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Leaping Before We Look?: Repeal of the State Estate Tax Credit and the Consequences for States, Americans, and the Federal Government

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TABLE OF CONTENTS

I. INTRODUCTION

We have all heard of the dreaded "death taxes," as affectionately called by the general populace. You know the drill: Aunt Ida dies, the family is grieving, and now it has to pay taxes based on Aunt Ida's death. Most people do not like this idea, and many complain. Aunt Ida was already taxed when she was alive, so what right does Uncle Sam have to take her money after she's dead? Isn't taxing her once enough? This anger and frustration culminate in the attitude of many Americans when it comes to death taxes: outrage.

Yet is Aunt Ida really being taxed twice? Does everyone even pay taxes at death? The answer to these questions in most situations is actually "no."[1] What we hear referred to as the death tax is actually an estate tax in most cases, or a tax on the privilege of conveying wealth,[2] not a penalty for saving money. In some states, inheritance taxes[3] are added to estate taxes to get a total "death tax." Another term that may be used to describe taxes levied at death is transfer tax, though this type of tax generally incorporates gift taxes[4] as well, so this can make the term transfer tax less accurate to describe what is being taxed based on someone's estate after death. Because the federal estate tax has an exemption amount of as much as one million dollars, the majority of Americans will never pay what they refer to so lovingly as "death" taxes.[5]

Even so, the average American disagrees with estate tax laws, appalled at the mere idea of someone, even a remote someone, being taxed after death.[6] For these people, the Economic Growth and Tax Relief

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1. Jennifer Jordan McCall & Joanne Butler, *Pending Estate Tax Legislation: Where Do We Stand?* N.Y.L.J., Oct. 6, 2003, at 9 ("Recent estimates show that only 1.9 percent of all decedents paid estate tax in recent years, and only 4.3 percent of taxpayers were required to file a return, as contrasted with the income tax, where 70 percent of taxpayers owed tax."); *see also* William G. Gale & Joel B. Slemrod, *A Matter Of Life and Death: Reassessing the Estate and Gift Tax*, 88 TAX NOTES 927 (2000). Research indicates that, due to the allowance of lifetime gifts, tax shelters, and special provisions to protect family businesses, "the majority of estate tax payments are made by the wealthiest decedents, with gross estates in excess of $2.5 million." *Id.* at 928.

2. State taxes will either be estate taxes or inheritance taxes. *See* ELIZABETH C. MCNICHOL ET AL., CENTER ON BUDGET AND POLICY PRIORITIES, *States Can Retain Their Estate Taxes Even As The Federal Estate Tax Is Phased Out*, at 4 n.1 (2003), *available at* http://www.cbpp.org/1-31-02sfp.htm. Estate taxes are "levied on the estate and collected from the assets of the estate before it is transferred to the heirs of the estate. An inheritance tax, on the other hand, is a tax on the amount of the estate inherited by each heir and is levied on and collected from the heirs." *Id.*

3. *Id.*

4. Gift taxes are taxes paid on property given while the person was alive. *See generally* I.R.C. §§ 2501-2524 (2004). The gift tax structure is discussed only briefly here, but basically it applies to gifts of money or property that fall over the federal exclusion amount, currently one million dollars. *Id.*

5. Most estates in America fall below the unified credit amount, currently $1,500,000 and rising steadily until 2009, after which there will be no federal estate tax. I.R.C. § 2010 (2004). Currently, less than two percent of estates in America are responsible for estate taxes. McCall, *supra* note 1, at 9 (citing Jane G. Gravelle, *Economic Issues Surrounding the Estate and Gift Tax: A Brief Summary*, CONGRESSIONAL RESEARCH SERVICE REPORT RS20609, Jan. 29, 2003).

6. *See* Krisanne M. Schlachter, *Repeal of the Federal Estate and Gift Tax: Will It Happen and How Will It Affect Our Progressive Tax System?*, 19 VA. TAX REV. 781, 786 n.24 (claiming that 77% of respondents to a 1998 poll "favored the repeal of the estate tax").

Reconciliation Act of 2001 (EGTRRA) should have been a source of joy and pride.[7] Finally, it seemed to many, the government had wised up and listened to the people. The EGTRRA was going to repeal the death tax, they said.[8] Death to death taxes, they said. The American public seemed satisfied, but state governments soon realized that EGTRRA was not the silver lining on the dark cloud of death taxes that everyone hoped it would be.[9]

State governments have routinely collected taxes based on someone's estate after that person dies, separate from the taxes the estate paid to the federal government.[10] Generally, the estate did not feel an additional burden based on this state tax because the total tax due would not increase.[11] Instead, the total tax would be divided between the state and the federal government, the estate owing the exact same tax either way.[12] However, EGTRRA brought changes to the entire estate tax system, and the division of tax between the federal government and the state was no exception.[13] Thus, while those who were against estate taxes were lighting firecrackers in celebration of their victory over the "death" tax, government officials in states throughout the country were lighting candles at both ends in order to work through the night in an attempt to resolve this newly-presented problem.

This paper will explain how certain provisions of the Economic Growth and Tax Relief Reconciliation Act affect the states and, consequently, American citizens. It will particularly examine how the elimination of the federal credit for estate taxes[14] paid to the states will disrupt a neatly

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7. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified in I.R.C. § 2010 (2004)).

8. Between 2003 and 2007 the maximum estate tax rate will be reduced from 49% to 45%, where it will stay for 2008 and 2009. *See* I.R.C. §§ 2011, 2010 (2004). Additionally, the applicable unified credit exclusion amount will be increased from $1,000,000 in 2001 up to $3,500,000 in 2009; in 2010, there will be no estate tax. *Id.*; *see also infra* Appendix II: Estate Tax Phase Out.

9. *See infra* sections IV and V.

10. Every state collects taxes at death, though states vary as to whether they use a pure estate tax, an inheritance tax, or some combination of the two. MCNICHOL ET AL., *supra* note 2, at 4.

11. *See id.* at 1. Because the vast majority of states used only the maximum federal credit as their estate tax, the tax burden on the estate would not increase. In essence, the state would merely collect its amount from the total federal tax owed, thus reducing the total federal tax paid, but not increasing the tax burden on the estate. *Id.*

12. This concept is referred to as a "pick-up" or "sponge" tax because the state picks up or absorbs the credit allowed by the federal government. *See* Marilyn Kennedy Melia, *Death Tax Hits Where You Live*, CHI. TRIB., Dec. 7, 2003, at 2. In this way, "it didn't seem like a state was staking a claim." *Id.*

13. According to some, "when the federal lawmakers decided to phase out the estate tax by ratcheting up the level that triggers tax, 'they also dipped into the pockets of the states by reducing the amount of the state death tax credit.'" *Id.* (quoting attorney Charles D. Fox IV).

14. For purposes of this paper, the term "estate taxes" will be used to refer to taxes owed on the estate in question, including any inheritance taxes that might be owed in addition to traditional estate taxes. Though estate and inheritance taxes, when added together, are colloquially referred to as "death" taxes, the term has a pejorative connotation inappropriate for the scope of this discussion.

functioning system, focusing first on a brief background behind EGTRRA. Next, the paper will explore the history of both the estate tax and the federal credit for state taxes paid, leading into the current state of the law as it stands after EGTRRA. It will then analyze the impact of these changes on states, American citizens, and the federal government. Finally, the future of estate taxes will be contemplated and possible solutions considered.

II. BACKGROUND

Even before EGTRRA, both the federal government and each state government collected estate taxes from decedents' estates.[15] However, since 1924, each estate has received a dollar-for-dollar federal credit for estate taxes paid to the state government, up to a maximum amount based on a sliding scale,[16] which is then subtracted from the total amount owed to the federal government.[17] In this way, states were able to collect their own estate taxes, gaining revenue from citizens,[18] but individual estates were not burdened with any additional taxes,[19] unless the estate was so large that the taxes owed to the state were more than the maximum federal credit

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15. All fifty states impose some type of death tax, such as inheritance tax (levied for the privilege of receiving the bequest) or estate tax (levied on the transfer of property), or some combination of the two. *See* 5-70 MODERN ESTATE PLANNING § 70.02 (LEXIS 2003).

16. *See* I.R.C. § 2011 (2004). The table is reproduced in Appendix I: Federal Credit for State Estate Taxes Paid (hereinafter Tax Table, Appendix I). This table is used to calculate the total credit allowed to be reduced from the federal estate tax owed. Just like with any tax table:

1. First, find the amount of the estate within one of the dollar ranges.
2. Next, subtract the minimum for that range from the total estate.
3. Then, multiply that result by the percentage amount listed for that dollar range.
4. Finally, add that sum to the dollar amount given for the range.

I.R.C. § 2011(b)(1); *see also* Tax Table, Appendix I.

For example, in 2001, if the total taxable estate after being reduced by the unified credit was two million dollars,

1. It would fall into the range of over $1,540,000 but not over $2,040,000.
2. Subtract $1,540,000 from $2,000,000, leaving $460,000.
3. Multiply that number by 7.2% as instructed by the table to get $33,120.
4. Add that number to $70,800 (the amount specified for this estate range).

Id.

The total federal credit allowed for this estate would be $103,920. This amount would then be subtracted from the total federal tax due of $560,250. 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, 653 (2003) (listing $560,250 as the total federal tax due on an estate of two million dollars in 2001). Thus, the burden on the estate is exactly the same—a total tax of $560,250, with $103,920 owed to the state government and $456,330 owed to the federal government.

17. I.R.C. § 2011(a) (2004) ("The tax imposed . . . shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or the District of Columbia, in respect of any property included in the [decedent's] gross estate. . . ."). In order to take advantage of the credit, the state taxes must actually be paid within four years after filing an estate tax return, unless an extension has been granted. I.R.C. §§ 2011(c), 2058 (2004).

18. *See* Appendix IV: State Revenue From Federal Credit.

19. Essentially, the federal government "shares" the total estate tax with the states by allowing the estate a credit for state taxes paid. In this way, the total tax burden on the estate remains constant while the state and federal governments are both able to collect taxes. *See supra* notes 11 and 12 and accompanying text.

allowed.[20] In essence, the state and federal governments simply split one total estate tax amount, one part to the state and one part to the federal government, the dollar amount of each part depending on the size of the estate.[21]

In order to ease computation of these state estate taxes, many states opted to use what is generally referred to as a "pick-up" tax or "sponge" tax.[22] This means that the state collects the amount of estate taxes owed to the state based on its own calculations, plus any additional amount that would make the total estate tax owed to the state equal to the total federal credit allowed for that estate, according to the Tax Table.[23] Until recently, many states used the federal credit as their sole tax, embracing the opportunity to utilize the federal system already in place and simply limiting their state estate taxes to the maximum allowable credit.[24] This system did not create additional taxes for the decedent's estate, but it did create additional revenue for the states.[25]

Problems arose when EGTRRA went into effect in 2001, though these problems were not seen immediately by all.[26] In accordance with EGTRRA,

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20. *See* Tax Table, Appendix I. This is not the case for most estates, luckily, because most estates fall within the maximum credit allowed. *See* Appendix III: Federal Estate Tax Revenue. Though less common, this situation could arise in a state that did not limit its estate tax to the federal pick-up amount, such as Oklahoma. Edward J. McCaffery, *Oklahoma's Death Tax: Not O.K.*, *at* http://www.ocpathink.org/ViewPolicyStory.asp?ID=126 (May 2000).

As an example, say Uncle Fred died in 1990 in such a state, leaving a taxable estate of $150,000 and paying inheritance taxes of $2,500 to the state regarding property that was in Uncle Fred's estate. According to the Tax Table, the amount closest to the taxable estate without going over is $140,000. Thus, the maximum credit would be $1,200 for the base of $140,000, plus 2.4% of the excess over $140,000. The excess is $10,000, making the additional tax $240.

Therefore, even though Uncle Fred's estate actually paid taxes of $2,500, the maximum credit his estate can take is $1,440. Now his estate has paid the maximum federal tax plus an additional $1,060 (the amount the estate paid to the state that was not credited to federal taxes paid), causing his estate to pay a larger total tax than just the federal amount owed.

21. *See* Tax Table, Appendix I.

22. *See, e.g.*, 1-2 CALIFORNIA WILLS & TRUSTS § 2.08 (2002) (explaining how California uses a "pick-up" tax "equal to the portion of the maximum allowable amount of the federal credit attributable to property located in California").

23. Kiplinger's Money Power, *State Death Taxes Pick Up As Federal Taxes Dwindle*, DESERET MORNING NEWS, Nov. 2, 2003, at M05, *available at* 2003 WL 65887217 ("The pickup tax was designed to claim precisely the same amount that federal law allowed as a credit for state taxes paid.").

