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Reimagining the Estate Tax in the Automation Era

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In a technological age, labor no longer plays the central role it once did in the nation's economy. Instead, automation has become more ubiquitous. This economic transformation has important and far-reaching consequences for the nation's tax system and, in particular, the means by which to fund public expenditures.

Under current law, the central underpinning to automation—namely, capital—yields income that is either lightly taxed or, in some instances, escapes taxation altogether. This puts tremendous stress on the nation's coffers and further perpetuates wealth disparities. Yet, levying a heavier capital gains tax burden might (i) dissuade taxpayers from realizing their gains and (ii) in a global arena, result in capital flight to lower tax jurisdictions.

Another possibility exists. Congress should impose a meaningful estate tax. Such a tax is essentially the equivalent of a deferred tax on capital income. A reimagined estate tax can help restore fiscal solvency, promote greater wealth equity, foster capital gains recognition, and minimize capital flight risk.

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INTRODUCTION

Over the course of the past century, the justifications for instituting and retaining the estate tax have essentially been twofold in nature. The estate tax is necessary, first, to augment revenues to meet public expenditures, and, second, to prevent dynastic wealth and the concentration of power within family units.[1] And, at least to a limited extent, the estate tax has admirably helped fulfill both of these objectives.[2]

In formulating these public policy objectives, context is important. Bear in mind that Congress enacted the estate tax in 1916 when World War I was raging and the robber baron era was plateauing.[3] Put differently, this was a time period during which severe military demands were being placed on the nation's budget,[4] and there was tangible concern that wealth centralization was infecting the political

1. *See infra* Section II.A.

2. *See, e.g.*, Paul L. Caron, *The One-Hundredth Anniversary of the Federal Estate Tax: It's Time to Renew Our Vows*, 57 B.C. L. REV. 823 (2016) (pointing out the achievements of the estate tax); Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259 (1983) (same); James R. Repetti, *The Case for the Estate and Gift Tax*, 86 TAX NOTES 1493 (2000) (same).

3. Revenue Act of 1916, Pub. L. No. 64-271, 39 Stat. 756 (1916).

4. *See, e.g.*, DAVID M. KENNEDY, OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY 13 (2004) ("Belligerency would require, [President Wilson] warned, 'the organization and mobilization of all the material resources of the country.' The Treasury would have to grant massive credits to the other governments at war with Germany, and Wilson at once announced his intention to raise those credits . . . ."); Anne L. Alstott & Ben Novick, *War, Taxes, and Income Redistribution in the Twenties: The 1924 Veterans' Bonus and the Defeat of the Mellon Plan*, 59 TAX L. REV. 373 (2006) (explaining how World War I played a fundamental role in shaping the nation's tax system).

system in ways that were corrosive.[5] While the estate tax was no panacea, its institution was a practical response to both of these concerns.

Fast-forward to a century later. Automation in the forms of plant, machinery, and robotics is rapidly transforming the workplace. Consider the fact that when Congress first instituted the estate tax, labor in the form of farm workers and blue-collar assembly-line workers was the dominant economic force.[6] This is no longer the case. Automation is eradicating millions of jobs and whole industries.[7] And this transformation process has important implications for the nation's tax system, a system that has been historically heavily reliant on tax revenue derived from labor

5. *See, e.g.*, Paul L. Caron & James R. Repetti, *Occupy the Tax Code: Using the Estate Tax to Reduce Inequality and Spur Economic Growth*, 40 PEPP. L. REV. 1255 (2013) (explaining how Congress has used and can continue to use the estate tax as a means to mitigate wealth disparities).

6. *See* Peter F. Drucker, *The Age of Social Transformation*, ATLANTIC MONTHLY, Nov. 1994, at 53 (tracing the history of labor during the twentieth century).

7. *See, e.g.*, MARTIN FORD, RISE OF THE ROBOTS: TECHNOLOGY AND THE THREAT OF A JOBLESS FUTURE (2015) (presenting a compelling and comprehensive case that technology is eradicating many jobs and, in some cases, has caused whole industries to vanish); *see also* Carl Benedikt Frey & Michael A. Osborne, *The Future of Employment: How Susceptible Are Jobs to Computerisation?*, TECHNOLOGICAL FORECASTING AND SOC. CHANGE, Jan. 2017, at 254, 265 ("According to our estimate, 47% of total US employment is in the high risk [of being lost] category . . . ."); Stephanie Clifford, *U.S. Textile Plants Return, with Floors Largely Empty of People*, N.Y. TIMES (Sept. 12, 2013), https://www.nytimes.com/2013/09/20/business/us-textile-factories-return.html [https://perma.cc/9AZQ-K6ZP] ("And politicians' promises that American manufacturing means an abundance of new jobs is complicated—yes, it means jobs, but on nowhere near the scale there was before, because machines have replaced humans at almost every point in the production process."); James Manyika, Michael Chui, Jacques Bughin, Richard Dobbs, Peter Bisson & Alex Marrs, *Disruptive Technologies: Advances That Will Transform Life, Business, and the Global Economy*, MCKINSEY GLOBAL INST. (May 2013), http://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/disruptive-technologies [https://perma.cc/9GFM-E8RK] ("Twelve emerging technologies—including the mobile Internet, autonomous vehicles, and advanced genomics—have the potential to truly reshape the world in which we live and work. Leaders in both government and business must not only know what's on the horizon but also start preparing for its impact."); John Markoff, *Skilled Work, Without the Worker*, N.Y. TIMES (Aug. 18, 2012), https://www.nytimes.com/2012/08/19/business/new-wave-of-adept-robots-is-changing-global-industry.html [https://perma.cc/G5CK-QT4L] ("A new wave of robots, far more adept than those now commonly used by automakers and other heavy manufacturers, are replacing workers around the world in both manufacturing and distribution."); Samantha Masunaga, *Robots Could Take Over 38% of U.S. Jobs Within About 15 Years, Report Says*, L.A. TIMES (Mar. 24, 2017, 11:20 AM), https://www.latimes.com/business/la-fi-pwc-robotics-jobs-20170324-story.html [https://perma.cc/5TER-XS7K] ("More than a third of U.S. jobs could be at 'high risk' of automation by the early 2030s . . . ."). Bear in mind that over half a century ago, technology was, even then, a perceived threat to the job market. *See The Automation Jobless: Not Fired, Just Not Hired*, TIME (Feb. 24, 1961), https://content.time.com/time/magazine/article/0,9171,828815,00.html [https://perma.cc/2UER-GCEH].

rather than from capital.[8] If the current technological trend continues (and it shows no signs of abating), tax revenues will necessarily diminish.[9]

To reverse this revenue trend, Congress should consider taxing capital more heavily. But capital is often mobile (i.e., plant and machinery and, in particular, intellectual property can readily be transported);[10] that being the case, in a global environment, if one country taxes capital too heavily, there is a tangible risk of capital flight.[11] In lieu of directly taxing the income that capital generates in the form of higher capital gains tax rates, Congress should instead impose a more robust estate tax. This makes sense for two reasons. First, unlike capital, for a whole host of reasons (e.g., immigration issues, family connections, and work responsibilities), taxpayers themselves cannot easily migrate and extricate themselves from high-tax jurisdictions.[12] Second, there is a moral fairness perspective; more specifically, owners and sellers of capital who were able to capitalize upon preferential tax rates on their gains during their lifetimes (in many cases bearing little or no tax) should, at least at death, shoulder their equitable share of the nation's tax burden.

A twenty-first-century estate tax targeted at capital should be broad-based and its enforcement vigorous. Part II provides historical background of the estate tax and the evolving dynamic between labor and capital in which the latter is eclipsing the former in terms of workplace trends. Part III then details how Congress currently taxes the income derived from labor and capital and why the status quo is unsustainable. Next, Part IV explains how the estate tax can fulfill a new role, namely, as a surrogate tax on capital income. Finally, Part V concludes.

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8. Consider two facts: The first is that, over the last decade, the nation's payroll taxes generate nearly the same amount of revenue as the nation's income tax. *See, e.g.*, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, HISTORICAL TABLES, at tbl.2.1 (2018), https://www.whitehouse.gov/omb/historical-tables/ [https://perma.cc/8P7Q-PTRR]. The second is that the amount of revenue collected on capital gains receipts constitute only a small component of the income tax revenue collected. DEP'T OF THE TREASURY, TAXES PAID ON LONG-TERM CAPITAL GAINS, 1977–2014 (2016), https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/Taxes-Paid-on-Long-Term-Capital-Gains.pdf [https://perma.cc/L8KF-XZTR].

9. *See* Jay A. Soled & Kathleen DeLaney Thomas, *Automation and the Income Tax*, 10 COLUM. J. TAX L. 1 (2019) (noting that if certain variables (e.g., economic growth and tax rates) are kept constant, as labor's role in the economy declines and that of capital increases, tax revenues will necessarily decrease).

10. *See, e.g.*, George R. Zodrow, *Capital Mobility and Capital Tax Competition*, 63 NAT'L. TAX J. 865, 890 (2010) ("There is general agreement that capital is mobile and has become increasingly mobile over time . . . .").

11. *See, e.g.*, Jasmine M. Fisher, *Fairer Shores: Tax Havens, Tax Avoidance, and Corporate Social Responsibility*, 94 B.U. L. REV. 337 (2014) (explaining how capital flows (at least on paper) to tax havens); Hedda Leikvang, *Piercing the Veil of Secrecy: Securing Effective Exchange of Information to Remedy the Harmful Effects of Tax Havens*, 45 VAND. J. TRANSNAT'L L. 293 (2012) (explaining the nature of tax shelters and how they attract capital).

12. The Code provides that taxpayers who relinquish their citizenship must pay an exit tax, which, in many cases, has the potential to be quite significant. I.R.C. § 877A (West 2018).

I. BACKGROUND

When the United States instituted the Sixteenth Amendment to the Constitution authorizing the income tax and three years later when the estate tax came into being, the nation was undergoing a fundamental transformation from an agrarian-based economy to an industrial-based economy.[13] As this transformation process unfolded, it resulted in a fundamental reorientation of the nation's revenue-raising mechanisms away from tariffs toward reliance upon an income tax.[14]

But since the institution of the income tax and the estate tax, the country has experienced two significant economic transformations. First, during the course of the twentieth century, the industrial era flourished as taxpayers and plant and machinery coexisted, side-by-side, escalating productivity to new heights.[15] Second, during the twenty-first century, the technology era is flourishing, with automation often replacing taxpayers at the workplace and productivity reaching even greater heights.[16] Notwithstanding the magnitude of these economic transformations, the nation's tax system largely subscribes to the same historical tenets as it has almost since its inception in 1913, with labor income heavily taxed, trade and business income moderately taxed, and capital gains either lightly taxed or exempted from tax.[17]

In light of these significant economic transformations, Congress must consider reforming the Internal Revenue Code ("Code") and, in particular, the estate tax. Section A explores the heritage of the estate tax and where it stands today. Next, Section B scrutinizes the relationship between the income tax and the estate tax and how the Automation Era may be bringing them closer together.

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13. *See generally* PAUL K. CONKIN, A REVOLUTION DOWN ON THE FARM (2008) (describing the radical transformation of the U.S. farming system); BRUCE L. GARDNER, AMERICAN AGRICULTURE IN THE TWENTIETH CENTURY (2002) (same).

14. *See, e.g.*, Sheldon D. Pollack, *Origins of the Modern Income Tax, 1894–1913*, 66 TAX L. 295, 329 (2013) ("Within the context of the 19th century system of protective tariffs that imposed a disproportionate share of the cost of government on laborers and farmers, a vote in Congress for an income tax was invariably coupled with a vote for tariff reduction.").

15. *See generally* DANIEL T. RODGERS, THE WORK ETHIC IN INDUSTRIAL AMERICA, 1850–1920, at 27 (1978).

16. *See* Allan Collard-Wexler & Jan De Loecker, *Reallocation and Technology: Evidence from the US Steel Industry*, 105 AM. ECON. REV. 131 (2015); Claire Cain Miller, *The Long-Term Jobs Killer Is Not China. It's Automation*, N.Y. TIMES (Dec. 21, 2016), https://www.nytimes.com/2016/12/21/upshot/the-long-term-jobs-killer-is-not-china-its-automation.html [https://perma.cc/NEA7-AGEC]; Michael Chui, James Manyika & Mehdi Miremadi, *Where Machines Could Replace Humans—and Where They Can't (Yet)*, MCKINSEY QUARTERLY (2016), https://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/where-machines-could-replace-humans-and-where-they-cant-yet [https://perma.cc/YS58-KG3H]; MICHAEL J. HICKS & SRIKANT DEVARAJ, CTR. FOR BUS. & ECON. RESEARCH, BALL STATE UNIV., THE MYTH AND THE REALITY OF MANUFACTURING IN AMERICA (2015), https://projects.cberdata.org/reports/MfgReality.pdf [https://perma.cc/5EF8-L9WP].

