.[78]

At the outset of her article, Professor Ryan claims that she takes "no normative view" on the appropriateness of provisions of the wealth transfer tax laws that accord benefits to married individuals.[79] By this, one can take Professor Ryan to mean that she believes that she perceives a congressional intent to move toward more robust marital sharing of wealth transfer tax exemptions. She explains how such a system might work.[80] Her article is especially helpful for its careful attention to the legislative history of the enactment of the marital deduction, gift-splitting, and portability provisions. But one should approach with some skepticism the claim that the article has no normative content. After all, to provide a detailed discussion of the operation of a legal regime in which spouses would share all of their wealth transfer tax exemptions is to implicitly affirm the place of the marital unit at the core of the tax system. The typical justifications for such a position are that the income tax laws already treat married couples as one via the joint income tax return, and that marital couples form a single economic unit.[81] These rationales remain unchallenged in Professor Ryan's "positive account."[82]

Commentators with diverse political affiliations and academic bents have vigorously criticized the joint return.[83] Among other objections, they explain how the return creates economic disincentives for secondary income earners.[84] Commentators also have critiqued the economic unity ra-

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[75] *Id.* at 1077.

[76] *Id.*

[77] *Id.* at 1076.

[78] *Id.*

[79] *Id.* at 1061 n.1.

[80] *Id.* at 1076–77.

[81] *Id.* at 1073–74 (quoting TRACY BLAKE DEVLIEGERI & TIFFANY B. CARMONA, REAL PROP., TR. & ESTATE LAW SECTION, AM. BAR ASS'N, THE RULES OF PORTABILITY 2 (2011), http://www.americanbar.org/content/dam/aba/publications/rpte_ereport/2011/Dec_2011/te_articles.authcheckdam.pdf [https://perma.cc/32LM-MAXY]).

[82] *See* Ryan, *supra* note 70, at 1071–76 (proposing a new framework for marital sharing of transfer tax exemptions).

[83] Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605, 606–07; Dennis J. Ventry, Jr., *Saving* Seaborn*: Ownership Not Marriage as the Basis of Family Taxation*, 86 IND. L.J. 1459, 1459–60 (2011).

[84] *See, e.g.*, Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49, 88–95 (1971) (examining whether unfavorable taxation creates disincentives for working wives to continue to work); Infanti, *supra* note 83, at 616–17 (discussing whether joint filings provide disincentives for work by secondary earners);

tionale for granting certain privileges to married couples, explaining that the benefit is both too broad (insofar as spouses who live entirely or mostly independent economic lives are eligible for the benefits) and too narrow (insofar as unmarried individuals who do lead economically interdependent lives are ineligible for the benefits).[85] For that reason, some commentators favor individual returns and no exemptions for marital wealth transfers.[86]

Consider what principles or values might underlie a proposal to further complicate the marital wealth transfer tax exemptions. Because the tax value of a person's estate and gift tax exemption amount is readily quantifiable, it is possible that making exemptions freely transferrable between spouses might give the "poorer" spouse a potential bargaining tool or quasi-property right in any marital negotiations.[87] If the "poorer" spouse has sufficiently few assets as to not "need" his or her individual exemption, the poorer spouse should be willing to transfer it to the richer spouse, and the richer spouse should be willing to pay some amount up to one dollar less than the taxes the richer spouse's estate would face in the absence of access to the poorer spouse's exemption. With respect to gift-splitting, the proposed benefit of the "positive account" is less clear, as it is not obvious whether it has any applicability to annual exclusion gifts, which, anecdotally, are a large percentage of the gifts that are split. In other words, if the wealthy spouse makes a gift to a third party of twice the annual exclusion amount, there is no financial reason that the "poorer" spouse should decline to split the gift at a 50-50 level, even if the "poorer" spouse has a taxable estate that will benefit from full use of the poorer spouse's applicable exemption. A fifty-fifty split of a gift equal to twice the annual exclusion

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Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 109–10 (1993) (asserting that separate taxation would not provide a disincentive for second earners to work); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 989–96, 1014–29 (1993) (illustrating by example how tax incentives affect the decision to operate as a one or two-earner household).

[85] *See* Bridget J. Crawford, *One Flesh, Two Taxpayers: A New Approach to Marriage and Wealth Transfer Taxation*, 6 FLA. TAX REV. 757, 792–94 (2004) (describing how the economic unit rationale is under-inclusive); *see also* Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 31 (1980) (noting that the joint return fails to account for the differences in how people share income); Kornhauser, *supra* note 84, at 96 (noting that "some critics attack the underlying assumption of pooling that couples always share income").

[86] Crawford, *supra* note 85, at 784–95 (explaining why marital wealth transfers should be taxed); Infanti, *supra* note 83, at 614–18.

[87] *See* Ryan, *supra* note 70, at 1077 (noting how enactment of an elective marital exemption may provide bargaining power to the poorer spouse during any marital negotiations).

amount "costs" the surviving spouse nothing in a tax sense.[88] It does not count against the poorer spouse's applicable exemption.