24. James F. Gulecas & Alan S. Gassman, *The Economic Growth and Tax Relief Reconciliation Act of 2001: Practical Estate Planning*, PRAC. TAX LAW., Summer 2001, at 35, 39 ("[M]any states have abandoned their own estate/inheritance tax regimes in favor of a sponge tax in recent years."). California is one such state, and the tax there cannot exceed the amount that would be paid in absence of the California tax. CAL. REV. & TAX. CODE § 13302 (Deering 2004).

25. *See infra* Appendix IV: State Revenue from Federal Credit.

26. No state responded immediately to the changes, the earliest being 2002, after the federal credit had already been reduced by 25%. Anne Tergesen, *The Many Lives of the Death Tax*, BUS. WK. ONLINE, Dec. 22, 2003, *available at* http://www.businessweek.com/print/magazine/content/

the federal estate tax is being phased out over ten years, to be eliminated completely in 2010.[27] However, a sunset clause takes effect in 2011,[28] so the entire system will revert back to what was in place in 2001, before EGTRRA.[29] Moreover, the federal credit is also being phased out, but with a time frame of only four years; it will be gone completely by 2005,[30] to be replaced by a deduction.[31] This may not sound like a major problem, but it has the potential to impact state revenue and individual estates dramatically, which can, and most likely will, impact American citizens.

As stated earlier, most states before EGTRRA utilized only the maximum federal credit amount as their estate tax.[32] Whatever amount allowable as a credit was paid to the state, thus increasing state revenue.[33] By eliminating the federal credit, EGTRRA accomplishes a shift of revenue from states to the federal government.[34] To illustrate, in 2005, a state that uses only the federal credit as its estate tax will not be able to collect any estate tax at all because the federal credit will be gone,[35] vanishing at the last

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03_51/b3863128_mz070.htm?mz. This lack of quick response indicates that many states did not realize the impact of this alteration until after the change had begun to take place, a notion furthered by the fact that states continue to make changes even as the federal credit dwindles. *Id.*

27. *See* Appendix II: Estate Tax Phase Out. As the years pass between 2002 and 2010, the maximum rate of tax will be reduced from 50% in 2002 down to 45% by the year 2007, where it stays for 2008 and 2009. I.R.C. § 2001(c)(2)(B) (2004). Then, in 2010, all estate tax calculations will be suspended and will not apply to decedents dying after December 31, 2009. *Id.* § 2210.

28. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 901, 115 Stat. 38, 150. Added to prevent application of the "Byrd rule" in the Senate, this provision remains a legitimate provision of EGTRRA. Gulecas & Gassman, *supra* note 24, at 26. The Byrd rule is a somewhat archaic and obscure limit on passing bills that would decrease revenues for a fiscal year more than ten years beyond the present one. *Id.* For the purposes of this discussion, it is less important why the sunset clause exists than that it does and the scope of its consequences.

29. Thus, in actuality, death taxes are being repealed for only one year, not indefinitely. *See* I.R.C. § 2011 (2004). The sunset provision applies to the entire Economic Growth and Tax Relief Reconciliation Act, not just the estate tax repeal. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 901, 115 Stat. 38, 150.

30. *See* I.R.C. § 2011(b)(2)(B) (2004). Each year from 2002 to 2004, the maximum allowable credit will be reduced by 25 percent until there is no credit remaining in 2005. *Id.* For example, for decedents dying in 2002 with a taxable estate of two million, their estate is limited to 75% of the maximum allowable credit, which would be $77,940 instead of the entire $103,920 that could be collected before the phase out. In 2003, the credit allowed would only be 50%, or $51960. And in 2004, the limit is 25% of the maximum allowable credit, or $25,980. In 2005 and beyond, no credit would be allowed at all. *See id.* § 2011; Tax Table, Appendix I.

31. I.R.C. § 2058 (2004). The deduction will take the place of the credit, but whereas the credit was a dollar-for-dollar reduction of state taxes paid, the deduction will be subtracted from the taxable estate before federal taxes are paid. *Id.* Furthermore, while the federal credit was applied uniformly to all estates, regardless of the federal estate tax rate, the deduction "will be of greater value to estates that are subject to higher federal estate tax rates." R-6901 FED. TAX COORDINATOR 2D 2002. This is mainly because the deduction will reduce the size of the taxable estate by the amount of estate taxes paid to the state, thus reducing the taxable estate for federal estate tax purposes and allowing an estate to fall into a lower tax bracket. *See id.*

32. *See supra* note 24 and accompanying text.

33. *See supra* note 25 and accompanying text.

34. MCNICHOL ET AL., *supra* note 2, at 1 (explaining that states would have received approximately six billion dollars from the federal credit in 2003). After EGTRRA, the portion of that money that would have gone to states utilizing only a pick-up tax will go directly into the federal coffers, leaving state coffers empty. *See id.* at 9 (estimating the loss of revenue to states from repeal of the state credit in 2002 as $5.7 billion).

35. *See* I.R.C. § 2011 (2004).

stroke of midnight on New Year's Eve 2004.[36] The state will have no revenue from estate taxes at all, and the federal government will collect all the money that would have gone to the states prior to EGTRRA.[37]

Considering that the sole estate tax in most states, prior to EGTRRA, was the pick-up tax, one can easily see how significant the consequences of such an apparently minor change will be on state revenue and state budgets.[38] Before exploring the impact in more detail, however, it is important to understand the scope of this change. One must first understand what the estate tax is and how it functions in order to understand fully the impact of these changes to the estate tax system. While this would normally require poking around in some dusty old books, the reality here is that estate taxes as we know them are fairly young.

III. HISTORY

A. *History of the Estate Tax*

Why do we have estate taxes and when did they start? Though the generally accepted date of origination of the estate tax is 1916,[39] many scholars believe estate taxes were implemented in America as early as the late 1700s.[40] Though most agree on the latest date of reinstatement, not all scholars agree upon the reasons why the tax was implemented.[41] Some believe that before WWI, the country needed revenue, and estate taxes, which started as an inheritance tax rather than as an estate tax, seemed like a legitimate means to generate this revenue.[42] Others believe it was to reduce

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36. R-6900 FED TAX COORDINATOR 2D 2002 ("The credit for state death taxes will terminate after 2004 for the estates of decedents who die after that date . . . .").

37. This shift will help to alleviate some of the loss felt by the federal government by the slow repeal of the federal estate tax. While the government is losing money from estate tax reduction overall, it is gaining money from the repeal of the state credit by collecting the money that used to go to the state as an estate tax. *See* Appendix III: Federal Estate Tax Revenue and Appendix IV: State Revenue from Federal Credit.

38. *See* Appendix IV: State Revenue from Federal Credit. Though the percentages may appear minimal in the abstract, the states are losing billions of dollars each year that previously helped to fund state relief programs, educational aid, and healthcare. *See generally* MCNICHOL ET AL., *supra* note 2, at 1.

39. *See* Revenue Act of 1916, Pub. L. No. 64-271, 39 Stat. 756 (codified as amended in scattered sections of Title 26 of the United States Code).

40. Klooster, *supra* note 16, at 634. Scholars disagree as to whether estate taxes began in 1787, 1797, or 1898, but after having been repealed several times and reinstated, all agree that during WWI, the estate tax was reinstated and has been in place ever since. *See id.* at 634-35 (identifying 1916 as the "latest restoration" of the estate tax).

41. *See id.* at 637-40.

42. *See* Revenue Act of 1916, § 2; *see also* Schlachter, *supra* note 6, at 782 n.7. Since then, however, the federal government has seen a reduction in federal revenue generated from estate taxes, especially in recent years as the tax rate has lowered. Gale & Slemrod, *supra* note 1, at 927. In

the wealth being amassed by powerful families, thereby avoiding the creation of a natural aristocracy in this country, a controversial reason to which many Americans were opposed, and which continues to meet with strong resistance today.[43]

When estate taxes were first imposed, they applied only to transfers at death, so if people made lifetime gifts,[44] they could avoid the tax altogether.[45] Obviously, this defeated the purpose of raising revenue. As a response, the federal gift tax was implemented in 1924,[46] and it still impacts estate taxes today, as this paper will briefly address. According to Krisanne Schlachter, "[T]he entire transfer tax system serves as a backstop to the income tax by ensuring that wealth accumulated through 'income-tax-preferred sources' does not escape taxation altogether."[47] The estate tax has always been controversial and a subject of political debate.[48] Even though only approximately two percent of Americans will be responsible for paying estate taxes, many more are strongly opposed to them.[49] The general consensus is that estate taxes cause people to be taxed twice and are thus immoral.[50] And even though proponents will argue that much of estate taxes are paid on wealth that has not previously been taxed,[51] the argument does little to sway those opposing the estate tax.

1999, only about $28 million was raised from estate taxes, which accounts for less than two percent of federal revenue. *Id.*

43. Major proponents of estate taxes for the purpose of redistributing wealth were Andrew Carnegie, who left much of his wealth for the public benefit, and, more currently, Bill Gates, Sr. *See* McCall & Butler, *supra* note 1, at 9.

44. Lifetime gifts such as cash or property transfers, trusts, etc., were not taxed until 1924 when the federal gift tax was first enacted. Gary Robbins, *Estate Taxes: An Historical Perspective*, 1719 BACKGROUNDER 2 (2004). Later, "[u]nder the Tax Reform Act of 1976, the estate and gift tax structures were combined into a single unified gift and estate tax system, which can be seen as a wealth transfer tax." McCaffery, *supra* note 20.

45. Beth L. Kramer & Lisa K.Y. Nakahara, ESTATE AND GIFT TAXES § 10.2 (2003); *see also* Schlachter, *supra* note 6, at 801 n.114 ("Lifetime gifts also have the effect of lowering the size of the decedent's estate by the amount of the gift, thereby decreasing future estate tax liability.").

46. I.R.C. §§ 2501-2524 (2004). When it started, the gift tax was generally lower than the estate tax, offering an incentive for lifetime gifts. Kramer & Nakahara, *supra* note 45, § 10.2. However, the taxes were unified in 1976 to circumvent this benefit. I.R.C. §§ 2001, 2502. As the estate taxes are phased out, beginning in 2004, the exclusion amounts will be different, increasing to $3.5 million by 2009 for estate taxes but remaining at $1 million for gift taxes. *Id.* §§ 2010(c), 2505.

47. Schlachter, *supra* note 6, at 783 (citing Harry L. Gutman, *Reforming the Federal Wealth Transfer Taxes After ERTA*, 69 VA. L. REV. 1183, 1271 (1983)).

48. Many early opponents of the estate tax argued it was unconstitutional, but in 1913, the estate tax was held constitutional as an "indirect" tax on transfers of property rather than on ownership of property. N.Y. Trust Co. v. Eisner, 256 U.S. 345 (1921); *see also* Gale & Slemrod, *supra* note 1, at 928 (stating that "the impact and proper role of estate taxes depends on issues as politically sensitive as parents' rights to provide for their offspring, and the true meaning of equal opportunity").

49. *See generally* Gale & Slemrod, *supra* note 1, at 929 ("Opponents often view death as an illogical time to impose taxes at best, and a morally repugnant one at worst.").

50. Many studying estate taxes explain away opposition with mainly economic arguments, such as the fact that more estates fall above the exclusion amount due to inflation or that rising stock prices have increased the expectations of baby boomers. Klooster, *supra* note 16, at 636.

51. Because much of an estate is due to accumulated wealth such as the value of real estate purchased many years ago or an increased value in stocks and bonds, much of what is paid in estate taxes is paid on wealth that has never been taxed. Schlachter, *supra* note 6, at 783. One theory is that the government is taxing wealth that would have been income had it been sold before the

Many argue that a person's heirs should not be penalized because that person worked hard to gain a fortune so that his heirs would not have to struggle as he did.[52] Many feel that one of the wonderful things about living in America is the opportunity to succeed, and they feel it is a slap in the face to have that hard-earned fortune taken away from their heirs when they die.[53] According to William Beach,

> The death tax appears to many people as a clear contradiction to a central promise of American life: that if you work hard, save, and live prudently, you will be assured the enjoyment of your economically virtuous life. There are few other places on the planet where this promise is made . . . and it along with companion promises of political and religious freedom has attracted millions of immigrants to the United States.[54]

Others think that it is exactly because we are a democracy and have such freedoms that the current inheritance system should be curtailed.[55] It may seem that people who are inheriting fortunes instead of learning to fend for themselves will not have the wherewithal to connect to others in society, where the majority of Americans are not wealthy.[56] Furthermore, some feel that the only way to keep equality that we have enjoyed in this country is by making sure that the few don't take over the many.[57] But is this really fair? And does it really work?