17. Soled & Thomas, *supra* note 9.

A. Heritage of the Twentieth-Century Estate Tax

Estate taxes date back several millennia.[18] In most industrial countries, the global presence of estate taxes today is a living testament to their viability and functionality.[19]

Insofar as the United States is concerned,[20] there are several predecessors to the current estate tax regime.[21] None of these predecessor estate tax regimes, however, remained extant for long; and in 1916, Congress constructed an entirely new estate tax regime.[22] Subsection 1 below explores the current estate tax's origins and objectives, and Subsection 2 examines why the current estate tax has largely fallen out of political favor.

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18. *See* 1 RANDOLPH E. PAUL, FEDERAL ESTATE AND GIFT TAXATION 3 (1942) (noting there is evidence that ancient Egypt imposed an estate tax as early as 700 B.C.); Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223, 223 (1956) (tracing the origins of the estate tax as far back as ancient Egypt and then to its later adoption by the Greeks and Romans).

19. *See* KENNETH SCHEVE & DAVID STASAVAGE, TAXING THE RICH: A HISTORY OF FISCAL FAIRNESS IN THE UNITED STATES AND EUROPE 93 (2016) (delineating those countries that have retained their estate taxes); JOINT COMM. ON TAX'N, JCX-22-08, DESCRIPTION AND ANALYSIS OF ALTERNATIVE WEALTH TRANSFER TAX SYSTEMS 3 (2008) ("Among the thirty OECD countries, only the United States and the United Kingdom have estate and gift tax systems that tax the transferor on gratuitous transfers during life and at death. The majority of OECD countries have inheritance taxes."). Admittedly, over the course of the last two decades, several countries have repealed their estate taxes. *See* John C. Goodman, *Why Do We Have a Death Tax?*, FORBES (Apr. 27, 2015, 9:21 AM), https://www.forbes.com/sites/johngoodman/2015/04/27/why-do-we-have-a-death-tax [https://perma.cc/Q8BH-Y58E] ("[I]t was the unfairness of tax avoidance opportunities that persuaded Sweden . . . to abolish the estate tax about a decade ago. Austria, Canada, Hong Kong, India, Israel, New Zealand, Norway, Russia and Singapore are some other countries that have abolished their estate or inheritance taxes.").

20. For an excellent exposition of the historical aspects of the nation's estate tax, see Alicia Lerud, *Looking to the Past in Planning for the Future: Does the Modern Estate Tax Fit Within the Ideals of the Founding Fathers?*, 6 NEV. L.J. 516 (2005–2006).

21. In 1797, Congress passed the first estate tax in the form of a legacy tax. Act of July 6, 1797 (Stamp Act of 1797), ch. 11, 1 Stat. 527 (1797). The stated purpose of this tax was to raise revenue for the nation's navy. *See* Debra Rahmin Silberstein, *A History of the Death Tax: A Source of Revenue, or a Vehicle for Wealth Redistribution?*, 17 PROB. & PROP. 58, 59 (2003). A few years later, in 1802, Congress repealed this tax. Act of Apr. 6, 1802 (Repeal of Internal Tax Act), ch. 19, 2 Stat. 148 (1802). In 1862, when Congress needed revenue to again fund the military, this time for the Civil War, it enacted another estate tax. Act of July 1, 1862 (Revenue Act of 1862), ch. 119, 12 Stat. 432, 483 (1862). Like its predecessor, this tax did not last long and was repealed in 1870. Act of July 14, 1870 (Internal Taxes, Customs Duties Act of 1870), ch. 255, § 27, 16 Stat. 256, 269 (1870). Driven by yet another need to fund military expenditures in 1898, Congress enacted an estate tax that was short-lived until its repeal in 1902. Act of June 12, 1898 (War Revenue Act of 1898), ch. 448, 30 Stat. 448 (1898), *repealed by* Act of Apr. 12, 1902 (War Revenue Repeal Act of 1902), Pub. L. No. 57-67, ch. 500, 32 Stat. 96 (1902).

22. Act of Sept. 8, 1916 (Revenue Act of 1916), Pub. L. No. 64-271, ch. 463, §§ 200–12, 39 Stat. 756, 777–80 (1916).

1. The Origins and Objectives of the Current Estate Tax Regime

In 1907, President Theodore Roosevelt set into motion the formation of the current estate tax regime.[23] In a speech, he called upon Congress to institute an estate tax that would have the following key characteristic: "[A] progressive tax on all fortunes beyond a certain amount either given in life or devised . . . to put it out of the power of the owner of one of these enormous fortunes to hand on more than a certain amount to any one individual."[24] Notwithstanding Roosevelt's speech, estate tax institution did not gain immediate political traction. Instead, it was World War I's advent, when trade tariff receipts precipitously dropped, that forced Congress to search for alternative revenue-raising measures.[25] The estate tax offered possibilities that appeared attractive to fulfill not only needed revenue objectives but also the social objective that Roosevelt had posited a decade earlier.[26]

The estate tax regime that Congress instituted in 1916 largely resembles the estate tax regime that is still in place today. The tax base was (and still is) based on the fair market value of the property owned by the decedent at the time of death.[27] In addition, the tax base was (and still is) augmented by transfers for inadequate consideration, transfers not intended to take effect until death, and transfers in contemplation of death.[28] Finally, the base included (and still does) the full value of property owned concurrently by a decedent and another person (except to the extent that the other person can prove contribution).[29]

In the twentieth century, the estate tax was a practical tax, designed to affect social engineering while simultaneously being driven by financial necessity. In the twenty-first century, this still remains the case; but since its enactment, not everyone has shared this opinion. To the contrary, as explored in the next subsection, the estate tax has endured a turbulent political history.

2. The Current Estate Tax Regime on the Brink of Repeal

The history of the estate tax has been marked by instability. Indeed, from its initial inception to the present day, the estate tax has had little political respite. Even

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23. *See, e.g.*, Theodore Roosevelt, *Seventh Annual Message to the Senate and House of Representatives, Dec. 3, 1907*, *in* 16 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1914, at 7070, 7083 (1908) (Roosevelt posited that a "graduated income tax of the proper type would be a desirable feature of Federal taxation, and it is hoped that one may be devised which the Supreme Court will declare constitutional.").

24. *See* RANDOLPH E. PAUL, TAXATION IN THE UNITED STATES 88 (1954).

25. *See* JOHN R. LUCKEY, CONG. RESEARCH SERV., 95-444, A HISTORY OF FEDERAL ESTATE, GIFT, AND GENERATION-SKIPPING TAXES 6 (2001), https://digital.library.unt.edu/ark:/67531/metacrs1946/m1/1/high_res_d/95-444a_2001Aug09.pdf [http://perma.cc/NUL7-NYD4] ("In 1916, Congress reacted to a mixture of changing attitudes and revenue shortages, the latter caused by a reduction in United States trade tariff receipts in the early years of World War I.").

26. *See* Eisenstein, *supra* note 18, at 228.

27. *See* Revenue Act of 1916 § 202(a); I.R.C. § 2033 (2012).

28. *See* Revenue Act of 1916 § 202(b); I.R.C. §§ 2035(a), 2037(a) (2012).

29. *See* Revenue Act of 1916 § 202(c); I.R.C. § 2040(a) (2012).

at the time that Congress originally enacted the estate tax, its passage was greeted with vehement opposition.[30]

Over the course of the ensuing decades, there have been repeated calls for estate tax repeal.[31] These demands for repeal have come from a variety of circles. Sometimes they have emanated from conservatives who rail against all forms of taxation;[32] other times, they have originated from small business owners and farmers who claim that the estate tax robs their offspring and other heirs of their rightful inheritance;[33] still other times, members of the academic community have expressed deep misgivings toward the estate tax on the basis that it spurs wasteful consumption.[34]

The calls for estate tax repeal have not gone unheard. Numerous public opinion polls have routinely expressed tepidness with respect to estate tax retention.[35] This has been especially true since a Republican strategist gave the estate tax its now-familiar moniker—*death tax*.[36]

Toward the end of the twentieth century and the beginning of the twenty-first century, estate tax repeal calls became increasingly louder. Over this time period, with each passing year, the number of times that congressional members submitted

30. For example, in a floor debate regarding estate tax enactment, Representative Charles Henry Sloan complained that "[i]f [the Democrats] can not reduce the cost of living[,] they demonstrate to the public their ability to raise the cost of dying." 53 CONG. REC. 10,594 (1916).

31. Even as early as the 1920s (just a few years after estate tax enactment), President Coolidge and his secretary of the Treasury, Andrew Mellon, sought estate tax repeal. Susan Murnane, *Andrew Mellon's Unsuccessful Attempt to Repeal Estate Taxes*, 108 TAX NOTES 1177 (2005); *Coolidge Would End Inheritance Taxes; Calls It State Field*, N.Y. TIMES, Feb. 20, 1925, at 1, 4.

32. *See, e.g.*, N. Gregory Mankiw, *Why Taxing Fairly Means Not Taxing Inheritances*, N.Y. TIMES (Sept. 9, 2016), https://www.nytimes.com/2016/09/11/upshot/why-taxing-fairly-means-not-taxing-inheritances.html [https://perma.cc/2LG9-HUP9] (advocating for estate tax elimination).

33. *See, e.g.*, Mark Koba, *Is the Death Tax Killing American Family Farms?*, FORTUNE (Apr. 13, 2015), https://fortune.com/2015/04/13/death-tax-killing-american-family-farms/ [https://perma.cc/EJ4K-URF5] (citing to congressional testimony from farmers seeking estate tax repeal).

34. *See, e.g.*, Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283, 364 (1994) ("The estate tax penalizes the productive work and savings efforts of our wealthiest citizens, while doing nothing about, indeed even inducing, their large-scale consumption of resources.").

35. *See, e.g.*, Am. Enter. Inst., *AEI Releases Study on Public Opinion of Taxes*, TAX NOTES TODAY, Apr. 14, 2006, at 2 ¶ 10 (discussing various public opinion polls that depict the general populace expressing tepid responses toward estate tax retention); *see* MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 122 (2005) (noting that polls in the late 1990s showed 70 percent support for estate tax repeal).

36. WILLIAM H. GATES SR. & CHUCK COLLINS, WEALTH AND OUR COMMONWEALTH: WHY AMERICANS SHOULD TAX ACCUMULATED FORTUNES 57 (2002) (describing how James Martin, founding member of the 60 Plus Association, coined this phrase).

bills to repeal the estate tax has grown.[37] However, as the repeal votes have become more dominant,[38] the estate tax has remained—albeit hanging on by a thread.

Even though the estate tax has yet to be repealed, it has largely been emasculated. Proof of this abounds: (i) in its heyday during the 1970s, the estate tax used to affect close to 7.65 percent of estates,[39] but today this figure has dwindled to an anemic 0.18 percent;[40] (ii) the estate tax rate has plummeted from a high of 77 percent from 1942 to 1976[41] to where it stands today at 40 percent;[42] (iii) the amount taxpayers can shelter from estate tax is at historically high levels (in 2018, \$22,360,000 for married taxpayers and \$11,180,000 for individual taxpayers);[43] and (iv) circumventions to transfer tax (e.g., fair market value manipulation) have gained traction and have even been given tacit administrative endorsement.[44] The estate tax of yesterday is not the estate tax of today; it's essentially a shell of its former self, seriously hobbled and reduced to virtual obscurity.

B. The Income Tax and Its Relationship to the Estate Tax

On the surface, there is little that the income and estate taxes share in common. The former taxes on an annual basis;[45] the latter taxes on a one-time basis.[46] Furthermore, the former imposes a progressive rate structure based upon family circumstances (e.g., married, single, and head of household);[47] the latter imposes a flat tax rate.[48] Finally, the former includes as its base income;[49] in contrast, the latter utilizes net wealth as the appropriate tax metric.[50]

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37. For an extensive discussion of congressional efforts to repeal the estate tax, see Daniel W. Matthews, *A Fight to the Death: Slaying the Estate Tax Repeal Hydra*, 28 WHITTIER L. REV. 663 (2006); *see also* Michael J. Graetz, *"Death Tax" Politics*, 57 B.C. L. REV. 801 (2016).