In one sense, allowing each spouse to decide whether and in what proportions to gift-split and share the exemptions between them is consistent with a respect for autonomy and individual decision-making. Each spouse would be able to decide whether, when, and in what proportion to share the tax benefits. Yet any such autonomy is necessarily limited; it is a limited autonomy to bargain only with one's spouse, not others in the marketplace. A truly autonomous approach would allow each taxpayer to freely transfer his or her applicable exclusion to anyone at all, without regard to the existence of a marital relationship. Such an ultra-autonomous approach to wealth transfer tax exemptions likely would not cause the development of a robust marketplace in tradable tax credits, such as low-income housing credits,[89] however, because there would be much more supply than demand. But an intermediate approach, such as allowing the transfer of one's wealth transfer tax exemption to a limited universe of people, preferably not defined by reference to family ties, might allow a more moderate marketplace to develop.[90] Doing so also would be consistent with an interest in deemphasizing the marital unit as a system for channeling governmental benefits or support.[91]

Although perhaps more consistent with an autonomy principle, a freely transferable, or even transferrable-within-a-small-group approach to wealth transfer tax exemptions would represent a revenue loss to the government. Current gift-splitting and portability rules limit the benefit to spouses. That is because one can view the current law as rules of convenience; the current law allows spouses to accomplish via elections that which they could accomplish via tax-free transfers by one spouse to another. In other words, *Spouse A* is permitted to gift-split with *Spouse B*, treating the transfer as if it had been made one-half by each, because *Spouse A* could have transferred

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[88] *See* I.R.C. § 2503(b)(1) (2012) (codifying certain exclusions from gift tax). Revenue Procedure 2015-53 provides that for the calendar year 2016, "the first $14,000 of gifts to any person (other than gifts of future interests in property) are not included in the total amount of taxable gifts under § 2503 made during that year." Rev. Proc. 2015-53, 2015-44 I.R.B. 615.

[89] I.R.C. § 42(b) (2012); *see* Clinton G. Wallace, *The Case for Tradable Tax Credits*, 8 N.Y.U. J.L. & BUS. 227, 237–47 (2011) (providing examples of tradeable tax credits).

[90] This author has argued elsewhere that definitions of family for purposes of § 2032A and § 6166 are outdated. *See* Bridget J. Crawford, *The Profits and Penalties of Kinship: Conflicting Meanings of Family in Estate Tax Law*, 3 PITT. TAX REV. 1, 58 (2004) (noting that "[§] 2032A's and § 6166's reliance on family-based tests seems especially inappropriate given the changing nature of the American family"); *see also* Infanti, *supra* note 83, at 614–18 (critiquing the family-based organization of income tax laws).

[91] *See, e.g.*, Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1860–65 (2014) (asserting that the legal recognition of family is intended to encourage private family support).

half of the property to *Spouse B* without incurring a gift tax (by virtue of the unlimited marital deduction). *Spouse B* then could have transferred that property to the ultimate beneficiary. Gift-splitting thus allows *Spouse A* to skip the step of actually transferring the property to *Spouse B*, and the government is no worse off, because it would not have collected any tax revenue on the transfer between spouses anyway.

But the same would not be true in a regime that allowed gift-splitting between, say, *Spouse A* and her sibling, *Sister*. In that case, if *Spouse A* makes a gift of $100,000 to a third party, and gift-splitting permitted the gift to be treated as if *Sister* had transferred $50,000 of that to the third party, the law would have to indulge the fiction of a transfer from *Spouse A* to *Sister*. A transfer of $50,000 from *Spouse A* to *Sister* would be taxable in excess of the annual exclusion amount. Indulging the fiction would permit $36,000 (using the 2016 annual exclusion) to escape taxation, then. That is a fiction with real financial consequences and not likely one the law would tolerate. Because a truly autonomous approach to wealth transfer tax exemptions as quasi-property interests represents a revenue loss for government, it is fiscally and politically unrealistic that the law would move in that direction.

CONCLUSION

If the estate tax is unpopular in many circles, so is academic scholarship. *New York Times* columnist Nicholas Kristof disparages academic culture generally as a "culture that glorifies arcane unintelligibility by disdaining impact and audience."[92] Legal scholarship takes a particular beating from prominent judges. Judge Dennis G. Jacobs of the U.S. Court of Appeals for the Second Circuit has bragged of not having read a law review "in years," saying, "No one speaks of them. No one relies on them."[93] Later Chief Justice Roberts of the U.S. Supreme Court piled on, saying,

> Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.[94]

[92] Nicholas Kristof, *Smart Minds, Slim Impact*, N.Y. TIMES, Feb. 16, 2014, at SR11.

[93] Adam Liptak, *Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES (Mar. 19, 2007), http://www.nytimes.com/2007/03/19/us/19bar.html [https://perma.cc/89XN-6JWY].

[94] Adam Liptak, *The Lackluster Reviews That Lawyers Love to Hate*, N.Y. TIMES (Oct. 21, 2013), http://nyti.ms/18gNzI1 [https://perma.cc/89XN-6JWY].

The claim, in short, is that academics are out of touch, bellowing into a giant echo chamber. This author suspects, but cannot prove, that none of Mr. Kristof, Judge Jacobs, or Justice Roberts reads much tax scholarship. If they did, they would know that the academic literature in taxation tends to be highly relevant to what lawyers, policy makers, and tax judges do and think about on a daily basis. In their contributions to this Symposium, Professor Joseph Dodge, Professor Wendy Gerzog, and Professor Kerry Ryan write in the tradition of the best tax scholarship: the work is technically expert, relevant to the legislative and regulatory regime that taxpayers face daily, focused on solutions, and deeply engaged in understanding how well the law meets its goals. This work deserves a wide audience.

In an interview published in the *Journal of Legal Education*, Judge Harry T. Edwards articulated his vision for relevant legal scholarship: it must "balance abstract scholarship with scholarly works that are of interest and use to lawyers, legislators, judges, and regulators who serve society through legal arguments, decision-making, regulatory initiatives, and enforcement actions."[95] He probably would appreciate a copy of this issue of the *Boston College Law Review*.

[95] Ronald K.L. Collins, *On Legal Scholarship: Questions for Judge Harry T. Edwards*, 65 J. LEGAL EDUC. 637, 645 (2015).