According to James Repetti, "Economic studies are remarkably unanimous in suggesting that high concentrations of wealth correlate with

decedent died. *See id.* However, some of the decedent's estate is bound to be previously taxed wealth, so the moral argument remains. *See generally id.*

52. *See* Gale & Slemrod, *supra* note 1, at 927. According to Gale and Slemrod, Winston Churchill felt that estate taxes were an attempt to tax the dead rather than the living, and Steve Forbes "campaigned in favor of 'no taxation without respiration.'" *Id.* Others have equated estate taxes with grave robbery and Communism. *Id.*

53. *See* William W. Beach, *Now is the Time to Permanently Repeal Federal Death Taxes*, *available at* http://www.heritage.org/research/taxes/wm295.cfm?renderforprint=1 (claiming that "[m]ost Americans oppose death taxes because they seem so un-American").

54. *Id.*

55. *See* McCall & Butler, *supra* note 1, at 9 ("[I]t is deemed more equitable to impose a tax on inheritance which may be viewed as a windfall than on wealth gained through personal effort."); *see also* Klooster, *supra* note 16, at 647 (stating that "[p]roponents of the estate tax argue that the tax is at least symbolic, ensuring that all believe they have the opportunity to realize the American Dream—not just those who have amassed great wealth").

56. *See* Klooster, *supra* note 16, at 639 ("Uncertainty due to sociopolitical instability disrupts market behavior and labor relations.").

57. *See* McCall & Butler, *supra* note 1, at 9. One key factor, according to economists, is that estate tax is imposed on wealth that has not yet been taxed, like stocks and real estate that have appreciated. *Id.*

poor economic performance in the long run."[58] Roberto Perotti, who studied concentrations of wealth and economic growth, concluded that "high concentrations of wealth have an adverse effect 'on the effectiveness of democracies to the extent that an objective of a democracy is to give all participants an equal voice.'"[59] However, due to the many resources available to the wealthy for transferring property and general wealth,[60] the estate tax, especially after EGTRRA, has not been as successful in redistributing wealth as its originators might have hoped.[61] Though estate taxes do encourage charitable contributions,[62] thus reducing the amount of the estate left for heirs, some argue that "total repeal, without some alternative transfer tax levied at death, would simply make the problem [of accumulated wealth] even worse."[63]

Those on the other side of the debate claim that not only does the estate tax fail to break up accumulated wealth, but it actually hinders economic activity in America.[64] In his discussion about the history of estate taxes,[65] Gary Robbins concludes that the estate tax, which has been extended "well into middle-class America,"[66] is "one of the most inefficient features of the current tax system."[67] In explaining this conclusion, Robbins claims that "[b]ecause the estate tax falls on assets, it reduces incentives to save and invest and, therefore, hampers growth."[68] It also unfairly hits "owners of small businesses, family farms, and savers who amass wealth during their

58. James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 831 (2001) (suggesting that poor economic growth over long terms has been shown to result from high concentrations of wealth).

59. Klooster, *supra* note 16, at 639 (citing Repetti, *supra* note 58, at 840).

60. Examples include inter vivos transfers, trusts, and life insurance. Because wealthy people generally have greater access to estate planning, according to Tye Klooster, "[i]nter vivos transfers and bequests account for nearly half of all wealth accumulations." *Id.* at 640 (citing Repetti, *supra* note 58, at 856).

61. *Id.* (stating that estate taxes have "failed to play a meaningful role in the disintegration of wealth concentration" and "total wealth held by the richest one percent of our nation has remained remarkably stable").

62. Because estates receive a credit for charitable contributions, many wealthy Americans leave large contributions, thus reducing the size of their estates for estate tax purposes. I.R.C. § 2055 (2004); *see also* Klooster, *supra* note 16, at 642 (acknowledging that charitable contributions reduce wealth within a family while helping those in need).

Some believe that if the estate tax is permanently repealed, the effect on charitable gifts will be devastating. *See, e.g.*, Gale & Slemrod, *supra* note 1, at 932 (claiming that a total abolition of estate taxes could "hurt nonprofit organizations"). The theory is that if there is no death tax, there will be no reason to reduce one's estate for estate tax purposes, so there will be little incentive to make charitable contributions upon death. *Id.*; *see also* McCall & Butler, *supra* note 1, at 9 ("Another important argument in favor of the estate and gift tax is its positive effect on charitable giving. Without the tax, this much needed support of cultural and educational institutions might greatly erode.").

63. Klooster, *supra* note 16, at 642.

64. *See* Beach, *supra* note 53; *see also* Robbins, *supra* note 44.

65. *See generally* Robbins, *supra* note 44.

66. *Id.* at 1.

67. *Id.* at 6. Robbins claims a "failure of the estate tax exemption to keep up with rising wealth is the main reason increasing numbers of average Americans face the prospect of having their heirs presented with an estate tax bill." *Id.* at 3.

68. *Id.*

lifetimes through hard work and thrift."[69] According to some economists, in 2000, "[t]he top federal income tax rate of 39.6 percent combined with the top estate tax rate of 55 percent implie[d] a tax penalty of almost 73 percent on a dollar earned with the intent to bequeath."[70] Edward J. McCaffery, a professor of law and economics in California, demonstrates this concept with a story that parodies Shakespeare's King Lear.

McCaffery relates the story of the Lears: King Lear and his wife gave each of their three daughters a tax-free gift of accumulated trust income[71] (free of both gift taxes for the parents and income taxes for the daughters) of one million dollars at the time she turned twenty-one.[72] The story continues as the eldest daughter partied and splurged, squandering all of her money in a short period of time.[73] She never had to pay income taxes on the money, and she certainly won't have to pay estate taxes on a fortune that has already been spent.[74] The middle daughter lived off an annuity she purchased with the original money, never having to work a day in her life.[75] When she died, she had no wealth on which to pay estate taxes, and she had never even paid any income taxes or Social Security taxes because she was never employed.[76]

The youngest daughter, on the other hand, invested wisely and took a job, paying income taxes throughout her life.[77] She never used the money from her father nor the income she received from the investment of the money.[78] When she died, leaving a large estate, her estate had to pay a large estate tax.[79] As stated by McCaffery, "She alone among the Lear daughters contributed work and taxes to the common pool of social resources as she

69. *Id.* at 5. Others claim that these small businesses and family farms are able to avoid most estate taxes, so the emotional arguments of family farmers forced to sell do not usually hold true. *See* Gale & Slemrod, *supra* note 1, at 928-30 (asserting that in 1997, farm assets accounted for "a microscopic 0.3 percent of taxable estates").

70. Gale & Slemrod, *supra* note 1, at 929. The argument remains, however, that income tax is never paid on many assets to which estate tax applies because much of what makes up an estate is not income but increase in value of assets; *see also* McCall & Butler, *supra* note 1, at 9.

71. In addition to a lifetime exclusion amount of $1,000,000, *see* I.R.C. §2505 (2004), everyone is entitled to give $10,000 per year, indexed for inflation, to anyone and everyone. *See id.* § 2503(b). The Lear parents each put that amount in a trust every year for each daughter, thus owing no gift tax on the trust amount. *See id.* § 2503(c).

72. McCaffery, *supra* note 20.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* This demonstrates McCaffery's point of view that "the federal death tax is a bad tax because it is an 'anti-sin' or a 'virtue' tax—it falls on just those activities we should want our most economically productive citizens to be doing." *Id.*

77. *Id.*

78. *Id.*

79. *Id.* McCaffery uses the example that the money from her father, if it had been invested in stocks, would have grown to over five hundred million dollars during her lifetime. *Id.* If she tried to leave this to her heirs, the government would take away up to three hundred million of her fortune in taxes. *Id.*

lived. In reward for her thrift, she alone among the Lear daughters got to contemplate a further and most onerous tax as she lay dying."[80]

Critics of the estate tax argue also that, in addition to taxing prudent behavior, the estate tax is unfairly imposed.[81] Robbins indicates that the wealthiest Americans do not, in fact, pay the highest estate taxes, largely due to the availability of estate planning to those who anticipate having to pay such a tax.[82] It seems that many Americans who ultimately owe estate taxes may not predict having estates large enough to trigger such a tax. According to Robbins, "Because wealth is often unexpected, these people may not be aware of, or take full advantage of, ways to reduce estate taxes. As a result, those who come late, or not at all, to estate planning end up paying most of the tax."[83]

B. History of the Federal Credit

Early on, the federal government felt that estate taxing should be a function of the states,[84] and many states began to impose their own estate taxes.[85] Yet once the federal estate taxes were implemented, most Americans paid these taxes to the federal government as well as to their individual states.[86] In order to ease this tax burden, the federal government in 1924 implemented a credit for estate taxes paid to a state,[87] with a maximum set on a sliding scale based on the size of the estate.[88] For most, then, the burden was reduced because the total tax due was divided between the federal government and the state. In essence, estate taxes already paid to the state were subtracted from the taxes owed to the federal government[89] as opposed to being collected additionally, as they had been before.[90] In this way, "increases or decreases in the state death tax credit only influenced the

80. *Id.*

81. *See* Robbins, *supra* note 44, at 5; *see also* Schlachter, *supra* note 6, at 793.

82. Robbins, *supra* note 44, at 5; *see also* Schlachter, *supra* note 6, at 793 ("Because of the large estate planning industry in this country, most wealthy taxpayers pay the estate tax at a much lower effective rate than the top marginal rate.").

83. Robbins, *supra* note 44, at 5.

84. Gale & Slemrod, *supra* note 1, at 928 ("The laws that govern how and to whom property may pass are the exclusive domain of the states.").

85. *Id.*

86. Since the federal government offered no credit or deduction for estate taxes paid to states, estates which owed such taxes had to pay the federal government as well as whatever amount was owed to the states, increasing the tax burden and complicating tax collection.

87. Revenue Act of 1924, Pub. L. No. 68-176, § 301, 43 Stat. 253, 304.

88. *See* Tax Table, Appendix I for current rates. Incidentally, 1924 is the same year the gift tax was implemented, so it is likely that federal revenue suffered little from the lost revenue credited to the states for estate taxes paid. *See* Robbins, *supra* note 44 at 2.

89. *See* I.R.C. § 2058 (2004).

90. Even after the credit was implemented, state estate taxes could have exceeded the federal credit allowed for a particular estate. R-7200 FED. TAX COORDINATOR 2D (2002). Some of the factors that make state taxes larger than the federal credit are: (1) state rates may be higher than they need to be in order to absorb the federal credit; (2) the estate may be taxed by more than one state, depending on where property is located, making the total tax larger than the federal credit; (3) a state's tax system could allow different deductions, inclusions and credits against the tax. *Id.*

allocation of the tax between the state and federal governments and had no effect on the total tax an estate would pay."[91] For those paying estate taxes, this made a big difference in the total amount of taxes owed.

In 1954, the federal government simplified the credit even more to incorporate contemporary rates, giving estates an even bigger break by implementing a larger credit against the estate taxes previously paid to the states.[92] The states relied on the revenue from estate taxes,[93] so the federal credit was a huge boon to state tax systems. For many states, such as California and Florida, an easy way to simplify their tax infrastructures was to adopt the maximum allowable federal credit as their estate tax owed.[94]

Before EGTRRA was enacted, most states utilized the maximum credit for their estate tax, either solely or in combination with their own tax, in order to benefit from the federal system and also to reduce the burden on its citizens' estates, a concept referred to as a "pick-up" or "sponge" tax because it picks up or absorbs the amount the federal government allows to be taken as a credit against the state taxes paid.[95] States use this pick-up tax to take full advantage of the maximum federal credit allowed while keeping their own tax systems simple and easy to implement.[96] Due to the ease of using the pick-up tax as the sole estate tax, many states replaced their individual tax systems with simple language based on the credit.[97] Before EGTRRA, several states used the sponge tax in addition to their separate estate tax systems, in order to reap the entire benefit that the federal credit allows.[98]

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91. David Keene & Marcia K. Fujimoto, *EGTRRA's Changes to the State Death Tax Credit: Good News for Some Estates, Bad News For Some States*, TAXES at 23, 24-25 (Nov. 2003).

92. Laura H. Peebles, *Estate Tax Credits and Computations*, 844-2d TAX MGMT. PORTFOLIO A-15 (2002); *see also* Robbins, *supra* note 44, at 3.

93. *See* David Megaw, *Changes in Estate Taxes May Generate a Tax Competition Among States*, NAT'L UNDERWRITER LIFE & HEALTH—FIN. SERVICES EDITION (2003), *available at* 2003 WL 66879728; *see also* Appendix IV: State Revenue from Federal Credit.

94. *See, e.g.*, EUGENE M. WYPYSKI, THE LAW OF INHERITANCE IN ALL FIFTY STATES (4th Ed. 1984); Committee on State Death Taxation, Probate and Trust Division, *Survey of State Death Tax Systems and of Selected Problems of Double Taxation of Real Property Interests*, 14 REAL PROP. PROB. & TR. J. 277 (1979).