38. Peter Baker, *House Votes to Repeal Estate Tax*, N.Y. TIMES (Apr. 16, 2015), https://www.nytimes.com/2015/04/17/us/politics/house-votes-to-repeal-estate-tax.html [https://perma.cc/S7WA-R3B7].

39. INTERNAL REVENUE SERV., STATISTICS OF INCOME BULLETIN HISTORICAL TABLE 17, https://www.irs.gov/uac/soi-tax-stats-historical-table-17 [https://perma.cc/3PKU-BPGR] (follow "Historical Table 17" hyperlink); JOINT COMM. ON TAX'N, JCX-52-15, HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM 25 (2015).

40. JOINT COMM. ON TAX'N, *supra* note 39, at 1.

41. *See* Darien B. Jacobson, Brian G. Raub & Barry W. Johnson, *The Estate Tax: Ninety Years and Counting*, STAT. INCOME BULL. 118, 122, 125 (2007), https://www.irs.gov/pub/irs-soi/ninetyestate.pdf [https://perma.cc/X8JG-BYM2] (providing data on estate tax exemptions and tax rates since 1916).

42. I.R.C. § 2001(c) (2012).

43. *Id.* § 2010(c).

44. *See, e.g.*, Rev. Rul. 93-12, 1993-1 C.B. 202, 1993 IRB LEXIS 84 (sanctioning taxpayers' use of minority and marketability discounts).

45. I.R.C. § 441(a), (b) (2012).

46. *Id.* § 2031(a).

47. *Id.* § 1(a)–(d).

48. *Id.* § 2001(c).

49. *Id.* § 63(a).

50. *Id.* § 2051.

Notwithstanding these seemingly vast differences, the estate and income taxes are tangentially related. By way of background, Subsection 1 examines how the Code identifies income sources and taxes them differently. Next, Subsection 2 explains how these income tax source rate differentials, in the Automation Era, possibly bind the income and estate taxes closer together.

1. Income Sources and Their Tax Consequences

Under the Code, the starting point for taxing income is marked by eloquent simplicity: all wealth accretions, no matter what their source, are defined to be *income*.[51] Thus, when Congress enacted the income tax,[52] ignoring the deemed realization requirement, the identical fate befell all annual wealth accretions.[53]

But this similarity in treatment did not last long. In the early 1920s, there were cries that the economy needed to be spurred and that a capital gains tax reduction would help achieve this objective.[54] Furthermore, a leading corporate attorney, Fredrick R. Kellogg, offered compelling congressional testimony that a reduced capital gains rate would unlock taxpayers' hesitations to realize capital appreciation and thereby enhance revenue flow to the federal government's coffers.[55] Couple these arguments with the fact that many of the country's European counterparts either subjected capital gains to lower tax rates or exempted them entirely from tax,[56] and it was not long before Congress instituted a tax rate preference for capital gains.[57]

Ever since, the capital gains preference has been one of the Code's hallmark features.[58] Indeed, only once in the past hundred years, during a brief time interval immediately following the passage of the Tax Reform Act of 1986, did the Code tax

51. *Id.* § 61(a).

52. Revenue Act of 1913, ch. 16, 38 Stat. 166, 169 (1913).

53. *See* Van Mayhall, *Capital Gains Taxation—The First One Hundred Years*, 41 LA. L. REV. 81, 87 (1980) ("As a result of [several Supreme Court decisions] interpreting the sixteenth amendment, the Revenue Acts, from 1913 through 1921, taxed capital gains in the same manner as any other income. Gains were included with other income and were subject to both a normal tax and a surtax at the full rates under the then-existing tax structure.").

54. *See* Ajay K. Mehrotra & Julia C. Ott, *The Curious Beginnings of the Capital Gains Tax Preference*, 84 FORDHAM L. REV. 2517, 2524 (2016) ("Faced with a mild post-war recession, and prevailing high marginal rates, business leaders and economic commentators protested that the elevated wartime rates were no longer necessary.").

55. *Internal-Revenue Hearings Before the Committee on Finance, United States Senate, on the Proposed Revenue Act of 1921*, 67th Cong. 534–54 (1921) (statement of Frederick R. Kellogg).

56. *See* Calvin H. Johnson, *Taxing the Consumption of Capital Gains*, 28 VA. TAX REV. 477, 488 (2009) ("Capital gain was originally excluded from the British income tax when the first general income tax was adopted in 1799 under the presumption that capital gains were allocated to capital or investment and were not available for consumption."); Marjorie E. Kornhauser, *The Origins of Capital Gains Taxation: What's Law Got to Do with It?*, 39 SW. L.J. 869, 894–96 (explaining how British law historically did not tax capital gains).

57. Income Tax Act of 1921, ch. 136, § 206, 42 Stat. 227 (1921).

58. *See, e.g.*, Deborah H. Schenk, *Foreword*, 48 TAX L. REV. 315, 315 (1993) ("A tax preference for capital gains is an idea with remarkable staying power.").

capital gains and ordinary income at the same tax rates.[59] Otherwise, the capital gains tax rate preference has reigned supreme, and its significance has been immense: capital gains have generally been taxed at one-half the tax rate applicable to ordinary income, and sometimes this tax rate disparity has been even greater.[60] Aside from the tax rate preference, in certain instances, the Code permits capital gains to be deferred[61] and, in other instances, even exempts such gains entirely from tax.[62]

While the history of capital gains taxation depicts its favorable tax treatment, the exact opposite is true with respect to the income that labor generates. During the early 1930s, as part of the New Deal, President Roosevelt decided to initiate a retirement safety net and created a Committee on Economic Security to study the issue.[63] On the basis of this committee's report, Roosevelt and Congress decided to act. As a place to tap for financial resources, they selected labor income.[64] Congress therefore enacted new payroll taxes on the salaries and wages that employees received and the wages and salaries that employers paid; in addition, a self-employment equivalent tax was imposed.[65] Using the success of the Social Security system as a model, President Johnson and Congress decided during the 1960s to institute what has commonly been referred to as the "Great Society."[66] As part of this plan, Congress would provide medical insurance for the elderly and needy; and, as a funding mechanism, it once again chose to tax labor income, introducing another payroll burden.[67]

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59. *See* J. Andrew Hoerner, *Why Can't America Get the Capital Gains Tax Right?*, 54 TAX NOTES 893, 896 (1992) (noting that following the Tax Reform Act of 1986, the capital gains preference was eliminated; however, in 1991, Congress raised ordinary income tax rates but maintained the lower tax rates for capital gains).

60. For an excellent historic exposition of capital gains tax rates, see John W. Lee III, *The Capital Gains "Sieve" and the "Farce" of Progressivity 1921–1986*, 1 HASTINGS BUS. L.J. 1 (2005).

61. I.R.C. § 1031(a) (2011).

62. *See id.* § 121(a) (for married couples, exempting the first $500,000 of gains on the sale of a personal residence from tax); *id.* § 1202(a) (exempting the gains on the sale of certain small business stock).

63. *See The Committee on Economic Security (CES)*, SOCIAL SECURITY, https://www.ssa.gov/history/reports/ces/cesbasic.html [https://perma.cc/2LU2-DWMT] (last visited Feb. 2, 2019).

64. *See* Patricia E. Dilley, *Taking Public Rights Private: The Rhetoric and Reality of Social Security Privatization*, 41 B.C. L. REV. 975, 1031 ("[T]he financing mechanism of the program was tied so closely to the benefit entitlement structure that benefits were advertised as being paid for by the workers who were earning them and paying FICA taxes along with their employers.").

65. *See* ARTHUR M. SCHLESINGER JR., THE COMING OF THE NEW DEAL 308–09 (1958) (quoting Roosevelt: "We put those payroll contributions there so as to give the contributors a legal, moral, and political right to collect their pensions and their unemployment benefits. With those taxes in there, no damn politician can ever scrap my social security program."); *see also* JOHN A. BRITTAIN, THE PAYROLL TAX FOR SOCIAL SECURITY 6–9 (1972).

66. RANDALL B. WOODS, PRISONERS OF HOPE: LYNDON B. JOHNSON, THE GREAT SOCIETY, AND THE LIMITS OF LIBERALISM 157–82 (2016); NANCY A. COLBERT, GREAT SOCIETY: THE STORY OF LYNDON BAINES JOHNSON 99–101 (2002).

67. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286, 361–413 (1965).

These historical incidents have left their indelible mark on the Code. Over the course of the past half century, the income derived from capital has been lightly taxed, business and trade profits moderately taxed,[68] and labor income heavily taxed. Consider a simple fact pattern that affirms this assertion. In 2018, assume married Taxpayer A experiences a $100,000 capital gain, married Taxpayer B earns $100,000 of business profits, and married Taxpayer C makes a $100,000 salary. Although each taxpayer secures $100,000 of pretax income, the tax burden that befalls each would be vastly different: in terms of taxes, Taxpayer A would owe $18,300;[69] Taxpayer B would owe $18,289.50;[70] and Taxpayer C would owe $33,589.50.[71]

2. Drawing a Connection Between the Income and Estate Taxes

As previously stated,[72] the income and estate taxes share no outward similarities. In light of their differences (or, perhaps, simply due to historical happenstance), the income tax is set forth in Chapter 1 of the Code,[73] and, separated by multiple chapters, the estate tax is set forth in Chapter 11 of the Code.[74]

There is also judicial affirmation that the income and estate taxes are not interconnected. Courts routinely state that the income and estate taxes should not be construed to be *in pari materia*.[75] The takeaway from these judicial adjudications is clear: since the focus of the income tax is upon annual wealth accretions[76] and the focus of the estate tax is on overall net worth at death,[77] they should not be read in a way that is necessarily consistent or complementary.

But over the course of the last century, connections between the income and estate taxes have been drawn. From an academic perspective, Columbia law

68. Note that the Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11011(a), 131 Stat. 2054, provides for a 20 percent deduction for "pass-through income," which lowers the effective tax rate for qualifying taxpayers earning income from sole proprietorships and pass-through entities, such as S corporations and limited liability companies. I.R.C. § 199A (West 2018).

69. *See* I.R.C. § 1(h) (2018) (levying a 15 percent capital gains tax); *id.* § 1411(a) (levying a 3.8 percent net investment income tax).

70. *Id.* § 1(a). If the taxpayer earned this income vis-à-vis a pass-through entity, a special pass-through deduction might be applicable. *See supra* note 68.

71. Under this set of assumptions, Taxpayer C would directly and indirectly incur $15,300 of payroll taxes (7.65 percent payroll tax levied directly on Taxpayer C's earnings, I.R.C. § 3101(a), (b) (West 2018)) and 7.65 percent payroll tax levied on Taxpayer C's employer (I.R.C. § 3111(a), (b) (2018)). In addition, Taxpayer C would bear $18,289.50 of income tax under I.R.C. § 1(a) (West 2018).

72. *See supra* notes 45–50 and accompanying text.

73. I.R.C. §§ 1 to 1400Z-2 (2018).

74. *Id.* §§ 2001–209.

75. *Compare*, *e.g.*, Farid-Es-Sultaneh v. Comm'r, 160 F.2d 812, 814 (7th Cir. 1947) ("In our opinion the income tax provisions are not to be construed as though they were in pari materia with either the estate tax law or the gift tax statutes."), *with* Estate of Sanford v. Comm'r, 308 U.S. 39, 44 (1939) ("The gift tax was supplementary to the estate tax. The two are in pari materia and must be construed together.").

76. *See* I.R.C. § 61(a) (2017) (defining *gross income*).

77. *See id.* § 2031(a) (defining *gross estate*).

professor Michael Graetz has argued that the estate tax functions as a de facto "backstop" to ensure that the income tax system is equitable.[78] In support of his position, Professor Graetz cites to the income tax rule that permits the adjusted tax bases of a decedent's assets to equal their fair market value (e.g., for Apple stock that a taxpayer purchased at $100 per share and, at the date of death, is trading at $1,000 per share, the Code accords the latter as its tax basis in the recipient's hands).[79] This "tax basis equals fair market value" rule at the date of death enables the appreciated dollar amount to escape the income tax base and costs the Treasury Department billions of dollars annually.[80] Estate tax imposition attempts to compensate for this revenue leakage but does so imperfectly.[81]

Professor Graetz is not alone is drawing such connections. Politicians routinely treat the income and estate taxes as being interconnected. Consider the fact that over the last several decades, a common political rallying cry has been that estate tax imposition constitutes a double tax on the same income and, as such, is wholly unfair.[82] The "double tax" critique is not entirely without legitimacy. When distilled down to its essentials, the mainstay of most people's estates is essentially an amalgamation of their after-tax incomes, which, by definition, have already been subject to tax.[83] The estate tax thus constitutes another burden levied upon the same income.