95. Before the EGTRRA changes, as many as forty-seven states utilized the pick-up tax, either independently or in conjunction with a separate state estate tax. McCaffery, *supra* note 20. Only Oklahoma, Mississippi and Ohio were completely detached from the pick-up tax, and they received severe criticism for failing to utilize what many thought was a fairer system, since the pick-up tax limited the total tax burden on the decedent's estate. *Id.*

96. *See* Kiplinger's Money Power, *supra* note 23.

97. Section 1502(b) of Delaware's statutes is an example: "[T]he amount of the tax shall be the amount of credit allowable under the provisions of the federal estate tax laws for estate, inheritance, legacy and succession taxes paid to any state." MCNICHOL ET AL., *supra* note 2, at 9.

98. States such as Indiana, Kentucky, and Tennessee utilized the pick-up tax in addition to their own tax systems rather than in place of it. *Id.* at 4-5. In this way, the state would get the entire benefit of the federal credit without changing its estate tax calculations. *See id.* The state would simply add, or "pick up," whatever dollar amount would make the estate tax for that estate equal to the full credit allowable. This gave states additional revenue with little effort. *Id.* at 4-5 ("If the

According to Joshua Rubenstein, states fall into one of three categories based on the manner in which changes in the federal estate tax are incorporated into their individual systems.[99] The categories are conforming pick-up states, frozen pick-up states, and independent estate tax states.[100] In conforming pick-up states, "the federal changes will take effect automatically and their state death tax will phase out [as the federal credit is phased out] absent affirmative action on their part."[101] The negative implication of this system is that once the federal credit disappears, so will the estate tax in those states.

In frozen pick-up states, "the federal changes will not take effect and they will no longer be pick-up states absent affirmative action on their part."[102] This means that the state's estate taxes will remain in place even after the federal credit is phased out because the state was not detrimentally linked to the federal credit in its statutory language.[103]

In independent estate tax states, the repeal of the federal credit will not affect their estate tax infrastructures directly.[104] These states have their own systems in play, and they will only lose the additional revenue they would have received when the federal credit was more than their individual tax, or the extra pick-up tax.[105] However, these states may face other financial challenges as surrounding states reduce or even eliminate their estate taxes,[106] creating an incentive to relocate for many citizens.[107]

For the purposes of this paper, only two general types of state tax systems will be discussed: first, conforming, or those that automatically incorporate federal changes (which generally utilize only the pick-up tax),

amount of the state tax is less than the credit allowed against federal taxes, the state tax is increased to the amount of the credit.").

99. Joshua S. Rubenstein, *Federal 'Repeal' of Estate Tax Puts Burden on States*, N.Y.L.J., Sept. 9, 2002, at 9.

100. *Id.*

101. *Id.*

102. *Id.*

103. An example of this type of state is Virginia. Although it uses the pick-up tax, Virginia's estate tax law provides for continuation of estate tax even with the repeal of the federal credit:

> "Federal credit" means the maximum amount of the credit for state death taxes allowable by Sec. 2011 of the United States Internal Revenue Code of 1954 . . . in respect to a decedent's taxable estate. The term "maximum amount" shall be construed as to take full advantage of such credit as the laws of the United States may allow. In no event, however, shall such amount be less than the federal credit allowable by Sec. 2011 of the Internal Revenue Code **as it existed on January 1, 1978**.

MCNICHOL ET AL., *supra* note 2, at 11.

104. Rubenstein, *supra* note 99, at 9.

105. *Id.* Before EGTRRA, only three states organized their tax structures this way: Ohio, Oklahoma, and Mississippi. *Id.*

106. Because some states will not be able to reinstate an estate tax after the repeal of the federal credit, states will be sharply divided based on whether or not they impose an estate tax at all, not just the varying amounts that may be owed. *See generally* MCNICHOL ET AL., *supra* note 2, at 9-16.

107. Some scholars predict that residents will be lured away from states that continue to impose estate taxes after the repeal of the credit by surrounding states that do not collect estate taxes. If this is the case, those states that protected themselves from loss of revenue by collecting separate estate taxes may find that the trade off is not worth it when many residents seek greener, and cheaper, pastures. *See, e.g.*, Kaja Whitehouse, *A Reason to Relocate: Death Taxes*, WALL ST. J., Nov. 5, 2003, at D2.

and second, frozen and independent will be combined as states that have their own tax systems in place (which may or may not use the pick-up tax as a source of additional revenue).

IV. CURRENT STATE OF THE LAW

In June of 2001, EGTRRA initiated many changes to the federal tax structure. However, all of the changes introduced by EGTRRA will be repealed after December 31, 2010 by a "sunset provision."[108] One of the major changes enacted was the repeal of the federal estate tax.[109] Generally speaking, the estate tax is a source of anger and controversy to most Americans, and hearing that the estate tax was being repealed satisfied many.[110] However, most Americans did not read the fine print: the estate tax is actually being repealed slowly over a period of eight years, finally to be eliminated by 2010.[111] This so-called repeal, then, is not as much a repeal as it is a phase-out, with only one year of true repeal. Additionally, after the solitary year of repeal, the sunset clause is in place to bring back the estate tax as it was before EGTRRA.[112]

A. The Federal Credit

Another change implemented by EGTRRA was a repeal of the federal credit for state estate taxes paid. While this may have only seemed like a ripple compared to the wave of changes brought by EGTRRA, repercussions from this repeal may ultimately affect many more people than the much more publicized repeal of the estate tax.[113] This is mainly due to some big differences between the repeal of the estate tax as a whole and the repeal of the federal credit, as well as the way states structure their tax systems. Whereas the repeal of the federal estate tax affects citizens directly and the

108. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 901, 115 Stat. 38, 150. Although the sunset provision was mainly added to avoid the "Byrd rule" in the Senate, it is part of the Act and will cause all changes to revert back to pre-EGTRRA standards if the legislature does not intervene before January 1, 2011. *See* Gulecas & Gassman, *supra* note 24, at 36.

109. Though EGTRRA includes many tax changes, the one that has received the most attention is the repeal of the estate tax. Economic Growth and Tax Relief Reconciliation Act of 2001 § 901.

110. *See supra* notes 48-83 and accompanying text.

111. As stated by one New York lawyer, "[n]ot everyone understands, however, that this was a tax increase, not a decrease, for the federal government, and in turn a tax increase for many Americans." Rubenstein, *supra* note 99, at 9. Other estate planners agree, stating "this may be the most deceptive tax legislation that has ever been enacted." Gulecas & Gassman, *supra* note 24, at 36.

112. Economic Growth and Tax Relief Reconciliation Act of 2001 § 901.

113. As states attempt to recover revenue lost by the repeal, some who would pay no estate tax may end up paying more elsewhere, such as through sales or use taxes. *See infra* notes 161-92 and accompanying text.

states only indirectly,[114] the repeal of the federal credit affects both states and citizens directly[115] and has the potential to impact both severely. Whether that impact will be positive or negative depends largely on one's point of view.

The major difference between the repeal of the federal estate tax and the repeal of the federal credit for state estate taxes paid is the timeline of phase out.[116] The federal estate tax is being phased out over eight years as the tax percentage decreases and the tax margin increases, so those estates that owe federal estate tax today may not have to pay any two years from now.[117] In contrast, the federal credit is being phased out over a short four-year period and will be gone completely by the year 2005.[118] This distinction may seem minor, but states will see major ramifications on state revenue and budgetary planning.[119] Each year after 2001, the percentage of the maximum allowable credit will be reduced by 25%, so that by the year 2005, the allowable percentage of the federal credit will be zero.[120]

For example, if a hypothetical Mrs. Brown had died in 2002 with a taxable estate of two million, her estate would have been limited to 75% of the maximum allowable credit, which would be $77,940 instead of the entire $103,920 that was allowed in 2001.[121] In 2003, the credit allowed was only 50%, or $51,960.[122] And in 2004, the limit was 25% of the maximum allowable credit, or $25,980.[123] In 2005 and beyond, no credit will be allowed at all.[124] At that time, the credit will be replaced by a deduction for

114. Citizens will pay less estate tax directly to the government, but states will be affected only if their state estate tax systems are inextricably linked to the federal system. *See* Whitehouse, *supra* note 107, at D2. For those states that have their own tax systems in place, the repeal of federal estate taxes will have little impact on them, and any impact will be indirect. This impact could take the form of competition between states for residents, as some scholars predict that residents will relocate to states with more favorable estate taxes. *Id.*

115. The repeal of the federal credit will, in turn, limit the amount of taxes that pick-up states can collect since the state can only collect the maximum amount of the federal credit. *See supra* notes 93-100 and accompanying notes. Thus, the citizens of those states that implement separate estate taxes will essentially be taxed twice—once by the federal government and once by the states, at least until 2010 when the federal estate tax is gone. *See generally* Liz Pulliam Weston, *The "Death Tax" is Far From Dead*, Jan. 24, 2004, *available at* http://moneycentral.msn.com/content/ Retirementandwills/Planyourestate/P51304.asp?Printer; Christopher F. Kinney, *State Inheritance Taxes After Federal Estate Tax "Repeal,"* TRUST AND TAX NOTES (Fourth Quarter 2003); Kiplinger's Money Power, *supra* note 23, at M05. *But see* MCNICHOL ET AL., *supra* note 2, at 7-8.

116. *Compare* I.R.C. § 2001(c)(2) (2004), *with* I.R.C. § 2011(b)(2)(B) (2004).

117. *See* Appendix II: Estate Tax Phase Out; I.R.C. § 2001 (2004).

118. I.R.C. § 2011 (2004).

119. As the credit dwindles, states that utilize only the pick-up tax as their estate tax will see their revenues dwindling as well and will have to scramble to address the consequences. *See* Steven Leipzig & Gary A. Phillips, *Estate Tax Repeal? Definitely Not in New Jersey*, N.J.L.J., May 26, 2003; Gulecas & Gassman, *supra* note 24.

120. I.R.C. § 2011 (2004).

121. *See id.* § 2011(b)(2)(B).

122. *See id.*

123. *See id.*

124. *Id.* § 2011(f).

the total amount of estate taxes paid to a state,[125] which will be discussed later.

What does this mean for Mrs. Brown's estate? Maybe nothing. If she lived in a state that has in place a tax system utilizing only the maximum federal credit as its estate tax, her estate will just pay the reduced federal credit to the state as its estate tax.[126] However, if Mrs. Brown lived in a state that has an estate tax of its own, separate from the federal credit, Mrs. Brown's estate will have to pay that tax, but the federal tax owed will be credited only by the reduced amount, so she may end up paying additional taxes after EGTRRA.[127] Mrs. Brown's lovely daughter will not like this, as she will lose some of her inheritance to taxes.

Another potential source of problems is the sunset clause that provides for the tax changes to revert back to what they were before EGTRRA was passed.[128] The potential problems do not stem from the sunset clause itself, for if the clause actually goes into effect, it is likely to help state revenue by reinstating the federal credit.[129] Instead the problems stem from the likelihood that the sunset clause will never be allowed to take effect regarding estate taxes.[130]

At any point between now and 2011, legislation could be passed that would, in effect, freeze the taxes where they stand at that point in time, undoubtedly motivated by the need for federal revenue.[131] If Congress were to freeze the repeal, federal estate taxes would be reduced, thus engendering positive reactions, but they would not be fully repealed.[132] Also, if the

125. *Id.* § 2058.

126. *Id.* § 2011.

127. *Id.* § 2011.

128. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 901, 115 Stat. 38, 150.

129. If the sunset clause takes effect in 2011, the federal estate tax rates and the federal credit would be reinstated as they were before EGTRRA was passed, effectively eliminating the repeal. *See* I.R.C. §§ 2001, 2011 (2004). For states that use only the pick-up tax, this means that they would be able to collect estate taxes once again based on the federal credit allowed. *See, e.g.*, CAL. REV. & TAX. CODE § 13302 (Deering 2004). California's estate tax statute limits collection to the amount based on the federal credit. *Id.*

130. According to some, America cannot afford total estate tax repeal: "If full and permanent repeal were affordable, then it would have been enacted immediately." Gulecas & Gassman, *supra* note 43; *see also* McCall & Butler, *supra* note 1, at 9 ("The significant amount of pending legislation is symptomatic of widespread unease with the current system of estate tax. The growing level of attention being paid to the tax may also reflect an increasing awareness of the accelerating importance of the tax for revenue purposes.").

131. *See, e.g.*, Gulecas & Gassman, *supra* note 43 ("The fact that there is a nine-year phase-out, a $1 million gift tax exclusion, and a sunset provision is a clear admission that the country cannot afford such a repeal and keep a balanced budget under present admitted projections.").

132. For example, if the repeal is frozen in 2006, the maximum tax rate for federal estate taxes will be 46%, and unified credit amount will be $2,000,000. I.R.C. §§ 2001(c)(2)(B), 2010(c) (2004). Though these rates will exclude some estates that would previously have had to pay estate taxes, it will certainly not be a total repeal.

repeal were to be frozen, the sunset cause would be rendered moot, and changes would remain in place as they stand at the time of the freeze.[133]

While this does not sound necessarily grave for the general population,[134] the likelihood is that the freeze will not happen until after 2004, when the federal credit will have been replaced with a deduction.[135] If that happens, the sunset clause will not allow the credit to return in 2011 as warranted by EGTRRA, thus setting the deduction in stone, at least until further legislation is passed to reenact the credit, which may never happen.[136] This means substantial change for states that have used the federal credit as their sole estate tax and have relied on the revenue from that pick-up tax. States would have to take affirmative action in order to recover from such legislation.

If no freeze occurs, states will just have to wait patiently until the sunset provision takes effect and the federal credit resurfaces.[137] In the meantime, they will temporarily lose revenue each year from estate taxes not being collected.[138] If the freeze does occur, which many tax attorneys and analysts feel is the more likely scenario,[139] the federal credit will not return,[140] and the

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133. Legislation could be passed that would freeze only part of EGTRRA while letting the other provisions continue through 2010, thus not affecting the sunset for the entire Act. Currently, Americans are pushing strongly for the estate tax repeal to be made permanent, and H.R. 8 has already been passed by the House of Representatives and is waiting for Senate approval. McCall and Butler, *supra* note 1, at 9. According to some, "Senate action remains doubtful." Brian T. Whitlock, *Significant Recent Developments in Estate Planning*, 9-34 TAX ADVISER 548 (2003).

134. If the tax changes are frozen, it will be after some reduction in estate taxes has already taken place, so citizens will still be better off than they would have been if there had never been a Tax Act, and they will even be in a better place than they would have been after the sunset clause takes effect. *See* MCNICHOL ET AL., *supra* note 2, at 12. So, even though some estate tax will still exist, fewer estates will be affected, and the overall amount collected will still be reduced. *See* Appendix II: Estate Tax Phase Out.

135. *See* I.R.C. §§ 2011(f) and 2053(d).

136. Though just speculation, it is unlikely that the legislature would reenact a provision they just eliminated. Once the repeal of the federal estate tax began, allowing the federal credit to stand would cause too much money to be diverted to the states and away from the federal government. *See supra* notes 33-37 and accompanying text. If the legislature were to reenact the federal credit against estate tax amounts that are slowly diminishing, the federal government would see too large a decrease in its estate tax revenue for this to be practical. *Id.*

137. Based on recent legislation, as discussed below, states are unwilling to "wait patiently" while their coffers are emptied of estate tax revenue. Consequently, some states may pass temporary legislation to survive until the sun sets on the repeal. *See generally* Anne Tergesen, *supra* note 26; Weston, *supra* note 115.

138. Some states may find even the temporary reduction in revenue devastating, especially during a time when state budgets are tight. *See* MCNICHOL ET AL., *supra* note 2, at 1. California is estimated to lose over five billion dollars and Florida two billion dollars, between 2003 and 2007. CENTER FOR POLICY ALTERNATIVES, ESTATE TAX DECOUPLING 127 (2004); *see also* Appendix III: Federal Estate Tax Revenue in Recent Years.

139. Though public opinion is pushing for a permanent repeal, many scholars and economists feel that the federal government cannot afford to repeal the estate tax for good. *See supra* notes 130-31 and accompanying text. If the federal government is not willing to reduce spending in other areas, the estate tax repeal may be a source of revenue that cannot be eliminated easily.

140. The credit will be lost because the sunset provision will be rendered moot. Without the sunset clause, the federal credit will not return in 2011, so that after it is replaced with a deduction in 2005, it will be gone, possibly forever. *See* I.R.C. § 2011 (2004).

states that relied on it for their pick-up tax will lose revenue indefinitely, possibly wreaking havoc on their state budgets.[141]

For example, in California, the estate tax owed to the state is equal to the maximum federal credit allowed for the estate in question.[142] If someone died in 2003 with a taxable estate of $1.5 million, the federal estate tax (after subtracting the $1 million exclusion amount) would have been $210,000, and the estate would have been entitled to a credit for state taxes paid of $32,200. This figure is 50% of the maximum allowable for this sized estate, the amount specified for 2003 in EGTRRA.[143] Of the $210,000 estate tax owed, $32,200 would have gone to the state, and $177,780 would have gone to the IRS.[144]

However, in 2001, before EGTRRA, California would have collected the entire amount of federal credit allowable for a particular estate. Thus, in the above situation, California would have been able to collect the entire $64,400 allowed by the tax table.[145] In just two years, the amount of revenue from every taxed estate was reduced by half. In 2004, only 25% of the maximum allowable federal credit could be collected by California, reducing its revenue from taxes on every estate by 75%.[146] In 2005, it will be even worse because California will not be able to collect any estate taxes because there will be no federal credit in place.[147]

B. Revenue from Estate Taxes

Though one of the original reasons for implementing an estate tax was to increase federal revenue, the states have found estate taxes more significant in their budgetary planning. [148] Individual states, to an extent greater than the federal government, have reaped the monetary benefits from estate taxes.[149] James Gulecas and Alan Gassman estimated Florida's

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141. Appendix IV contains recent estimates of dollar amounts lost from the repeal of the federal credit.

142. CAL. REV. & TAX. CODE § 13302 (Deering 2004).

143. I.R.C. § 2011 (2004).

144. Because California utilizes the pick-up tax, the estate tax owed to the state is equal to whatever amount is allowed by the federal government as a credit. CAL. REV. & TAX. CODE § 13302 (Deering 2004). In 2003, that amount was only 50% of the maximum credit allowed before EGTRRA. I.R.C. § 2011 (2004).

145. *See* Tax Table, Appendix I; I.R.C. § 2011 (2004).

146. *See* I.R.C. § 2011 (2004).

147. While its citizens will be entitled to a deduction for state estate taxes paid, California will not be able to collect any estate taxes because its system is based entirely on the federal credit, which will no longer exist. CAL. REV. & TAX. CODE § 13302 (Deering 2004). Therefore, citizens will pay the same estate tax, but it will all go to the federal government instead of a portion going to the state government, as it was before EGTRRA. California's law specifically assures that the total of federal and state taxes will not exceed the amount that would be paid just to the federal government. *Id.*

148. *See supra* notes 33-37 and 92-94 and accompanying text.

149. *See* Appendix III: Federal Estate Tax Revenue in Recent Years.

revenue collected through the federal estate tax credit in 2001 to be $800 million[150] and expected that revenue to rise to over $1 billion per year over the next several years.[151] However, once the EGTRRA changes go into effect, Florida is likely to lose over $7 billion of revenue in ten years.[152]

California is another state that will see major complications from EGTRRA. Since California, like Florida, uses the federal credit as its sole estate tax, its repeal will affect California's estate tax revenue dramatically.[153] California has the largest revenue from estate tax in the country.[154] Additionally, California and Florida, unlike some other pick-up states, have provisions in their state constitutions or estate tax statutes that prohibit them from reinstating an estate tax if there is no federal estate tax.[155] So, whereas some pick-up states are able to pass legislation to reinstate their own estate taxes as the federal tax declines, others will be left without such an alternative.[156]

C. The Deduction

After the federal credit disappears, the federal government will allow a deduction for any estate taxes actually paid to a state or the District of Columbia.[157] At first glance, most taxpayers will not see how this drastically changes the estate taxes for an average estate.[158] One may ask: if the estate is still getting to deduct the total amount of taxes paid, does it really matter whether it comes in the form of a deduction or a credit? Though it may not be immediately obvious, the answer is clearly yes.

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150. Gulecas & Gassman, *supra* note 24, at 39.

151. *Id.* For 2002, Florida collected $751,600 in revenue from the federal estate tax. MCNICHOL ET AL., *supra* note 2, at 10 tbl. 3.

152. Gulecas & Gassman, *supra* note 24, at 39. Florida is one of the many states that used the pick-up tax as its sole estate tax, so once the federal credit is gone, so is Florida's estate tax revenue. *Id.*

153. California stands to lose over five billion dollars in revenue from the federal credit between 2003 and 2007, illustrating the importance of this credit to California's state budget. MCNICHOL ET AL., *supra* note 2, at 10.

154. *See id.*

155. CAL. REV. & TAX. CODE § 13302 (Deering 2004).

156. As will be discussed later, many pick-up states have already introduced legislation to reinstate an estate tax that subverts the federal repeal. Those states that are prohibited by state constitutional or statutory provision, however, will either have to cut state budgets or find alternative methods of raising state revenue. *See infra* notes 173-77 and accompanying text.

157. I.R.C. § 2058 (2004) ("[T]he value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or the District of Columbia, in respect of any property included in the gross estate."). The statutory limitations that applied to the federal credit, such as payment deadlines, likewise apply to the deduction.

158. Many may not understand how a credit and a deduction are different since they both cause the federal tax that is owed to be reduced. However, as will be explained, the federal credit was a dollar-for-dollar decrease of taxes owed whereas the deduction is taken from the taxable estate, before federal taxes are computed. *See* MCNICHOL ET AL., *supra* note 2, at 8. Thus, the overall tax burden on the estate could increase when the credit is replaced with a deduction. *But see id.* at 12 (stating that the "total federal and state estate tax for which an estate will be liable will be lower than under 2001 law, even if a state retains its estate tax by decoupling from the federal law").

The reason it matters stems from the math involved. Though extra large estates may actually pay less tax under a deduction than they did under the credit pre-EGTRRA, most estates will not similarly benefit. For example, say a taxable estate[159] is $4,000,000 and hypothetically owes $250,000 in state estate taxes and $750,000 in federal taxes. Under the federal credit system, the estate would get a credit for $250,000, reducing the federal taxes to $500,000. In this way, the estate does not pay any additional taxes. Under the deduction system, the $250,000 gets deducted from the taxable estate of $4,000,000, creating a new taxable estate of $3,750,000, on which federal estate taxes are $775,000. In this case, the estate gets a deduction for the $250,000 paid to the state, but the estate still owes $525,000 to the federal government, increasing the total tax burden by $25,000.

If it seems like these changes are confusing, it is because they are. Even estate planners are finding the changes hard to decipher, and numerous articles have been published about estate planning after EGTRRA.[160] Generally, the advice is for people to remain flexible in order to make the most of the changing laws.[161] However, this is difficult when dealing with death, since we cannot predict it and generally do not even like planning for it. But plan we must, as the only securities in life are death and taxes.

Although most articles about the repeal of the federal credit are aimed at tax analysts and estate planners, they are not the only ones who will be affected by the changes introduced by EGTRRA. The American taxpayer should be aware that major changes are taking place in the area of estate tax law in America rather than just listening to the media tell them that death taxes are being repealed. An informed public is in a better position to question their lawmakers, including those who passed EGTRRA with its confusing phase-outs and negative consequences, "add[ing] complexity to the estate planning process."[162]

V. IMPACT

There are two main schools of thought about how this major change in federal tax law will impact America. They basically boil down to whether one wants to look at the situation as positive or negative in terms of government structure and revenue. The difference may also stem from political preference or other motivation not related to one's views about estate taxes per se. In general, the two main differences have to do with how

159. For estate tax purposes, the taxable estate is the gross estate less any allowable deductions. I.R.C. § 2051 (2004).

160. *See, e.g.*, Whitlock, *supra* note 133, at 548; Gulecas & Gassman, *supra* note 24, at 35.

161. *See, e.g.*, Gulecas & Gassman, *supra* note 24, at 47 (concluding that the EGTRRA "creates an era of planning in a dynamic and uncertain environment").

162. Whitlock, *supra* note 133, at 549.

the states will respond and how that response will affect the American taxpayer. These differences will be discussed in detail below.

A. *The States*

At this point, there are two kinds of state systems currently being utilized: those which rely on the federal credit as their sole estate tax and those which utilize an independent estate tax system. Because some states are retaining a method of collecting estate taxes and others are not, the implications will vary significantly between these two types.

1. States Currently Imposing Only the Pick-Up Tax

Regarding overall impact, this group is likely to be hit the hardest. In basic terms, the problem is this: as the federal credit dwindles, the amount of tax these states can collect dwindles as well, eventually disappearing completely.[163] If the law states that the state death tax is the maximum federal credit allowed for a specific estate, and the maximum federal credit is zero, the state cannot collect any estate taxes from that estate.[164] Because so many states utilized the federal system before EGTRRA,[165] many will find their statutory language controlling how much estate tax they can collect becoming problematic.[166]

If the statutory language of a state's estate tax system is directly tied to the maximum allowed by the federal credit, these states will need to change that language if they want to continue to collect estate taxes after the federal credit is gone.[167] Some states, however, are not allowed to change this language, so they will have to look for other alternatives to compensate for the loss of revenue from estate taxes.[168] Clearly this can be detrimental to states that have relied on the federal credit for their estate taxes.