Or does it? Due to the automation trend (discussed in more detail in the next Part), the answer to this question remains open to debate. As a general proposition, as the income derived from capital gradually becomes more pervasive and the income derived from labor wanes,[84] a greater proportion of taxpayers' incomes (particularly, the incomes of those who are wealthy) is being taxed lightly or not at all.[85] As a result, estate tax imposition may be the only tax that the Code levies (or,

78. Graetz, *supra* note 2, at 271–73.

79. I.R.C. § 1014(a) (2017).

80. *See* U.S. TREASURY DEP'T, TAX EXPENDITURES 1, 23 tbl.1 (2017), https://www.treasury.gov/resource-center/tax-policy/Documents/Tax-Expenditures-FY2018.pdf [https:// perma.cc/B3JN-GWCT] (estimating billions of dollars of annual revenue loss).

81. *See, e.g.*, STAFF OF THE JOINT COMM. ON TAX'N, 110TH CONG., DESCRIPTION AND ANALYSIS OF ALTERNATIVE WEALTH TRANSFER TAX SYSTEMS 1–2 (2008), https://www.jct.gov/ publications.html?func=showdown&id=1318 [https://perma.cc/YRR4-5G5Z] ("[T]ransfer taxes sometimes are thought to serve as an important backstop to an income tax system, potentially capturing and taxing certain accrued income that 'leaks' through the income tax system."); Graetz, *supra* note 2, at 270–73 ("[The estate tax] provid[es] an important element of progressivity in the federal tax system.").

82. *See, e.g.*, Edmund L. Andrews, *Death Tax? Double Tax? For Most, It's No Tax*, N.Y. TIMES (Aug. 14, 2005), https://www.nytimes.com/2005/08/14/business/yourmoney/death-tax-double-tax-for-most-its-no-tax.html [https://perma.cc/W56Q-PSCP] ("And while opponents contend that the estate tax is a 'double tax,' . . ."). And, as evidenced by the estate tax's low approval ratings, *see supra* note 35 and accompanying text, this critique appears to have resonated with large swaths of the public.

83. All accretions to wealth are supposed to be taxed. I.R.C. § 61(a) (West 2017). There are, admittedly, many exceptions to this general rule set forth in Part III of Subchapter B of Chapter 1 of the Code. *See id.* § 101 *et seq.*

84. *See infra* Section III.B.

85. *See infra* Section III.C.

if it is a second tax, it simply compensates for the initially lighter tax burden that befalls capital income). Framed in this fashion, going forward, the income and estate taxes may operate symbiotically to ensure that all taxpayers bear their fair share of the nation's tax burden.

II. THE AUTOMATION ERA AND THE LABOR/CAPITAL DYNAMIC

When it comes to what potentially lies in the future, the founder of Tesla Motors, Elon Musk, paints a dire picture. When the Automation Era hits full stride, according to Musk, the country will be a scene of dystopia, where the vast majority of people have no jobs or sources of income—and, as a result, anarchy may reign.[86] While Musk does not describe the tax consequences associated with the Automation Era, left unchecked, they may be bleak as well.

In the subsections below, the tax implications associated with the Automation Era are explored. First, Section A describes the Automation Era's technological changes that curtail or eliminate the need for labor. Next, Section B summarizes the consequences associated with labor's diminishment. Based upon these potential consequences, Section C then sets forth the case for a meaningful estate tax.

A. Technological Changes That Curtail or Eliminate Labor

Technology and automation are rapidly transforming the economic landscape. Tasks that were once labor-intensive (e.g., harvesting a wheat field) and took hundreds or thousands of labor hours can now be achieved through automation that engenders few labor hours and, in some cases, is completely automated.[87]

From every economic sector, evidence for the depth of this transformation process abounds. In the area of housing, for example, prefabricated housing is increasingly in vogue.[88] In the area of agriculture, a whole new range of specialized

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86. Dom Galeon, *Elon Musk: Automation Will Force Governments to Introduce Universal Basic Income*, FUTURISM (Feb. 14 2017), https://futurism.com/elon-musk-automation-will-force-governments-to-introduce-universal-basic-income/ [https://perma.cc/6ESZ-XE96].

87. *See, e.g.*, Michael Morgenstern, *Automation and Anxiety*, ECONOMIST (June 25, 2016), https://www.economist.com/special-report/2016/06/25/automation-and-anxiety [https://perma.cc/QX66-GFLQ] ("In previous waves of automation, workers had the option of moving from routine jobs in one industry to routine jobs in another; but now the same 'big data' techniques that allow companies to improve their marketing and customer-service operations also give them the raw material to train machine-learning systems to perform the jobs of more and more people.").

88. *See* Pooja Bhatia, *From Factory to Home: Prefab Is Having a Moment*, USA TODAY (July 23, 2014, 10:42 AM), https://www.usatoday.com/story/money/business/2014/07/23/ozy-prefab-houses/12986815 [https://perma.cc/PK99-KG9X]; Peter Gössel, Arnt Cobbers & Oliver Jahn, *A Brief History of Prefab*, ARCHITECTURE WK. (Oct. 3, 2012), https://www.architectureweek.com/2012/1003/design_1-1.html [https://perma.cc/MS25-DSJN].

tools can harvest entire fields[89] and even milk cows.[90] Finally, in the general area of manufacturing, innovation has sparked production.[91] And there is every indication that the economic landscape's transformation process will continue unabated.[92]

For the time being, notwithstanding these vast economic changes, the labor market has remained somewhat nimble. When, for example, work disappeared from farms and ranches,[93] the nation's labor force shifted to manufacturing.[94] When manufacturing jobs began to diminish, the nation's labor force gravitated toward the service sector.[95] Even as service-sector jobs have somewhat dried up, new positions in the sphere of technology have arisen.[96]

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89. *See Japanese Robot Can Pick Strawberry Fields Forever for Farmer*, JAPAN TIMES (Sept. 26, 2013, 12:38 AM), https://www.news.com.au/technology/science/japanese-robot-can-pick-strawberry-fields-forever-for-farmer/news-story/48111ca9c51f012fd4bce90bd58229ee [https://perma.cc/4VCB-HR6H]. ("This robot would harvest two-thirds of strawberries during the night when growers are sleeping.").

90. *See* Kaleigh Rogers, *Robots Are Milking Cows for Dairy, Data*, MOTHERBOARD (Feb. 26, 2015, 1:30 PM), https://motherboard.vice.com/en_us/article/robots-are-milking-cows-for-dairy-data [https://perma.cc/2FRP-97X6] ("Milking has been semi-automated for decades now, but it still requires a human to corral the animals, clean the cows' udders, and hook up and detach the milking machine. Robotic milkers eliminate the need for human intervention: it's just animal and machine.").

91. *See* Darrell M. West, *How Technology Is Changing Manufacturing*, BROOKINGS (June 2, 2016), https://www.brookings.edu/blog/techtank/2016/06/02/how-technology-is-changing-manufacturing [https://perma.cc/4XXB-NVD9] ("Workers now are producing 47 percent more than 20 years ago. Through the development of automation, robotics, and advanced manufacturing, the sector has bounced back along with the overall economy.").

92. *See, e.g.*, Ashish Deshpande, *Global 2018 Trends That Will Influence Business Automation*, FORBES (Mar. 7, 2018, 8:00 AM), https://www.forbes.com/sites/forbestechcouncil/2018/03/07/global-2018-trends-that-will-influence-business-automation [https://perma.cc/69SH-M3CK] ("Automating everyday business processes and workflows has become hugely important in 2018 as many companies realize that manual processes may not cut it in a world where they must act with unprecedented speed to meet customer needs, improve and innovate continuously to compete and analyze critical information.").

93. *See, e.g.*, Donald M. Fisk, U.S. Bureau of Labor Statistics, *American Labor in the 20th Century*, MONTHLY LAB. REV. (2003), https://www.bls.gov/opub/mlr/cwc/american-labor-in-the-20th-century.pdf [https://perma.cc/33YG-KBFV] ("At the turn of the [twentieth] century, about 38 percent of the labor force worked on farms. By the end of the century, that figure was less than 3 percent.").

94. *See, e.g.*, Jonathan Rees, *Industrialization and Urbanization in the United States, 1880–1929*, OXFORD RES. ENCYCLOPEDIA OF AM. HIST. (July 2016), https://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-327 [https://perma.cc/Q38J-VJNS] ("Between 1880 and 1929, industrialization and urbanization expanded in the United States faster than ever before.").

95. The service industry grew from 31 percent of all workers in 1900, U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 138, 152–66 (1975), https://www2.census.gov/library/publications/1975/compendia/hist_stats_colonial-1970/hist_stats_colonial-1970p1-chD.pdf [https://perma.cc/9HVW-ACKJ], to 78 percent in 1999, U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2000, at 410 tbl.656, 426 tbl.682 (2000), https://www.census.gov/library/publications/2000/compendia/statab/120ed.html [https://perma.cc/U4G5-PC2G].

96. *See generally* Jon Swartz, *Tech Jobs Are Thriving Nationwide—Up to 7.3M*, USA TODAY (Apr. 3, 2017, 12:03 AM), https://www.usatoday.com/story/tech/talkingtech/2017/04/03/tech-jobs-thriving-nationwide——up-73m/99789502/ [https://perma.cc/3HSC-THLU].

The unanswered question is whether the country is heading toward a critical breaking point in which many jobs and whole industries will disappear and will not be replaced by new ones. To date, the unemployment rate has remained fairly low.[97] Nevertheless, many economists predict this will not remain the case, insisting that the unemployment rate is likely to rise precipitously.[98] The reasons for economic pessimism are well-founded. Technological advancements are proceeding at a rapid pace, and these advancements can readily produce robots and machinery that can unceremoniously eradicate virtually any menial position and, in some cases, even those jobs that require special skills and expertise.[99]

While the future is hard to predict, labor's prospects are dim. To find positions and to remain employed, taxpayers will have to educate and retrain themselves on a constant basis.[100] Those who do otherwise are at grave risk of joining the unemployment rolls. Virtually every economist draws the following inescapable conclusion: in the future, less, rather than more, labor will likely be needed.[101]

B. *Consequences Associated with Labor Income's Diminishment*

For the income tax system, the implications associated with labor's diminishment are vast. In a nutshell, this transformation (1) jeopardizes income tax collections and (2) widens wealth disparities. Consider the severity of each.

1. *Income Tax Collections*

There is no secret that the federal government collects most of its revenue via the income tax.[102] What is also clear is that when income tax receipts are broken down by category, tax revenues derived from payroll tax receipts are far in excess of those derived from capital gains.[103] As reflected in Appendix A, this has been the case for many decades, and, at least in the near term, there exist no estimates or

97. *See* BUREAU OF LABOR STATISTICS, THE EMPLOYMENT SITUATION—OCTOBER 2018 (2018), https://www.bls.gov/news.release/pdf/empsit.pdf [https://perma.cc/UHQ7-DQ6F]. (indicating that the nation's unemployment rate was 3.7 percent).

98. *See supra* note 7 and accompanying text.

99. *See supra* note 7 and accompanying text.

100. *See* Ryan Wibberley, *Growth of AI Means We Need to Retrain Workers . . . Now*, FORBES (Feb. 28, 2017, 11:26 AM), https://www.forbes.com/sites/ryanwibberley/2017/02/28/growth-of-ai-means-we-need-to-retrain-workers-now [https://perma.cc/Q9WX-B3FQ].

101. *See supra* note 16 and accompanying text.

102. Over 80 percent of the nation's revenue comes from a combination of income and payroll taxes (for fiscal year 2017, individual income taxes raised 47.9 percent and social insurance (payroll) taxes raised 35.0 percent, respectively, of the nation's revenue). *See* OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES 34 tbl.2.2 (Fiscal Year 2019), https://www.whitehouse.gov/wp-content/uploads/2018/02/hist-fy2019.pdf [https://perma.cc/UVY6-8CXR].

103. In 2014 (the last year data was available), payroll taxes generated just over a trillion dollars of revenue, s*ee id.* at 33 tbl.2.1; by contrast, capital gains generated $139 billion of revenue. OFFICE OF TAX ANALYSIS, DEP'T OF THE TREASURY, TAXES PAID ON CAPITAL GAINS FOR RETURNS WITH POSITIVE NET CAPITAL INCOMES, 1954–2014 (2016), https://www.treasury.gov/resource-center/tax-policy/tax-analysis/documents/taxes-paid-on-capital-gains-for-returns-with-positive-net-capital-gains.pdf [https://perma.cc/B5M2-4WPX].

projections that indicate that the tax receipts' ratio of labor income to capital income will significantly vary.