Before EGTRRA, this included most states.[169] Fourteen more states utilize the pick-up tax as only a portion of their estate or inheritance taxes.[170]

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163. This is true in states like California because the language of California's estate tax laws incorporate the federal credit and its maximum. Thus, when the maximum is reduced, so is California's collectable tax. CAL. REV. & TAX. CODE § 13302 (Deering 2004).

164. As of January 1, 2005, the federal credit will in fact be zero, replaced by a deduction for any amount actually paid to the state. I.R.C. § 2058 (2004). While helping those estates that owe both state and federal taxes, the deduction will not help states recover their revenue once the federal credit is gone.

165. Thirty-six states used only the pick-up tax, and fourteen more used the pick-up tax in conjunction with their state statutes. MCNICHOL ET AL., *supra* note 2, at 4.

166. *See id.* at 9. The most common wording for a state estate tax law can be seen in section 1502(b) of Delaware's law: "the amount of the tax shall be the amount of credit allowable under the provisions of the federal estate tax laws for estate, inheritance, legacy and succession taxes paid to any state." *Id.* (quoting DEL. CODE ANN. tit. 30, § 1502(b) (2004)).

167. Though some, like California, are unable to do so, so they will have to find other ways to address these changes. CAL. REV. & TAX. CODE § 13302 (Deering 2004).

168. MCNICHOL ET AL., *supra* note 2, at 13.

169. Thirty-six states out of fifty-one (including the District of Columbia) utilized the maximum federal credit as their sole estate tax before the changes implemented by EGTRRA. *See supra* note 165.

However, some states have already responded to these changes.[171] These states have relied on the revenue from estate taxes for a portion of their budgets in past years.[172] Consequently, as the federal credit and state estate taxes disappear, the revenue from those taxes disappears.[173] For some states that are already feeling the crunch of budgetary constraints, this could prove detrimental.[174]

a. Possible Solutions

States will need to act affirmatively, and quickly, in order to recover from the loss of revenue they will experience due to this shift from a credit to a deduction.[175] Many have recently decoupled from the federal tax system, meaning that their estate tax is no longer tied to the federal credit, so federal changes are not automatically incorporated into their state systems.[176] For purposes of definition:

> [A] state is considered decoupled from the federal estate tax law if one or both of the following components exist in the state's law:
>
> 1. The state's law departs from the federal law as to the percentage of the state death tax credit allowed . . . .
>
> 2. The state's law departs from the federal law as to the exemption amount subject to tax.[177]

170. MCNICHOL ET AL., *supra* note 2, at 4. These states specify in their laws that "if the amount of the state tax is less than the credit allowed against federal taxes, the state tax is increased to the amount of the credit." *Id.* However, some of these states had already changed their laws so that they would rely solely on the pick-up tax in the future; worse timing could not have been planned! *Id.*

171. States such as Massachusetts, New Jersey, and the District of Columbia now have separate means of calculating an estate tax on estates of decedents dying in those states. *The Death Tax Lives On*, WALL ST. J., May 30, 2003, at A6. Because states are responding quickly, an accurate estimation of the number of states which have kept a separate estate tax is difficult, though it fell right around seventeen, in addition to the District of Columbia, at the end of 2003. *Id.*

172. *See* Appendix IV: State Revenue from Federal Credit.

173. *See* Schlachter, *supra* note 6, at 799-800.

174. According to the Center on Budget and Policy Priorities, "States are already facing fiscal distress—deeper than in the early 1990s—as a result of the economic recession. An additional revenue loss on top of the revenue declines resulting from economic forces will only worsen their problems." MCNICHOL ET AL., *supra* note 2, at 1.

175. Because the credit will be gone by 2005 and has been decreasing since 2001, states lose money for each day they wait. *Id.* at 1. Based on the revenue collected in 2002, New York, had it not decoupled, would have lost over $2,000,000 per day! *Id.*

176. As explained by David Megaw, this means "the calculation of state death tax is independent of the federal tax structure." Megaw, *supra* note 93.

177. Keene & Fujimoto, *supra* note 91, at 23.

In these states, governments were able to pass legislation quickly, some as early as March 2002, when the states realized the potential impact of the EGTRRA changes.[178]

However, some states, such as California and Florida, are unable to decouple from the federal system, mainly due to provisions in these states' constitutions or statutory language.[179] In California, for example, a state statute forbids the collection of a tax that causes the total estate tax to be more than the maximum federal tax.[180] Thus, once the federal credit is gone, any tax that California were to impose would cause the estate to pay a total tax larger than what the estate would have paid just to the federal government. California, then, cannot impose such a tax.

However, while states like California and Florida may be singing the tax blues now in terms of lost revenue, some tax analysts and estate planners are singing their praises.[181] While it may appear to California and Florida as though they are wearing handcuffs, to those living in states that have decoupled, it may appear as though these states are wearing halos, making them more attractive as states to live in because they impose no estate taxes.[182] Analysts are predicting that estate taxes could to be a deciding factor as residents contemplate where to settle.[183] They predict competition between and among the states,[184] and they think it is possible that some states may even reduce their estate taxes in order to compete with those states that do not, or cannot, impose such taxes.[185]

Moreover, states that have not decoupled are being hailed as estate friendly and favorable to residents. In one article, Florida is glorified as "allowing its death tax to die gracefully" rather than being described as having its hands tied.[186] So, even though it is possible that states like Florida wish they could reinstate an estate tax for the revenue it provides, these states may be better off in the future as things stand. If tax analysts are

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178. Maine changed its tax laws to disregard EGTRRA for estate tax purposes on March 15, 2002. *Maine: Federal Changes Addressed*, ST. TAX REV., Apr. 8, 2002, at 22. Nebraska quickly followed suit in April. *Nebraska: State Estate, GST Taxes Decoupled from Federal Credit*, ST. TAX REV., Apr. 29, 2002, at 23. Maryland was not far behind in May. *Maryland: Maryland Taxes Decoupled from Federal Tax Changes*, ST. TAX REV., May 28, 2002, at 10.

179. Twenty-five such states "will allow their estate tax to sunset with the federal credit." Megaw, *supra* note 93.

180. CAL. REV. & TAX. CODE § 13302 (Deering 2004).

181. *See generally The Death Tax Lives On*, *supra* note 171, at A6; Gulecas and Gassman, *supra* note 24; Kiplinger's Money Power, *supra* note 23, at M05.

182. *See generally* Schlachter, *supra* note 6; Megaw, *supra* note 93.

183. *See* Schlachter, *supra* note 6; *see also* Whitehouse, *supra* note 107, at D2.

184. *See, e.g.*, Rubenstein, *supra* note 99, at 9 (discussing how independent estate tax states will have to worry in the future about becoming less competitive for retaining affluent taxpayers than they were before EGTRRA).

185. Schlachter, *supra* note 6, at 800 n.109 (explaining how changing estate taxes could cause a "race to the bottom," as incentives would surface to conform or risk losing residents to states where no estate taxes are imposed).

186. *The Death Tax Lives On*, *supra* note 171, at A6. The author of the article takes the view that reinstating estate taxes is a bad move for states. *Id.* However, the author fails to address the reasons behind the reinstatement, namely the major loss of revenue. *Id.*

correct, states that impose no estate taxes may see an influx of new residents in the future as people relocate from states that impose estate taxes.

Furthermore, while some scholars talk about the states being "forced" to implement their own estate taxes to avoid the loss of revenue,[187] others talk of the opportunity for state governments to trim the fat in their budgets.[188] Though the consensus of most economists is that the states are going to need that missing revenue and will find some other way to get it,[189] there are those who argue for government and budgetary reform to cope with the inevitable loss.[190] In an era when the size of government grows yearly rather than shrinking or even remaining constant,[191] this concept seems almost foreign. However, it is a logical solution and could be an even better one in the long run for states whose hands are tied.[192]

In states where constitutional or statutory limits prevent reinstatement of an estate tax, some can overcome this limitation by passing new laws by a majority vote.[193] It is a rare state that will find the majority of its citizens waiting eagerly to reinstate a tax that so many Americans are against. This should indicate to government officials in these states that citizens will not appreciate paying these same taxes through other avenues like a sales tax or automobile tax, among other things.[194] Moreover, states that want to continue collecting estate tax revenue will find themselves requiring more staff to collect it, mainly because they will have to implement independent tax systems rather than simply using the federal system that was already in place with the federal credit.[195]

Rather than simply compensating for the loss of estate tax revenue by

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187. *See* Klooster, *supra* note 16, at 655.

188. *See, e.g.*, Chris Atkins, *States Need to Enact Real Tax and Expenditure Limits*, LIMITS, June 2002, at 1, 2 ("We must put an end to the vicious cycle and the destructive politics it engenders by enacting state constitutional limits on taxing and spending.").

189. Megaw, *supra* note 93. Megaw predicts that some states will raise their cigarette and alcohol taxes, sales taxes, or even income taxes. *Id.*

190. *See* Atkins, *supra* note 188, at 2; Weston, *supra* note 115.

191. According to Chris Atkins, "Growth in excess of 3% is an indication that government is expanding." Atkins, *supra* note 188, at 1. The last decade saw 46 states increase spending, some "by 100% or more." *Id.*

192. Because a reinstatement of estate tax or redistribution to other taxes could cause a backlash of public outrage, causing some to flee, a state may find that some cuts actually cost less than the loss of residents. *See* Keene & Fujimoto, *supra* note 91, at 23.

193. States such as Florida and California can pass new tax legislation only by popular vote, "a virtual impossibility to secure." Rubenstein, *supra* note 99, at 9.

194. *See* Atkins, *supra* note 188, at 1 ("If the people are serious about disciplining the states when it comes to spending, they need to limit what the politicians can do with their money.").

195. *See* Virginia A. McArthur, *The Nightmare of Death Tax: EGTRRA Has Created an Egregious Mess For States and Citizens Alike*, LEGAL TIMES, Apr. 28, 2003, at 35 (claiming that maintaining the level of revenue that a state saw before the repeal "may well cost more").

collecting it from other sources, namely the general population,[196] the states could take this opportunity to review their budgets and government structures, cutting out unnecessary programs and superfluous spending.[197] Though this solution obviously implicates other problems, such as reduction of government programs and resources, it may be less of a burden on the average taxpayer overall than a hike in sales tax or other taxes.

As one possible source of relief, many states expend a significant amount of state funds on illegal aliens.[198] In states like California and Florida, where large numbers of illegal aliens reside,[199] a great source of controversy in this election year is also one possible solution to cut spending. As the National Research Council has pointed out, "[T]he net fiscal cost of immigration ranges from $11 billion to $22 billion per year, with most government expenditures on immigrants coming from state and local coffers, while most taxes paid by immigrants go to the federal treasury."[200]

In many states, programs are in place to provide services such as allowing illegal aliens to attend community college for free or to receive free health care.[201] The Urban Institute estimated in 1994 that the "States with the largest populations of illegal aliens—California, Florida, Texas, New York, Illinois, Arizona, and New Jersey—spent the following amounts in fiscal year 1993 in providing three types of services to illegal aliens within their borders: $3.1 billion for public education; $471 million for incarceration; and $445 million for emergency medical care under Medicaid."[202]

Though these numbers are staggering in a time when many Americans lack adequate healthcare and jobs, "[c]onstitutional and statutory provisions at the Federal level have not foreclosed all State authority to deny illegal

196. This seems to be the general consensus of tax planners, that states will either decouple or recover losses through tax increases in other areas. *See generally* Weston, *supra* note 115; McArthur, *supra* note 195, at 35; Rubenstein, *supra* note 99, at 9.

197. One solution proposed by Chris Atkins is passing tax and expenditure limitations (TELs) to limit how state governments can spend the taxpayers' money. *See* Atkins, *supra* note 188, at 1.

198. *See generally* CENTER FOR IMMIGRATION STUDIES, *Illegal Immigration, at* http://www.cis.org/topics/illegalimmigration.html.

199. The Immigration and Naturalization Service (INS) estimates that in early 2000 there were seven million illegal aliens living in America, a number that is growing by as much as half a million people per year. *Id.* Because of its location on the Mexican border, California has a far larger percentage of population due to illegal aliens than a state like New York—4.6 percent compared to 2.4 percent. *Id.*

200. CENTER FOR IMMIGRATION STUDIES, *Costs, at* http://www.cis.org/topics/costs.html. This deficit is caused by lower tax payments by immigrants, "because they are disproportionately low-skilled and thus earn low wages," and they consume services at a higher rate, "both because of their relative poverty and their higher fertility." *Id.*

201. *See generally id.* California alone has estimated that "the net cost to the state of providing government services to illegal immigrants approached $3 billion during a single fiscal year." *Id.* That is more than three times the amount of state estate taxes collected in 2002 from California estates. *See* Appendix IV: State Revenue from Federal Credit.