But as the Automation Era shifts into full gear and the nation undergoes a fundamental economic transformation, there is every reason to believe that the income derived from labor (income and payroll tax receipts) will wane as the income from capital grows in prominence. Assuming that this is the case, receipts from labor will necessarily decline, and, by contrast, revenues from capital will increase. Yet because of tax rate differentials,[104] the outcome will not be symmetrical (the revenue gains from capital will not equal the revenue loss from labor). To illustrate, assuming that the effective tax rate on labor income is 40 percent and the rate on capital gains is 15 percent, for every $100 billion drop in labor income and $100 billion increase in capital gains, the government stands to lose $25 billion (i.e., [0.40 x $100 billion] – [0.15 x $100 billion]) of tax revenue.

While the relationship between labor's decline and capital's rise is easy to identify, what is far less certain is exactly how much potential revenue loss is at stake. There are many factors to consider, including the speed at which technology eradicates jobs, labor's ability to transform itself to make itself useful, and the ways in which the government responds with policy reforms (e.g., promotion of educational opportunities). However, if there were a 10 percent decline in payroll tax receipts and a corresponding 10 percent increase in capital gains tax receipts, the anticipated revenue loss associated with this change would be over $90 billion.[105]

Anticipated revenue losses akin to the dollar figure just projected cannot be blithely ignored. With annual tax receipts in the $3.27 trillion range (for 2016),[106] the absence of $90 billion would put pressure on elected officials to consider four difficult choices: (i) raising taxes, (ii) curtailing public expenditures, (iii) incurring deeper deficits, or (iv) engaging in a combination of the foregoing. None of the four foregoing options is particularly attractive. However, along with other measures (e.g., tax simplification), the introduction of a reimagined estate tax should be high on the consideration list.

2. *Wider Wealth Disparities*

In the United States, over the course of time, wealth disparities have been commonplace. Such disparities have existed at key time epochs, extending from the time of colonial America to the Civil War and beyond the Great Depression.[107]

104. *Compare* I.R.C. § 1(c) (2018) (the highest tax rate for unmarried individuals is currently 37 percent), *with id.* § 1(h) (the highest capital gains tax rate is currently 20 percent).

105. *Compare* I.R.C. § 1(c) (2018) (the highest tax rate for unmarried individuals is currently 37 percent), *with id.* § 1(h) (the highest capital gains tax rate is currently 20 percent).

106. OFFICE OF MGMT. & BUDGET, *supra* note 102.

107. J. Bradford DeLong, *A History of Bequests in the United States*, *in* DEATH AND $S: THE ROLE OF GIFTS AND BEQUESTS IN AMERICA 33, 49 (Alicia H. Munnell & Annika Sundén eds., Brookings Institution Press 2003) (from 1774 to 1900, the total wealth in the hands of the richest 1 percent of taxpayers rose dramatically).

And the presence of these wealth disparities has even helped define the cultural landscape in books (e.g., John Steinbeck's *The Grapes of Wrath*), plays (e.g., Stephen Karam's *The Humans*), and movies (e.g., Oliver Stone's *Wall Street*).

To curtail wealth disparities, Congress's attitude has not been laissez-faire. To the contrary, Congress has instituted a wide array of legislative measures designed to ameliorate wealth disparities. Such measures include, but are not limited to, (i) a social welfare program to ensure retirement income for all who participated in the nation's labor force and disability income for those workers who are disabled,[108] (ii) a comprehensive income tax system with a progressive rate structure so that those earning more contribute a greater absolute dollar amount to the federal coffers,[109] and (iii) an assortment of antitrust laws (e.g., the Sherman Antitrust Act, Clayton Antitrust Act, and Foreign Trade Antitrust Improvements Act) so that power and wealth do not become monopolized in the hands of only a few.[110]

Despite the institution of these legislative measures, wealth disparities have stubbornly remained part of the socioeconomic landscape. Statistics and empirical studies support this proposition. At the start of the twenty-first century, those who were in the upper 20 percent net worth category commanded approximately 93 percent of the nation's assets; conversely, those who were in the bottom 80 percent net worth category commanded a meager 7 percent of the nation's assets.[111] The Gini coefficient—a measure connected with asset ownership that calibrates wealth inequality—is also telling. A Gini coefficient of 0 indicates perfect equality (i.e., every citizen having identical net worth), and a Gini coefficient of 100 indicates perfect inequality (i.e., one citizen owning all of a nation's wealth).[112] A recent report indicates that the United States has the greatest wealth inequality worldwide, with a Gini coefficient score of 80.56.[113]

While the United States has never fared too well in terms of wealth inequality, the nation's wealth disparities are poised to worsen as automation becomes increasingly dominant. Financial wherewithal appears to be concentrated in the

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108. *See generally* Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301–1397f (1988)); STAFF OF H. COMM. ON WAYS & MEANS, 104TH CONG., 2D SESS., 1996 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 1–115 (Comm. Print 1996).

109. I.R.C. § 1(a)–(e) (2018).

110. *See generally* 15 U.S.C.

111. Deborah L. Jacobs, *Occupy Wall Street and the Rhetoric of Equality*, FORBES (Nov. 1, 2011, 11:40 AM), https://www.forbes.com/sites/deborahljacobs/2011/11/01/occupy-wall-street-and-the-rhetoric-of-equality/#426b530d1b88 [https://perma.cc/9WSF-2R4N]; *see also* CHARLES E. HURST, SOCIAL INEQUALITY: FORMS, CAUSES, AND CONSEQUENCES 34 (2007) (in 2007, the top 20 percent of the wealthiest possessed 80 percent of all financial assets).

112. *See generally Gini Coefficient*, WIKIPEDIA, https://en.wikipedia.org/wiki/Gini_coefficient [https://perma.cc/URN4-T7GN] (last visited Feb. 2, 2019).

113. ALLIANZ'S GLOBAL WEALTH REPORT 52 (2015), https://www.allianz.com/content/dam/onemarketing/azcom/Allianz_com/migration/media/economic_research/publications/specials/en/AGWR2015_ENG.pdf [https://perma.cc/F4X2-2PG7].

hands of those who comprise the top 1 percent of wealth owners.[114] In fact, wealth concentrations actually appear to be largely in the hands of those at the very, very top of the financial pyramid.[115]

And the really troublesome aspect of U.S. wealth concentration is that it is dominated by capital asset ownership. Put differently, those taxpayers who comprise the upper tiers of net worth have assets that are primarily capital in nature, such as equities, real estate, and plant and equipment; by extension, these taxpayers do not own vast amounts of cash, inventory, or accounts receivable.[116] As the twenty-first century progresses, automation seems to put those who own the tools of production in a position to exploit this technology to their financial benefit and to the financial detriment of nonowners.[117] Thus, given the nature of asset ownership among those taxpayers who are the holders of great wealth in the United States, coupled with the Code's orientation to afford preferential tax treatment to such assets, there is every reason to suspect that wealth disparities in the United States will, absent reform, worsen.

C. The Need to Tax Capital More Heavily

Based upon the foregoing discussion, in an era marked by automation, there is clearly a need for meaningful tax reform. The unanswered question is what form it should take.

Some tax reform ideas are not viable. Taxing labor income more heavily, for example, doesn't appear to be a satisfactory solution because it is already heavily taxed, and additional burdens on labor income may further dissuade its use. And if Congress seeks to tax capital too heavily, one of two things can happen: (i) given capital's mobility (combined with the globalization of the world's economic

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114. *See, e.g.*, Thomas Piketty et al., *Distributional National Accounts, Methods and Estimates for the United States*, 133 Q. J. ECON. 553, 553-57 ("Income has boomed at the top[:] . . . [i]n 1980, top 1% adults earned on average 27 times more than bottom 50% adults, while they earn 81 times more today.").

115. *See, e.g.*, Larry Elliott, *World's Eight Richest People Have Same Wealth as Poorest 50%*, GUARDIAN (Jan. 15, 2017, 7:01 PM), https://www.theguardian.com/global-development/2017/jan/16/worlds-eight-richest-people-have-same-wealth-as-poorest-50 [https://perma.cc/ZQD4-XRTP] (detailing an Oxfam report indicating that eight people (six of whom are from the United States) own as much wealth as 50 percent of the world's population).

116. *See* U.S. CENSUS, WEALTH ASSET OWNERSHIP, AND DEBT OF HOUSEHOLDS DETAILED TABLES (2013) (Household Net Worth: $500,000 and Over), https://www.census.gov/data/tables/2013/demo/wealth/wealth-asset-ownership.html [https://perma.cc/K62S-NE5Z] (depicting the fact that large proportions of the wealth of high-net-worth taxpayers are comprised of capital asset ownership); Edward N. Wolff, *Recent Trends in Household Wealth in the United States: Rising Debt and the Middle-Class Squeeze—An Update to 2007* 17 (Levy Econ. Inst. of Bard Coll., Working Paper No. 589, 2010), http://www.levyinstitute.org/pubs/wp_589.pdf [https://perma.cc/B78A-7RK7] ("[After the top richest one percent of households, among the next nineteen percent], [f]orty-four percent of their assets took the form of investment assets—real estate, business equity, stocks, and bonds—and 19 percent was in the form of stocks directly or indirectly owned.").

117. *See* Piketty et al., *supra* note 114, at 4 ("[W]e find that the upsurge of top incomes has mostly been a capital-driven phenomenon since the late 1990s.").

marketplace), it may result in the flight of capital to other countries;[118] and/or (ii) it may exacerbate the so-called lock-in effect, whereby taxpayers retain their current investments rather than selling them and only reinvest their diminished after-tax proceeds.[119]

While the path to satisfactory tax reform is thus unclear, one potentially palatable solution would be the congressional imposition of a meaningful estate tax that functions as a deferred capital tax. Consider the plight of two taxpayers, Rich and Penny, who each earns $100,000 annually. However, Rich earns this income as a result of capital gains, and Penny earns her income in the form of salary payments. As a result of taxes, Rich nets $85,000 and Penny $60,000 (the income of the former enduring a 15 percent effective tax rate, and the income of the latter enduring a 40 percent effective tax rate).[120] To meet their living and family expenses, assume further that Rich and Penny each annually spend $60,000. In terms of after-tax savings, this leaves Rich with $25,000 and Penny with nothing. Finally, assume that for the next forty years this earnings, spending, and savings pattern continues and that both taxpayers then suddenly perish. Notwithstanding the fact that both taxpayers earned identical incomes, Rich will have a $1 million estate (($85,000 – $60,000) x 40), and Penny will have a $0 estate (($60,000 – $60,000) x 40). To be fair and equitable to both taxpayers, estate tax imposition on Rich's estate thus appears to make a lot of sense.

The foregoing argument in favor of estate tax imposition, needless to say, would not resonate with everyone. To the contrary, estate tax naysayers would likely posit three counterarguments.

First, estate tax naysayers would point to those taxpayers whose robust incomes and related savings are a product of their own labor. Penny, they would claim, could easily receive a sizable salary increase and earn $141,667, an amount whose after-tax income would thus be equal to Rich's after-tax income of $85,000 (i.e., $141,667 – ($141,667 x .4)), presuming that their annual spending habits are the same (i.e., $60,000). This would leave Rich and Penny in the same economic positions and both with the identical net $1 million estate. However, in the case of Penny (and other similarly situated taxpayers) in such a scenario, estate tax imposition would result in a hefty double tax.

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118. *See supra* note 10.

119. *See generally* Charles C. Holt & John P. Shelton, *The Lock-In Effect of the Capital Gains Tax*, 15 NAT'L TAX J. 337 (1962). There is a considerable literature on the effect of tax rate changes on realization rates. CONG. BUDGET OFFICE, HOW CAPITAL GAINS TAX RATES AFFECT REVENUES: THE HISTORICAL EVIDENCE (1988), https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/84xx/doc8449/88-cbo-007.pdf [https://perma.cc/87RC-Y2Y8]; CONG. BUDGET OFFICE, PERSPECTIVES ON THE OWNERSHIP OF CAPITAL ASSETS AND THE REALIZATION OF CAPITAL GAINS (1997), https://www.cbo.gov/sites/default/files/105th-congress-1997-1998/reports/capgains.pdf [https://perma.cc/AWF9-PYTD]; Jane G. Gravelle, *Can a Capital Gains Tax Cut Pay for Itself?*, 48 TAX NOTES 209 (1990); J. Andrew Hoerner, *Treasury's Capital Gains Estimates: Mr. Economist Goes to Washington*, 44 TAX NOTES 141 (1989); George Zodrow, *Economic Analyses of Capital Gain Taxation: Realizations, Revenues, Efficiency and Equity*, 48 TAX L. REV. 419 (1993).

120. *See supra* note 105.

Estate tax naysayers would also have a second line of attack. They would contend that taxpayers who invest in the capital market should be rewarded, not penalized, for the risks that they undertake.[121] The logic of this position is grounded in the notion that capital investments are, by their very nature, risky. Consistent with this worldview, according wealth to those undertaking such risks should be encouraged and applauded—not taxed.

As a fail-safe, estate tax naysayers would have a final argument in mind, namely, that estate tax imposition undermines small-business enterprises and family farms. When the estate tax applies, so the argument goes, it forces estates to sell these enterprises at deep discounts, stripping them from younger and deserving heirs who have likely toiled hand in hand with the older generation to make them successful.[122] The by-product of estate tax imposition is thus a country destined for economic turmoil, in which family enterprises are torn asunder and the country is deprived of a critical component of its workforce.

But in the twenty-first century, the estate tax naysayers' three contentions ring hollow, failing to be grounded in reality. Consider the inherent flaws in each of the naysayers' arguments against estate tax imposition.

First, when it comes to estate tax imposition, numbers and statistics speak volumes. Study after study indicates that the vast majority of those taxpayers who have estate tax exposure are those who derived the mainstay of their wealth via their capital investments, not their sweat equity (i.e., labor).[123] Yes, exceptions to this rule can always be identified, but these are few and far between and should not dictate the overall direction of public policy.

Second, risk is inherent in every sphere of human existence. Undoubtedly, those who make capital investments assume risk, but different career paths involve risk as well. Consider a PhD student who is getting her doctorate in anthropology.

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121. *See generally* JOINT ECON. COMM., THE ECONOMIC EFFECTS OF CAPITAL GAINS TAXATION 2 (1997), https://www.jec.senate.gov/public/_cache/files/b3116098-c577-4e64-8b3f-b95263d38c0e/the-economic-effects-of-capital-gains-taxation-june-1997.pdf [https://perma.cc/T3YM-QUNV] ("High capital gains tax rates lower the return on investment, thus increasing the cost of capital and depressing overall investment in the economy. Conversely, a capital gains tax reduction would lower the cost of capital and stimulate investment.").

122. *See, e.g.*, Danielle Mayoras & Andy Mayoras, *Will Estate Taxes Force Al Davis' Family to Sell the Oakland Raiders*, FORBES (Oct. 10, 2011, 09:02 AM), https://www.forbes.com/sites/trialandheirs/2011/10/10/will-estate-taxes-force-al-davis-family-to-sell-the-oakland-raiders/#1337d2087918 [https://perma.cc/QKA9-UYQR].

123. Robert B. Avery, Daniel Grodzicki & Kevin B. Moore, *Estate vs. Capital Gains Taxation: An Evaluation of Prospective Policies for Taxing Wealth at the Time of Death*, at fig.1 (Fin. and Econ. Discussion Series, Working Paper No. 2013-28, 2013), https://www.federalreserve.gov/pubs/feds/2013/201328/201328pap.pdf [https://perma.cc/926C-EMX4] (unrealized capital gains account for approximately 32 percent of estates worth between $5 million and $10 million, up to 55 percent of the value of estates worth more than $100 million); James Poterba & Scott Weisbenner, *The Distributional Burden of Taxing Estates and Unrealized Capital Gains at the Time of Death*, at tbl.9 (Nat'l Bureau of Econ. Research, Working Paper No. 7811, 2000), https://www.nber.org/papers/w7811 [https://perma.cc/LR3J-C8HG] (for estates in excess of $10 million, a large component of decedents' estates is comprised of unrealized capital gains).

She hopes to secure a tenure-track position at a university; however, if she fails to secure such a position or secures the position yet fails to achieve tenure, notwithstanding her advanced degree, she may ultimately be relegated to being a lowly store clerk. The point is that the time, effort, and energy that taxpayers invest in capital is often matched or exceeded by the time, effort, and energy that taxpayers invest in developing and refining their labor skills. Both exercises engender tremendous risk, and, as such, neither necessarily warrants preferential tax treatment.

Third, there should be a recognition that the era of small-business enterprises and family farms and ranches is part of a bygone era. Look up and down Main Street. Virtually everywhere, there are large-scaled business enterprises and a myriad of franchises that have driven small businesses and mom-and-pop operations out of existence.[124] Here, too, statistics are telling. A U.S. Census Bureau Report indicates that only 17.6 percent of the labor force now works for "very small enterprises" (defined as having fewer than twenty employees); the rest of the labor force works for small, medium, and large enterprises.[125] Furthermore, as reported by the U.S. Department of Agriculture, the farming industry is dominated by a significant number of large family-owned farms.[126] In sum, small businesses and family farms and ranches no longer constitute meaningful aspects of the nation's economic landscape—and those that do exist have little, if any, estate tax exposure.[127]

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What this Part reveals is that the nation's twentieth-century Code is ill-designed to meet the demands of the twenty-first century and, in particular, the Automation Era. The Code currently taxes the income from labor too heavily (at the possible cost of dissuading its use) and, conversely, does not adequately tax the income derived from capital (heightening its financial attractiveness). This unfortunate situation is only going to go from bad to worse as labor income wanes

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124. *See, e.g.*, STACY MITCHELL, MONOPOLY POWER AND THE DECLINE OF SMALL BUSINESS 9 (2016), https://ilsr.org/wp-content/uploads/downloads/2016/08/MonopolyPower-SmallBusiness.pdf [https://perma.cc/8PGZ-3TVY]. Between 1997 and 2012, the number of small construction firms declined by about 15,000, while the number of small manufacturers fell by more 70,000 [*sic*]. Local retailers also saw their ranks diminish by about 108,000—a drop of forty percent when measured relative to population. As recently as the 1980s, independent retailers supplied about half of the goods Americans bought in stores; today their share is down to about one quarter.

125. *See* ANTHONY CARUSO, STATISTICS OF U.S. BUSINESSES EMPLOYMENT AND PAYROLL SUMMARY: 2012 (2015) (U.S. Census Report G12-SUSB), https://www.census.gov/content/dam/Census/library/publications/2015/econ/g12-susb.pdf [https://perma.cc/RQ6B-VJZS].

126. James M. MacDonald & Robert Hoppe, *Large Family Farms Continue to Dominate U.S. Agricultural Production*, U.S. DEP'T OF AGRIC. (Mar. 6, 2017), https://www.ers.usda.gov/amber-waves/2017/march/large-family-farms-continue-to-dominate-us-agricultural-production/ [https://perma.cc/5EUV-8QYG].

127. *See id.* ("[L]arge-scale family farms . . . made up only 2.9 percent of U.S. farms but contributed 42 percent of total production.").

and capital income increases, triggering tax revenue shortcomings, income inequality, public expenditure curtailment, and/or deeper deficits.

While strengthening the estate tax does not constitute a panacea, its imposition can put the Code on sounder financial footing. When it comes to the income derived from capital, the estate tax sometimes functions as the only tax levied. Furthermore, in those instances when it constitutes a secondary tax, it's still playing an ameliorative role in compensating for the preferential tax treatment accorded capital gains during a taxpayer's lifetime.

The next Part discusses the salient attributes of a twenty-first-century estate tax.

III. ESTATE TAX REFORM IN THE AUTOMATION ERA

The founder of Microsoft, Bill Gates, recently floated the idea of a new tax, namely, one levied on robots.[128] Gates recommended that the resulting revenue be used to train and retool the nation's workforce.[129] Although levying a tax on robots is impractical for a whole host of reasons, including our collective inability to define exactly what is a robot (e.g., whether its scope would include the Mars Rover, Watson, and any and all plant and machinery),[130] there is an element of truth in Gates's idea: in the Automation Era, there is a pressing need to tax capital (i.e., robots) more heavily and to relax taxes imposed on labor.[131] Since directly taxing robots is infeasible, the next question is what indirect modes of taxation exist.

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128. *The Robot That Takes Your Job Should Pay Taxes, Says Bill Gates*, QUARTZ (2016), https://qz.com/911968/bill-gates-the-robot-that-takes-your-job-should-pay-taxes/ [https://perma.cc/ST6Z-YZEK] ("In a recent interview with Quartz, Gates said that a robot tax could finance jobs taking care of elderly people or working with kids in schools, for which needs are unmet and to which humans are particularly well suited.").

129. *See, e.g.*, Reuters Staff, *European Parliament Calls for Robot Law, Rejects Robot Tax*, REUTERS (Feb. 16, 2017, 11:03 AM), http://www.reuters.com/article/us-europe-robots-lawmaking-idUSKBN15V2KM [https://perma.cc/Z6GG-R7YZ] ("But [the European Parliament] rejected a proposal to impose a so-called robot tax on owners to fund support for or retraining of workers put out of a job by robots.").

130. *See* Jac Depczyk, *Why Taxing Robots Is Not a Good Idea*, ECONOMIST (Feb. 25, 2017), http://www.economist.com/news/finance-and-economics/21717374-bill-gatess-proposal-revealing-about-challenge-automation-poses-why-taxing [https://perma.cc/QAG2-3S8G] ("Investments in robots can make human workers more productive rather than expendable; taxing them could leave the employees affected worse off."); Noah Smith, *What's Wrong with Bill Gates' Robot Tax*, BLOOMBERG (Feb. 28, 2017, 5:00 AM), https://www.bloomberg.com/view/articles/2017-02-28/what-s-wrong-with-bill-gates-robot-tax ("The problem with Gates' basic proposal is that it's very hard to tell the difference between new technology that complements humans and new technology that replaces them.") (emphasis in original); *cf.* Robert Shiller, *Why Robots Should Be Taxed If They Take People's Jobs*, GUARDIAN (Mar. 22, 2017, 7:18 AM), https://www.theguardian.com/business/2017/mar/22/robots-tax-bill-gates-income-inequality [https://perma.cc/JK3N-5ACT] ("If these and other labor-displacing innovations succeed, surely calls to tax them will grow more frequent, owing to the human problems that arise when people lose their jobs—often jobs with which they closely identify, and for which they may have spent years preparing.").

131. Soled & Thomas, *supra* note 9.

There are two possibilities with respect to taxing capital. The first is to tax more heavily the income that capital produces, in particular, capital gains. While this is an attractive possibility and should be pursued, there are limitations to its feasibility. As previously pointed out, in a global economy, if legislators were to raise capital gains tax rates too high, capital might migrate to lower-tax jurisdictions.[132] Furthermore, a high capital gains tax rate might curtail income realization events,[133] thereby subverting this policy's revenue-raising objective.

In lieu of raising the capital gains tax rate too high, there is a second and potentially more viable option to taxing capital, namely, the imposition of a reimagined estate tax. In Section A, the reasons are spelled out for a reimagined estate tax in the twenty-first century. In Section B, the public policy implications associated with a meaningful estate tax are detailed.

A. Twenty-First-Century Reimagined Estate Tax

As the world has gradually shifted from being agrarian-based to being automation-based,[134] the nature of the estate tax has remained relatively constant.[135] By definition, an estate tax is "[a] tax imposed on the right to transfer property by death."[136]

In the Automation Era, assuming that a dual estate tax rate structure (i.e., a high tax rate applicable to capital assets and a low tax rate applicable to noncapital assets) is a nonstarter,[137] something nevertheless should be done to account for the

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132. *See supra* note 10.

133. *See supra* note 109.

134. *See supra* Section III.A.

135. *See* Jacobson, Raub & Johnson, *supra* note 41, fig.C (depicting several significant changes that the estate tax has undergone since its inception in 1916; despite these changes, the central essence of the estate tax—a tax levied on a decedent's net estate—has remained intact throughout this entire time period).

136. *Estate Tax*, BLACK'S LAW DICTIONARY (5th ed. 1979).