202. Statistics available at http://www.welfareacademy.org/research/greenboo/appendix/j/jill.htm.

aliens State funded assistance."[203] Many believe that we should first take care of our own citizens who are either uneducated or in poor health before we worry so much about those who are here illegally.[204] However, efforts to curb spending for programs that benefit illegal aliens has engendered constitutional challenges, and states may be hesitant to attempt new measures to cut such spending.[205]

An alternate source of revenue that could also be considered in order to compensate for the loss of estate tax revenue is taxes from Native American casinos. Native American casinos bring in substantial revenue each year that remains untaxed.[206] The tribes who run the casinos may find competition in the future,[207] which may indicate a renegotiation of the "terms of the gambling compact, which is a treaty of sorts."[208] Additionally, Mark Macarro, Chairman of the Penchanga band of Luiseno Indians said that "[i]n a time of budget crisis, tribes do want to be helpful."[209] If state governors can negotiate with Indian tribes, as Governor Schwarzenegger has in California,[210] it is possible that tribes would be receptive to compromise. If this is possible, strides could be made toward keeping other tax increases to a minimum after the disappearance of the estate tax.[211]

While these two sources of replacement revenue are sure to be controversial, the fact remains that many Americans think estate taxes are immoral and want states to respond to this belief by following the federal government's lead and allowing a repeal of estate taxes.[212]

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203. In fact, laws in many states, including Arizona and New York, deny benefits to illegal aliens. *Id.*

204. California introduced Proposition 187 in November of 1994 to reduce or cut services to illegal aliens, in what one critic called "a dramatic effort to drive out undocumented aliens and to deter their entry by cutting them off from medical and other public services and depriving their children of an education." Stanley Mailman, *California's Proposition 187 and Its Lessons*, N.Y. L.J., Jan. 3, 1995, at 3.

205. The case of *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995), temporarily enjoined most of the provisions of California's Proposition 187. *See id.*

206. In California, fifty-four casinos are estimated to bring in anywhere from three and one half to six billion annually, and they "cannot be forced to pay state taxes." Peter Henderson, *Some California Tribes Mull Casino Payments to State*, REUTERS NEWS SERVICE (Jan. 14, 2004), *available at* http://www.forbes.com/markets/newswire/2004/01/14/rtr1211739.html.

207. According to Peter Henderson, "rival gambling operators [are] promot[ing] an initiative . . . that would strip the slot machine monopoly from tribes, filling urban horse tracks and card clubs with one-armed bandits." *Id.*

208. *Id.*

209. *Id.*

210. The California governor is reportedly "targeting a $500 million contribution in his 2004-2005 budget." *Id.*

211. A contribution of $500 million would nearly offset the entire loss of estate tax revenue for a single year. *See* Appendix IV: State Revenue from Federal Credit.

212. *See generally* Gale & Slemrod, *supra* note 1.

2. States Imposing Separate Estate Taxes

It would seem that states that already imposed separate estate taxes had little to worry about after implementation of EGTRRA.[213] They may have even heaved a sigh of relief that they never joined the majority of states utilizing only pick-up taxes.[214] But there are likely to be other implications beyond simply the collection of revenue from these states. Some tax analysts and scholars speculate that the uneven distribution of estate taxes among the states is likely to cause competition for residents, especially wealthy or aging ones.[215]

However, these states likely will not have to raise sales taxes or other forms of revenue to counteract the loss of estate taxes, which is a real possibility for the states that impose only a pick-up tax.[216] For states that imposed a separate estate tax before EGTRRA, little change should be required for their state statutes.[217] Most should be able to retain current language without fundamentally altering the way the estate tax is calculated and collected, unless the wording of their statutes incorporates former federal language that is obsolete. In that case, states will have to change statutory language to reflect their current estate tax objectives rather than relying on their old statutes.[218]

Even though this may be tedious and a bit overwhelming, decoupled states will likely find the necessary alternations less challenging to address than those states that have to draft completely new legislation to deal with

213. In one article, California residents are advised that the reduction (and eventual elimination) of the federal credit is "not a significant issue . . . since California's death tax is a pick-up tax, not an add-on tax. So the overall total tax paid by California residents is not affected by this particular change." Sabby Jonathan, *Tax Act Holds Additional Changes for Taxpayers*, DESERT SUN, Jan. 24, 2002, at E3. However, Jonathan fails to examine the effect on the state and, consequently, on the state's citizens. *Id.*

214. MCNICHOL ET AL., *supra* note 2, at 1. Two states, Connecticut and Louisiana, currently have plans in place to phase out their estate taxes. *Id.* at 4. It will be interesting to see whether the states allow or cancel the phase out.

215. In states like California and Florida which already have large populations of wealthy and/or aging residents, their lack of estate tax may help them lure new residents from surrounding states which continue to impose estate taxes after the credit disappears. Rubenstein, *supra* note 99, at 9.

216. Scholars and tax analysts on one side of the issue predict that many of these states will increase taxes to compensate for the lack of estate tax revenue. *See* Kinney, *supra* note 115. Though others believe that this decrease in revenue could be a catalyst for change and a reduction in the size of state governments, many speculate that states will be unwilling to part with the additional funds and will alter current programs in order to make up the difference. *See* Tergesen, *supra* note 26.

217. States that did not reflect the federal credit within their statutes should be able to retain most of the wording without altering the amount of taxes collected. *See* MCNICHOL ET AL., *supra* note 2, at 11. However, they may have to revise some statutory language if the wording incorporates the federal credit, though not if it simply acts as an additional source of revenue. In Virginia, for example, the date of January 1, 1978 is set as a sort of default by which to measure the federal credit, assuring revenue even after the phase out is completed. *Id.* North Carolina's estate tax statute simply adds "without regard to the phase-out of that credit [the federal credit] under subdivision (b)(2) of that section" to indicate that the estate tax should remain in place. CENTER FOR POLICY ALTERNATIVES, ESTATE TAX DECOUPLING 129 (2004).

218. *See generally* MCNICHOL ET AL., *supra* note 2, at 9-16.

the problem.[219] States that have not decoupled have had to create entirely new infrastructures and implement new collection methods in order to continue to collect an estate tax, which is likely to be time consuming and costly.[220] As one lawyer quipped, "states have had to dust off vocabulary and concepts that had been shelved for decades in which they collected state estate tax based on the federal model."[221] In addition, "[b]ecause it would require new legislation in states that do not already have a separate tax, [reinstatement of an estate tax] might be more likely to be regarded as a state tax increase than simple decoupling," which might be less politically popular and harder to enact.[222] However, even with stable structures in place, these states may face a slew of possible complications.[223]

B. The American Taxpayer

This change in the estate tax laws slid quietly under most of America's radar. In one article, the change was described as being implemented "with the subtlety of a fine Napa Valley Cabernet."[224] It is not surprising that many missed the shift in the federal estate tax system, since most Americans do not owe estate taxes after they die, and even those who do rarely want to address the reality of estate and its consequences.[225] However, once states have lost the revenue from collection of estate taxes, there will be consequences from that loss.

The Federal Tax Coordinator notes that "if the state's death tax isn't pegged to the credit, then part of the benefit of lower federal estate taxes will be lost if the state retains its current rates and no state death tax credit is available."[226] This will in fact be the case for several states, those that have decoupled from the federal system.[227] Individual estates may have to pay a

219. For states implementing entirely new statutory language, passing new legislation may be slow, requiring committees and legislative agreement. In the meantime, states will likely be losing revenue, so they will likely be anxious to pass legislation quickly and efficiently. *See id.*

220. *See* Keene & Fujimoto, *supra* note 91, at 23.

221. McArthur, *supra* note 195, at 35. Though many states that have been utilizing only a pick-up tax originally had their own estate tax systems, those systems may be outdated or obsolete, thus creating a need for entirely new systems or, at a minimum, revision of the old models. *Id.* As pointed out by McArthur, these changes may take some trial and error; a newly drafted form in the District of Columbia "called for a tax of $18,000 on the first dollar over the filing floor." *Id.*

222. *See* MCNICHOL ET AL., *supra* note 2, at 18.

223. *The Death Tax Lives On*, *supra* note 171, at A6. This reporter concluded that the costs of implementing this tax could ultimately cost "some states more than they are able to collect." *Id.*

224. *Why the Estate Tax Might Never Die*, 11-6 TURNING POINT (2003), *available at* http://www.turningpointmagazine.com/news/novdec03/moneysmart.html.

225. *See id.*

226. R-6900 FEDERAL DEATH TAX COORDINATOR 2D, 2002. The idea of a state's tax being pegged to the federal tax is the same concept as the pick-up tax—meaning that the state system follows the federal system.

227. This is true because these states will collect separate taxes from citizens, although a deduction will be allowed. *See* I.R.C. § 2058 (2004).

tax that is somewhat greater than they would have, taking into consideration the difference between the federal credit and the deduction, but the difference should not be extreme for most estates.[228] Additionally, those with very large estates may actually benefit because they will be able to deduct the entire amount of taxes paid whereas the federal credit was limited.[229]

Some who are opposed to the repeal argue that the repeal of estate taxes "would plump up the coffers of the wealthiest Americans, such as, say, Hollywood celebrities, while reducing the state revenues available to provide benefits and services for all state citizens."[230] Many economists believe that states that are unable to decouple or have decided not to will attempt to recover the revenue lost from estate taxes through other methods.[231] The most likely place from which to recover this missing revenue is in the pockets of other citizens, those who are still alive.[232] Because states may begin to raise other taxes, Americans who would have paid very little or no estate taxes may be shouldering the burden that the wealthy usually carried. They will be paying more for things while they are alive, and the wealthy may get to pay less after they die, which does not seem to balance, especially in light of one of the original purposes behind estate taxes.[233] If we want to redistribute wealth, the most effective manner is likely not to take wealth from the middle class and allow the wealthy to keep more in their estates after death.[234]

C. The Federal Government

In the aftermath of the federal credit repeal, the federal government appears to be taking some of the blame off of those states that are reinstating estate taxes. The federal government has been described as "dipp[ing] into the pockets of the states,"[235] and EGTRRA has been called "the most deceptive tax legislation that has ever been enacted."[236] One may wonder why the government, and specifically Congress, would change the federal credit to a deduction when the allowance for state taxes paid remains intact.[237] However, many states are going to lose the ability to collect estate

228. *See id.*; *see also* Keene & Fujimoto, *supra* note 91.

229. *Id.*

230. *Why the Estate Tax Might Never Die*, *supra* note 224.

231. *See supra* notes 174-75 and 184-85 and accompanying text.

232. *See* Gulecas & Gassman, *supra* note 24, at 3.

233. *See supra* notes 51-59 and accompanying text. Since one of the reasons behind the estate tax was to break up concentrations of wealth, it is not logical to remove the tax burden from the wealthy only to redistribute it, albeit in smaller portions, among the rest of society. *See id.*

234. *See* Gale & Slemrod, *supra* note 1, at 930-32 ("The real question is whether the concentration of wealth is less than it would be in the absence of the tax.").

235. Melia, *supra* note 12, at 2.

236. Gulecas & Gassman, *supra* note 24, at 36.

237. Technically, the individual estate is getting a bigger tax cut because it can now deduct the entire amount paid to the state for estate taxes rather than being limited to a maximum amount as under the credit. *See* I.R.C. §§ 2011, 2058 (2004).

taxes, but the money is not really lost. The money is really just redirected—the federal government can step in and collect those lost amounts.[238] Keep in mind, the federal burden on the estate is not growing; the estate tax will just fail to be split between a state and the federal government.[239]

The main reason for this change is to offset the reduction of overall estate taxes.[240] The federal government will increase its revenue by switching from a credit to a deduction because many states will be unable to collect estate taxes after the federal credit is gone.[241] Thus, all the revenue that the states are unable to collect will be going directly to the federal government, offsetting its loss from an increase in the exemption amount and a decrease in the tax percentage.[242] This change likely results from the fact that the government cannot really afford to eliminate estate taxes, which is why they are likely to be frozen.[243]

Because many people were unaware of the federal credit and how it worked, the federal government has been able to inadvertently divert most of the attention, and blame, away from itself. However, one could argue that the federal government knew what it was doing by replacing the federal credit with a deduction, especially if it knew that most states utilized only a pick-up tax. What is unclear is whether Congress knew that it was diverting so much revenue away from the states.[244] One would think that Senators and Representatives would not want to divert funds away from their own constituencies.[245] However, because in many cases the state ends up looking like the villain, not Congress, this may have been a shrewd move indeed.[246]

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238. Since states that utilize only the pick-up tax will be unable to collect estate taxes, the federal government will not lose any amount to the states, as it would have when the federal credit was in place. *See* MCNICHOL ET AL., *supra* note 2, at 8. Thus, federal revenue from estate tax will increase as state revenue decreases in states that are not decoupled.