137. From the estate tax's inception to date, Congress has used a single tax rate structure to determine an estate's applicable tax burden. As the world has changed, however, the retention of a single tax rate structure applicable to a taxpayer's entire net worth may no longer make sense. Bear in mind that over this same time period, the income tax system has had a two-rate structure in place: as embodied in Code sections 1(a)–(g), a progressive tax rate structure applies to ordinary income; and, as embodied in Code section 1(h), a preferential tax rate structure applies to long-term capital gains. Akin to the income tax system, fairness and logic perhaps suggest that it would make sense to have the reverse apply at death: a higher estate tax rate imposed on capital assets (e.g., real estate, stock, and bonds) and a lower estate tax rate imposed on noncapital assets (e.g., notes, cash, and life insurance proceeds). Notwithstanding the logic of having a dual estate tax rate structure that differentiates between capital and noncapital assets, for several reasons it would be impractical. For starters, aside from assets, many taxpayers also have debts; exactly how Congress would choose to allocate these debts between and among capital and noncapital assets would be challenging. Along the same lines, assets passing to a surviving spouse may qualify for the unlimited estate tax marital deduction, I.R.C. § 2056 (a) (2018); however, at the first spouse's death, a resulting estate tax burden could depend upon which specific assets of a decedent's estate (i.e., capital versus noncapital) pass to the surviving spouse and which do not. Third, because the gift and estate taxes are inherently intertwined, for the sake of consistency, Congress would have to craft a dual capital and noncapital gift tax rate, inviting its own set of nettlesome issues. Finally, to reduce their estate tax burden, many taxpayers would feel compelled, particularly in

tax benefits that inure to taxpayers who amass wealth (both capital and noncapital) during their lifetimes. To address the tax privileges of capital ownership, Congress must reimagine the estate tax and institute four critical changes to the current structure of the estate tax regime.

For the reasons stated below, (1) the lifetime estate tax exemption should be drastically reduced, (2) the estate tax rates should be significantly raised, (3) the estate tax base should be made more comprehensive, and (4) the generation-skipping transfer tax should be overhauled and strengthened.

1. Drastic Reduction of the Lifetime Exemption Amount

When Congress originally instituted the estate tax, it provided a significant exemption.[138] Over the ensuing years, this exemption was accorded various monikers, including *the unified credit* and *the applicable exclusion amount*; for ease of reference, this analysis utilizes the *lifetime exemption amount* phraseology to delineate this feature of the Code.[139] Simply stated, the purpose of the lifetime exemption amount was to safeguard the vast majority of taxpayers from estate tax imposition, designed so that only the estates of the nation's wealthiest taxpayers bore this tax.[140]

For nearly a century, the lifetime exemption amount operated fairly consistently. It would exempt approximately 98 percent of taxpayers' estates from estate tax imposition.[141] There was also consistency in the resulting revenue stream that the estate tax generated: with some variation, this revenue stream historically accounted for approximately 2 percent of federal receipts.[142]

But three relatively recent legislative pieces put an end to this legacy of consistency. As part of the Economic Growth and Tax Relief Reconciliation Act (EGTRRA) of 2001,[143] over a ten-year period, Congress gradually raised the then $1 million lifetime exemption amount to $3.5 million.[144] In 2010, Congress acted again and raised the then $3.5 million lifetime exemption amount to $5 million and,

deathbed situations, to shed their capital assets immediately prior to death to avoid what might otherwise be a heavier estate tax burden. In light of logistical practicalities involving debts, marital bequests, gifts, and forced deathbed sales, congressional institution of a dual estate tax rate system is not a viable option to address the flaws related to the Code's current approach to taxing capital and the income that it produces.

138. Revenue Act of 1916, § 203(a)(2), 39 Stat. 756, 778.

139. I.R.C. § 2010(c) (2018).

140. *See generally* Eisenstein, supra note 18.

141. Jacobson, Raub & Johnson, *supra* note 41, fig.F. Over this elongated time period, there were, of course, percentage variations. In 1976, for example, those taxpayers exempt from estate tax exposure declined to 92 percent, *id.*; and, conversely, in 2017, those taxpayers exempt from estate tax rose to 99.8 percent. CHYE-CHING HUANG & CHLOE CHO, CTR. ON BUDGET & POLICY PRIORITIES, TEN FACTS YOU SHOULD KNOW ABOUT THE FEDERAL ESTATE TAX (2017), https://www.cbpp.org/sites/default/files/atoms/files/1-8-15tax.pdf [https://perma.cc/Z5BX-AX57].

142. Jacobson, Raub & Johnson, *supra* note 41, fig.G.

143. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified in scattered sections of 26 U.S.C.).

144. *Id.* § 521.

for the first time, indexed the lifetime exemption amount for inflation.[145] Finally, in 2017, Congress enacted the Tax Cuts and Jobs Act, which, without any theoretical justifications,[146] doubled the anticipated applicable exclusion amount (after inflation adjustments, calculated to be $5.6 million in 2018) to $11.2 million beginning in 2018.[147]

The consequences of raising the lifetime exemption amount and annually adjusting it for inflation have since become apparent. First, there are fewer estate tax returns that are being filed annually: the percentage of taxpayers' estates subject to estate tax has dwindled to 0.2 percent, essentially a historical nadir for the estate tax.[148] Second, the amount of revenue that the estate tax is anticipated to generate has correspondingly decreased to below 1 percent,[149] essentially another historical nadir with respect to revenue collection.[150] And, as the number of estate tax returns has declined and revenue collections have sagged, estate tax retention has been called into question, punctuated by issues such as whether preservation of the administrative apparatus (e.g., IRS staffing) still makes logistical sense.[151]

But due recognition must be given to how taxpayers are able to accumulate wealth. Yes, wealthy taxpayers often work hard, use their ingenuity, and save. Yet, there are several factors that propel wealthy taxpayers' wealth that need to be taken into account. These factors include a tax system that, among other things, accords preferential capital gains tax rates to taxpayers;[152] permits gains recognition deferral;[153] and, finally, applies a tax basis-equal-to-fair-market-value rule at death, which eliminates future income taxation on asset appreciation.[154]

Owners of capital are ideally situated to avail themselves of these tax advantages. In the Automation Era, the wealthiest 10 percent of taxpayers currently control approximately 76 percent of the nation's wealth.[155] As such, admittedly somewhat Procrustean, it makes sense to impose the estate tax on the estates of

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145. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. 111-312, § 302, 124 Stat. 3296, 3301.

146. *See* Ashlea Ebeling, *Final Tax Bill Includes Huge Estate Tax Win for the Rich: The $22.4 Million Exemption*, FORBES (Dec. 21 2017) ("President Donald Trump's vow to kill the federal estate tax failed, but his family, and other high-net worth families, could still come out way ahead based on changes to the estate, gift and generation-skipping taxes in the final tax bill that awaits his signature.").

147. Tax Cuts and Jobs Act, Pub. L. 115-97, § 11061(a), 131 Stat. 2054.

148. *See generally* JOINT COMM. ON TAXATION, *supra* note 19.

149. OFFICE OF MGMT. & BUDGET, *supra* note 102.

150. Jacobson, Raub & Johnson, *supra* note 41, fig.F.

151. *See generally* Kevin Brady, *Cost and Consequences of the Federal Estate Tax*, JOINT ECON. COMM. (2012), https://www.jec.senate.gov/public/_cache/files/bc9424c1-8897-4dbd-b14c-a17c9c5380a3/costs-and-consequences-of-the-federal-estate-tax-july-25-2012.pdf [https://perma.cc/5EGA-BCBA] (suggesting that compliance costs are in excess of revenue generated).

152. I.R.C. § 1(h) (West 2017).

153. *Id.* §§ 1001(c), 1031(a).

154. *Id.* § 1014(a).

155. Jeanne Sahadi, *The Richest 10% Hold 76% of the Wealth*, CNN MONEY (Aug. 18, 2016, 6:50 PM), https://money.cnn.com/2016/08/18/pf/wealth-inequality/index.html [https://perma.cc/E2YW-KAVT].

taxpayers who comprise this select echelon. The rationale for this approach is simple: during their lifetimes, the Code accorded these taxpayers the financial privileges and benefits of capital ownership; upon their demise, they should accordingly pay a monetary "toll charge" for these privileges and benefits. What Congress must therefore do is reduce the lifetime exemption amount in a manner such that the scope of the estate tax would extend to a much larger number of taxpayers' estates. At the present time, were Congress to make the lifetime exemption amount $1 million, the estate tax would apply to appropriately 10 percent of households.[156] Extending estate tax application in this fashion would enable Congress to recoup some or all of the tax benefits it accorded these very same taxpayers during their lifetimes.[157]

2. Significant Increase in the Estate Tax Rates

As was the case with respect to the lifetime exemption amount, historical context is useful to understand the estate tax's rate structure. When Congress first enacted the estate tax, the rate structure was graduated and extended as high as 10 percent.[158] Over the ensuing years, while the top tax rate fluctuated, it remained consistently high (from 1932 to 2001, the top estate tax rate ranged from 55 percent to 77 percent).[159] Only at the turn of the century did Congress do an extraordinary about-face: as part of the Economic Growth and Tax Relief Reconciliation Act, over a ten-year period, Congress reduced the top estate tax rate from 55 percent to 45 percent;[160] furthermore, as part of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Congress further reduced the estate tax to a flat 35 percent;[161] finally, as part of the American Taxpayer Relief Act of 2012, Congress made a small increase to the estate tax rate to 40 percent.[162]

Bear in mind that in the Automation Era, as a result of capital gains tax preferences, capital ownership has never been so financially rewarding.[163] That being the case, Congress should attempt to recapture some of the tax benefits that

156. *See* Scott Burns, *The New Wealth Scoreboard*, ASSETBUILDER (Aug. 25, 2012), https://assetbuilder.com/knowledge-center/articles/the-new-wealth-scoreboard [https://perma.cc/FM6J-7S6V] (citing to 2010 Survey of Consumer Finances, Dallas Federal Reserve Bank Research Department, indicating that those age 80 and over who comprise the top 10 percent of net worth category have an approximate net worth of $1 million).

157. *See supra* notes 138–140 and accompanying text.

158. Revenue Act of 1916, ch. 463, § 201, 39 Stat. 756, 777–80 (1916).

159. Jacobson, Raub & Johnson, *supra* note 41, at 122, fig.D.

160. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 511, 115 Stat. 38, 70 (codified in scattered sections of 26 U.S.C.).

161. *See* Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. 111-312, § 302, 124 Stat. 3296, 3301.

162. American Taxpayer Relief Act of 2012, Pub. L. 112-240, § 101, 126 Stat. 2313, 2315.

163. *See* CONG. BUDGET OFFICE, THE DISTRIBUTION OF MAJOR TAX EXPENDITURES IN THE INDIVIDUAL INCOME TAX SYSTEM 18 (2013), https://www.cbo.gov/sites/default/files/cbofiles/attachments/43768_DistributionTaxExpenditures.pdf [https://perma.cc/HE4B-PX9D] ("Virtually all of the benefits from the preferential tax rates on those sources of income accrue to the top quintile of households.").

inure to taxpayers during their lifetimes in the form of a reimagined estate tax applicable upon taxpayers' demises. The challenging part is to quantify the value of capital gains preferences and then derive an appropriate estate tax rate. Notwithstanding the difficulty of this exercise, it is worth undertaking.

Here is an example that can possibly help reveal the appropriate estate tax rate structure: Suppose that on January 1, 2020, Taxpayer Jay incorporates a new business enterprise in his garage and that over the course of the next ten years it appreciates $100,000 annually until it is eventually worth $1 million and is sold on December 31, 2029. Assume further that on the resulting $1 million gain (i.e., $1,000,000 – $0), Taxpayer Jay owed $150,000 of tax (i.e., $1,000,000 x .15). He would therefore net $850,000 (i.e., $1,000,000 – $150,000). Compare the plight of Taxpayer Jay with that of Taxpayer Kay, who earns $100,000 salary annually and pays income and payroll taxes at an effective combined tax rate of 55 percent and who, over a ten-year period, nets $450,000 (i.e., $1,000,000 – ($1,000,000 x .55)).

The foregoing example demonstrates the need for a significant increase in the estate tax rate. For starters, at a minimum, the estate tax rate should be equal to 47 percent. Application of this estate tax rate to Jay's estate would yield an estate tax of approximately $400,000 (i.e., $850,000 x .47) and thereby reduce his net estate to $450,000 ($850,000 – $400,000)—the same as Kay's estate. On its face, this seems fair and equitable.

But even a 47 percent estate tax rate would likely prove inadequate. As previously pointed out, the benefits of capital ownership are enormous. For example, in year 10, had Taxpayer Jay died, the tax basis in his stock would have been increased to $1 million,[164] eliminating any future income tax exposure. In cases such as this, to secure economic parity, the appropriate estate tax rate should, at a minimum, be 55 percent so that Taxpayer Jay's estate would be reduced to $450,000 (i.e., $1,000,000 – ($1,000,000 x .55))—again, the same as Kay's estate.