239. *See* Keene & Fujimoto, *supra* note 91, at 25 (explaining that the "total tax burden on the estate will not increase or decrease" from this change in tax law).

240. Because the federal government will lose revenue over the course of the estate tax repeal, this change will allow some revenue to be diverted from states back into the federal government's funds. *See generally* MCNICHOL ET AL., *supra* note 2, at 3 tbl. 1. Over the course of four years, 2003-2007, the federal government will gain over five billion dollars from California alone. *Id.* The money is the revenue that would have gone to California under the federal credit, but is now being redirected to the federal government since California has not decoupled and so cannot collect the tax. *See id.* at 7-8.

241. If the state cannot collect estate taxes, then the existence of a deduction is irrelevant, because there will be nothing to deduct. Therefore, more money is going to the federal government.

242. I.R.C. §§ 2001, 2011, 2058 (2004).

243. *See supra* notes 130-136 and accompanying text.

244. Joshua Rubenstein thinks it surprising "how few members of Congress seem to understand what Congress has done" regarding the federal estate tax repeal. Rubenstein, *supra* note 99, at 9.

245. William Beach calls Congress' move "peculiar" and the repeal of the estate tax with a sunset clause a "bizarre fiscal hiatus." Beach, *supra* note 53. Furthermore, whereas the House of Representatives has already passed H.R. 8 in an attempt to repeal the estate tax permanently, the bill is finding opposition in the Senate. *See* Weston, *supra* note 115.

246. Chris Atkins opines, "There seem to be very few state lawmakers willing to take a stand against the expansion of state government." Atkins, *supra* note 188, at 1.

V. CONCLUSION

Is there a solution for the myriad of problems the estate tax engenders? At first glance, total and permanent repeal seems like a viable solution, yet even then there will be consequences.[247] And because the federal government finds the revenue useful, maybe even necessary, to fund its programs, total repeal may not be a realistic solution.[248]

However, the politics behind the estate tax are neither simple nor easily recognized, and we may be faced with estate tax changes that no one could foresee. The changes we have already seen may have political consequences beyond just federal and state revenue.[249] Since state representatives made the decision to repeal the federal credit that put such a burden on the states, the state citizens may retaliate by failing to reelect current Senators and Representatives. Replacing them may send a message to a future Congress as they decide such legislation.

Regardless of what the federal government does, it seems that states are not willing to sit around and wait until 2011 for their revenue to dry up, when the sunset clause is scheduled to go into effect.[250] The last two years have already seen numerous states changing their statutes to replenish funds that were diminished by the repeal.[251] However, it is doubtful that the citizens in states where estate taxes are still in effect will sit idly by and allow their estates to be taxed when they are not paying a federal estate tax, assuming the estate tax is permanently repealed.[252] And even if the federal tax is frozen before 2010, the moral argument is still strong with Americans, and they will likely revolt if their tax burden is increased by the states imposing separate estate taxes.[253]

While there is clearly no easy solution, no win-win situation, something does need to be done about estate taxes. As the future draws closer and the sunset clause becomes ever more likely to set, these problems and possible solutions need to be addressed quickly and permanently. Without permanent solutions, the monster that is estate taxes will just continue to rear its ugly

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247. Possible consequences extend beyond simply loss of revenue. If the estate tax is permanently repealed, the reasons it was implemented in the first place will be rendered moot.

248. *See* MCNICHOL ET AL., *supra* note 2, at 1 (explaining that "the potential revenue loss to states is substantial" and "the repeal of the estate tax is projected to cost the federal government about $50 billion per year").

249. As discussed earlier, competition between states and a "race to the bottom" may result as a consequence of the EGTRRA. *See supra* notes 179-185 and accompanying text.

250. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38, 150.

251. *See generally* MCNICHOL ET AL., *supra* note 2.

252. *Id.*

253. The prevalence of the issue of relocation of citizens to states with no estate tax in the coverage of this topic indicates that the threat is very real. If scholars are right, American citizens will strongly disagree with reimplementation of estate taxes in many states. *See supra* notes 179-185 and 212 and accompanying text.

head for generations. Unless we want to pass this problem off to our children and our children's children, the time to act is now.

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254. J.D. Candidate, Pepperdine University School of Law, 2005. I would like to thank two people without whom this article would never have been written: Professor Robert Popovich, who opened my eyes to the exciting world inside the tax code, and who led me down the path to an amazing topic; and my husband Kevin, whose patience and encouragement gave me the strength and confidence to make this endeavor possible.

VII. APPENDIX I: FEDERAL CREDIT FOR STATE TAXES PAID

If the adjusted taxable estate is:	The maximum tax credit shall be:
Not over $90,000	8/10 of 1% of the amount by which the adjustedtaxable estate exceeds $40,000
Over $90,000 but not over $140,000	$400 plus 1.6% of the excess over $90,000
Over $140,000 but not over $240,000	$1,200 plus 2.4% of the excess over $140,000
Over $240,000 but not over $440,000	$3,600 plus 3.2% of the excess over $240,000
Over $440,000 but not over $640,000	$10,000 plus 4% of the excess over $440,000
Over $640,000 but not over $840,000	$18,000 plus 4.8% of the excess over $640,000
Over $840,000 but not over $1,040,000	$27,600 plus 5.6% of the excess over $840,000
Over $1,040,000 but not over $1,540,000	$38,800 plus 6.4% of the excess over $1,040,000
Over $1,540,000 but not over $2,040,000	$70,800 plus 7.2% of the excess over $1,540,000
Over $2,040,000 but not over $2,540,000	$106,800 plus 8% of the excess over $2,040,000
Over $2,540,000 but not over $3,040,000	$146,800 plus 8.8% of the excess over $2,540,000
Over $3,040,000 but not over $3,540,000	$190,800 plus 9.6% of the excess over $3,040.000
Over $3,540,000 but not over $4,040,000	$238,800 plus 10.4% of the excess over $3,540,000
Over $4,040,000 but not over $5,040,000	$290,800 plus 11.2% of the excess over $4,040,000
Over $5,040,000 but not over $6,040,000	$402,800 plus 12% of the excess over $5,040,000
Over $6,404,000 but not over $7,040,000	$522,800 plus 12.8% of the excess over $6,040,000
Over $7,040,000 but not over $8,040,000	$650,800 plus 13.6% of the excess over $7,040,000
Over $8,040,000 but not over $9,040,000	$786,800 plus 14.4% of the excess over $8,040,000
Over $9,040,000 but not over $10,040,000	$930,800 plus 15.2% of the excess over $9,040,000
Over $10,040,000	$1,082,800 plus 16% of excess over $10,040,000

I.R.C. § 2011 (2004).

VIII. APPENDIX II: ESTATE TAX PHASE OUT

The following table represents the exemption amount and top marginal tax rates in effect throughout the phase out.

Year	**Applicable Exclusion Amount**	**Top Marginal Rate***
2002	$1,000,000	50%
2003	$1,000,000	49%
2004	$1,500,000	48%
2005	$1,500,000	47%
2006	$2,000,000	46%
2007	$2,000,000	45%
2008	$2,000,000	45%
2009	$3,500,000	45%

* Applicable to taxable estates in excess of $2,500,000
Table information provided by Tye Klooster, *Repeal of the Death Tax? Shoving Aside the Rhetoric to Determine the Consequences of the Economic Growth and Tax Reconciliation Act of 2001*, 51 DRAKE L. REV. 699, 647 n.139 (2003); I.R.C. § 2001 (2004).

IX. APPENDIX III: FEDERAL ESTATE TAX REVENUE IN RECENT YEARS

Part I:

The following list illustrates the total federal revenue collected from estate taxes between 1990 and 1998 and the percentage of total federal revenue that estate taxes represented for those years.

Year	**Revenue**	**Percentage of Total Receipts**
1990	$11,500,000	1.12%
1991	$11,138,000	1.06%
1992	$11,143,000	1.02%
1993	$12,577,000	1.09%
1994	$15,255,000	1.21%
1995	$15,087,000	1.12%
1996	$17,189,000	1.18%
1997	$19,845,000	1.26%
1998	$24,076,000	1.40%
Average	**$15,300,000**	**1.16%**

Part II:

The following list illustrates the total revenue that will be retained by the states between 2003 and 2007 if they are fully decoupled from the federal estate tax credit.

Cumulative Total for 2003-2007 (in millions)

Alabama	$213.3	Missouri	565.6
Alaska	10.1	Montana	21.8
Arizona	282.7	*Nebraska*	59.0
Arkansas	85.3	Nevada	144.5
California	5,229.3	New Hampshire	102.4
Colorado	216.8	*New Jersey*	729.7
Connecticut	463.0	New Mexico	85.8
Delaware	122.3	*New York*	2,530.0
District of Columbia	240.2	*North Carolina*	430.7
Florida	2,599.8	North Dakota	19.3
Georgia	422.0	*Ohio*	125.2
Hawaii	110.7	Oklahoma	48.2
Idaho	38.9	*Oregon*	189.6
Illinois	1,488.0	*Pennsylvania*	278.3
Indiana	64.3	Rhode Island	67.4
Iowa	119.8	South Carolina	190.5
Kansas	197.6	South Dakota	18.7
Kentucky	181.9	Tennessee	70.9
Louisiana	81.0	Texas	1,112.0
Maine	106.2	Utah	56.6
Maryland	596.8	*Vermont*	49.7
Massachusetts	608.1	*Virginia*	487.7
Michigan	565.0	*Washington*	365.9
Minnesota	230.3	West Virginia	65.9
Mississippi	107.9	*Wisconsin*	462.6
		Wyoming	34.6

Total: $22,764.00

States in italics have already decoupled from the federal laws.
If states even continued to collect estate taxes but exempted any estate that was not required to pay federal estate tax, the states would retain a cumulative total of $18,971.00.

Source: ELIZABETH C. MCNICHOL ET AL., CENTER ON BUDGET AND POLICY PRIORITIES, *States Can Retain Their Estate Taxes Even As The Federal Estate Tax Is Phased Out*, at 4 n.1 (2003) *available at* www.cbpp.org/1-31-02sfp.htm.

2002 Estate Tax Revenue (federal credit at 75% of maximum)	In Millions	As percentage of General Fund Revenue
Alabama	$ 83.0	1.6%
Alaska	3.1	0.2
Arizona	80.6	1.4
Arkansas	40.0	1.3
California	890.6	1.2
Colorado	77.1	1.3
Connecticut	78.6	0.7
Delaware	41.6	1.7
District of Columbia	124.5	3.6
Florida	751.6	3.8
Georgia	127.9	0.9
Hawaii	16.6	0.5
Idaho	9.1	0.5
Illinois	329.0	1.4
Indiana	18.0	0.2
Iowa[1]	33.5	0.8
Kansas	46.6	1.1
Kentucky	45.0	0.7
Louisiana	19.1	0.3
Maine	23.4	1.0
Maryland	134.1	1.4
Massachusetts	170.0	0.8
Michigan	127.0	1.5
Minnesota	68.0	0.6
Mississippi	30.2	0.9
Missouri	137.0	1.8
Montana	7.5	0.6
Nebraska	16.5	0.7
Nevada	29.2	1.7
New Hampshire	28.6	2.5
New Jersey	204.0	1.0
New Mexico	20.9	0.5
New York	767.0	1.9
North Carolina	104.8	0.8

North Dakota	5.4	0.7
Ohio	77.2	0.4
Oklahoma[2]	0.0	0.0
Oregon	65.2	1.5
Pennsylvania	60.0	0.3
Rhode Island	18.8	0.8
South Carolina	63.6	1.3
South Dakota	5.2	0.6
Tennessee	16.6	0.2
Texas	334.2	1.2
Utah	11.5	0.3
Vermont	13.9	1.7
Virginia	133.7	1.1
Washington	117.1	1.1
West Virginia	13.3	0.5
Wisconsin	82.6	0.8
Wyoming	9.9	1.6
Total $ 5,711.9 (millions) 1.2		
[1] Iowa's number is an estimate based on its total estate and inheritance tax because Iowa does not collect separate numbers for the pick-up tax. [2] the structure of Oklahoma's separate estate tax causes it to be higher than the federal credit, so the state has no revenue from the pick-up tax.		

Source: ELIZABETH C. MCNICHOL ET AL., CENTER ON BUDGET AND POLICY PRIORITIES, *States Can Retain Their Estate Taxes Even As The Federal Estate Tax Is Phased Out*, at 4 n.1 (2003) *available at* http://www.cbpp.org/1-31-02sfp.htm.