Finally, there are other benefits that the Code affords capital gains that need to be considered in determining the estate tax rate structure. For example, the Code permits taxpayers to take charitable deductions equal to the fair market value of their appreciated capital assets;[165] defer capital gains recognition utilizing the installment method;[166] and, in the case of small businesses, exempt all capital gains from income.[167] These, and other tax benefits (e.g., ordinary losses on the disposition of the stock of small businesses[168]), are hard to quantity and encapsulate in an estate tax rate structure. Nevertheless, since these benefits constitute departures from the general income baseline that the Code should tax all accretions

164. I.R.C. § 1014(a) (2018).
165. *Id.* § 170(e).
166. *Id.* § 453(a).
167. *Id.* § 1202(a)(4).
168. *Id.* § 1244(a).

to wealth the same (hence, they are commonly referred to as *tax expenditures*),[169] they should be recaptured, and a taxpayer's death affords this opportunity. The tax expenditure budget estimates that the capital gains preference alone exceeds $108 billion annually (estimate for tax year 2018);[170] ideally, Congress should consider calibrating the estate tax rate structure in a manner that recaptures at least this much revenue in return.

3. Broaden the Estate Tax Base

As currently configured, the federal transfer tax system has several legislative and administrative mechanisms that taxpayers routinely use to narrow the estate tax base. The most common involve strategic gifts that engender (i) valuation discounts and (ii) transfers into trusts with retained interests.

Valuation Discounts. Taxpayers who own closely held businesses that are not listed on any public exchange are ideally situated to minimize their future estate tax burdens. Many deliberately divide their property interests and make lifetime transfers;[171] engaging in this tactic enables them to capitalize upon minority and marketability discounts.[172] In theory, valuation discounts associated with minority ownership are sensible: minority owners often have little or no voice in a company's business affairs and, by the same token, bear the risk of having their ongoing financial interests trampled upon (e.g., by the company according overgenerous compensation to the majority owner).[173] Likewise, according valuation discounts to nonpublicly traded business interests makes sense, too, because there is no ready market for such closely held business interests, rendering their sale or other disposition challenging.[174]

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169. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 3, 88 Stat. 937, 938 (codified at 31 U.S.C. § 1302) (defining *tax expenditure* as "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability").

170. U.S. TREASURY DEP'T, *supra* note 80, at 23 tbl.1 l.70.

171. *See, e.g.*, Reed W. Easton, *Give More and Pay Less Tax by Claiming Valuation Discounts*, 64 PRAC. TAX STRATEGIES 92, 92–95, 97, 99 (2000) (describing the transfer tax savings associated with transferring divided business interests); Matthew Ressegieu, *Valuation Discounts: What Is Required?*, 54 PRAC. TAX STRATEGIES (1995) (describing the transfer tax savings associated with transferring divided business interests).

172. *See generally* Richard A. Booth, *Minority Discounts and Control Premiums in Appraisal Proceedings*, 57 BUS. LAW. 127, 131 (2001) ("[T]he term minority discount as properly understood refers to a discount from the price that would be set for non-control shares in an active market simply because they are minority shares and have no power to influence the governance of the corporation and may therefore be exposed to the possibility of looting . . . . [A] marketability discount refers to a discount from what a fair trading price would be if there were an active market for the shares.").

173. Zenichi Shishido, *The Fair Value of Minority Stock in Closely Held Corporations*, 62 FORDHAM L. REV. 55, 99 (1993).

174. Ashok B. Abbott, *Estimating the Discount for Lack of Marketability: A Best Fit Model*, 15 VALUATION STRATEGIES 20, 22 (2012).

Consider an example that illustrates how these two valuation discounts operate, commonly in tandem. Suppose a taxpayer owns all 100 shares of a closely held business with an estimated fair market value of $1 million. The taxpayer can gift forty-nine shares to her daughter and, for transfer tax reporting purposes (i.e., IRS Form 709 [U.S. Gift and Generation-Skipping Tax Return]), rather than value the transferred shares at $490,000, can likely take a 40 percent minority interest discount (i.e., $196,000, or $490,000 x .4) and possibly another 15 percent marketability discount (i.e., $44,100, or (($490,000 – $196,000) x .15).[175] The combined discounts would result in a reportable gift of only $249,900 (i.e., $490,000 – $196,000 – $44,100). The IRS has administratively conceded that under current law, valuation discounts of this sort are legitimate.[176] With the agency's imprimatur, taxpayers have not been shy and, depending on circumstances, have taken enormous valuation discounts.[177]

Minority and marketability discounts of the sort just described are not limited to lifetime transfers. They can also be accorded to business interests owned at the time of death. In the prior example, consider the transfer tax consequences if the taxpayer had subsequently gifted another two shares to her daughter, thus leaving the taxpayer with forty-nine shares. Had the taxpayer then died owning such shares, her estate would have been ideally positioned to avail itself of significant minority and marketability discounts. Just as was the case with respect to gift giving, a long line of cases attests to taxpayers' estates aggressively taking such valuation discounts and, in large part, their positions being judicially upheld.[178]

Transfers into Trusts with Retained Interests. Congress has codified multiple opportunities that permit taxpayers to retain an interest in property and simultaneously gift the remainder interest.[179] This latitude granted to taxpayers greatly narrows the estate tax base. Consider two examples—one that illustrates the dynamics of a personal residence trust and the other that illustrates the dynamics of a grantor-retained annuity trust—that highlight how taxpayers (with the help of their skilled advisers) can readily minimize their transfer tax obligations.

Qualified Personal Residence Trust (QPRT):[180] Suppose a taxpayer, age 60, owns a $1 million residence and that the applicable federal rate is 4 percent.[181]

175. *See generally* Alan L. Feld, *The Implications of Minority Interest and Stock Restrictions in Valuing Closely-Held Shares*, 122 U. PA. L. REV. 934, 938 (1974).

176. Rev. Rul. 93-12, 1993-1 C.B. 202.

177. *See* LOUIS A. MEZZULLO, VALUATION OF CORPORATE STOCK, *in* BNA Portfolio 831, at 4, worksheet 1 (2018).

178. *See generally* Joseph M. Dodge & Calvin H. Johnson, *Passing Estate Tax Values Through the Eye of the Needle*, 132 TAX NOTES 939, 941 (2011); JOINT COMM. ON TAX'N, JCS-02-05, OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES 396–404 (2005).

179. *See generally* Grayson M.P. McCouch, *Rethinking Section 2702*, 2 FLA. TAX REV. 99, 99, 101 (1994).

180. *See* Rev. Proc. 2003-42, 2003-23 I.R.B. 993 (containing a sample qualified personal residence form).

181. *See* I.R.C. § 7520(a) (2014) (requiring the Treasury Department to publish monthly interest tables to value annuities, interest for life or a term of years, or any remainder or reversionary interest).

Suppose further that the taxpayer establishes a so-called QPRT[182] with a twenty-year term (in a nutshell, the terms of a QPRT permit a taxpayer to reside in a home during its term and authorize the payment of upkeep expenses; at the end of the twenty-year term (or whatever term the trust settlor determines), title to the house can pass outright or in further trust to other named beneficiaries). Were the taxpayer to transfer title to his house into this trust, for gift tax–reporting purposes, its value would be diminished to $264,780. Over the course of the ensuing twenty years, suppose the house were to grow modestly in value 3 percent annually; by year 20, the house would be worth $1,806,111. The difference between the amount reported for gift tax purposes and the house's actual fair market value at the end of the trust term, namely, $1,541,331 (i.e., $1,806,111 – $264,780), constitutes the dollar figure ultimately escaping from the estate tax base.

<u>Grantor-Retained Annuity Trust (GRAT)</u>: Suppose a taxpayer owns all of the stock in a closely held business worth $1 million and that the applicable federal rate is 4 percent.[183] Assume further that the taxpayer were to establish a so-called GRAT[184] with a three-year term (in a nutshell, the terms of a GRAT require that the trust settlor retain a fixed dollar amount [expressed as a percentage of the originally contributed property] for a term of years; at the end of the designated term, title to the contributed property can pass outright or in further trust to other named beneficiaries). Were the taxpayer to contribute his entire business interest into a GRAT and retain an annual annuity of $360,347, for gift tax–reporting purposes, its value would be $0 (i.e., the value of the contributed gift is $1 million less the fair market value of the retained annuity interest of $1 million).[185] If the value of the contributed business interest grew a modest 5 percent annually (and also earned a 5 percent income return), $141,351 would be available in the trust at the end of the trust term.[186] This amount would pass to the remainder trust beneficiaries free from any transfer tax and, akin to the advantages associated with QPRT use, escape from being part of the estate tax base.

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There is a common feature that underpins both discounting and transfers into trusts with retained interests, namely, valuation manipulation. In the case of

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182. Treas. Reg. § 25.2702-5(c) (1997). For a detailed overview of the advantages associated with QPRT use, see Joseph E. Edwards III, *Qualified Personal Residence Trusts: A Powerful Estate Planning Tool*, 24 COLO. LAW. 39 (1995).

183. *See* I.R.C. § 7520(a) (2018) (requiring the Treasury Department to publish monthly interest tables to value annuities, interest for life or a term of years, or any remainder or reversionary interest).

184. For a general overview of grantor-retained annuity trusts, see, e.g., Robert E. Harrison, *Avoiding Gift and Estate Taxes with Grantor Retained Annuity Trusts*, 29 EST. PLAN. 528, 528 (2002).

185. For two excellent articles on this strategy, see S. Stacy Eastland, *Optimize Contribution to Grantor Retained Annuity Trust*, 39 EST. PLAN. 3 (2012); and John Goldsbury, *If Walton Is Correct, Every GRAT Should Be Zeroed Out*, 29 EST. PLAN. 174 (2002).

186. If the fair market value of the business interest did not grow, the taxpayer could form another three-year grantor-retained annuity trust and try his luck again, with no financial downside risk. Jerome J. Caulfield, *The Quest for the Zeroed-Out GRAT: Walton Says It Can Be Done*, 28 EST. PLAN. 251 (2001); Goldsbury, *supra* note 185.

discounting, taxpayers avail themselves of theoretical valuation concerns that are utterly illusory in the context of a cohesive family unit, whose members work in unison and harbor no immediate expectation of selling or disposing of the business enterprise to an unrelated third party. In the case of transfers into trusts with retained interests, taxpayers have little or no downside risk: over time, the fair market values of most residences increase rather than decrease, and many business interests appreciate in excess of the applicable federal rate. The popularity of QPRTs and GRATs affirms their ability to eradicate part or all of the future estate tax exposure of many taxpayers.[187]

In the Automation Era, if the estate tax is to recoup the tax benefits that the Code currently affords owners of capital, maintaining the integrity of its base is crucial. Accurate valuation measures constitute a key component of fulfilling this objective. Congress should therefore enact two critical pieces of legislation. The first would be to eliminate any valuation discounts associated with intrafamily transfers; legislation of this sort would essentially mandate that, when it comes to valuation, if the aggregate ownership of an interest by family members (as defined under the Code) equals or exceeds 50 percent (using ownership attribution rules), no minority or marketability discounts should be permitted.[188] The second legislative initiative would be to treat any transfer with a retained interest as an incomplete gift until the retained interest lapses.[189] Enacting both of these measures would buoy the integrity of the estate tax, propelling it into a meaningful twenty-first-century mode of taxation.

4. Strengthen the Generation-Skipping Transfer Tax Regime

Relative to other taxes (e.g., income, corporate, and estate taxes), the generation-skipping transfer (GST) tax is of relatively recent vintage. Originally

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187. Even President Trump and his family have utilized GRATs to alleviate their transfer tax burden. *See* Annie Lowrey, *Trump's Shady Accounting Playbook for the Hyper-Rich*, ATLANTIC (Oct. 3, 2018), https://www.theatlantic.com/ideas/archive/2018/10/game-rigged-and-rich-cheat-anyway/572032/ [https://perma.cc/4CHR-7TNX] ("Among other tactics, the Trump family manipulated 'grantor-retained annuity trusts,' or GRATs. The Trumps put assets into these special vehicles and took annuity payments from them, before passing the assets on to their children. By grossly undervaluing the real estate in the GRATs—properties valued at $41 million for tax purposes in 1995 were worth close to a billion dollars when valued by banks a decade later—the family dodged hundreds of millions of dollars in taxes . . . .").

188. For overviews and suggested solutions to the intrafamily valuation discounting problem, see Mary Louise Fellows & William H. Painter, *Valuing Close Corporations for Federal Wealth Transfer Taxes: A Statutory Solution to the Disappearing Wealth Syndrome*, 30 STAN. L. REV. 895, 924, 927–28, 931 (1978); and James R. Repetti, *Minority Discounts: The Alchemy in Estate and Gift Taxation*, 50 TAX L. REV. 415, 481–82 (1995).

189. *See* Joseph M. Dodge, *Three Whacks at Wealth Transfer Tax Reform: Retained-Interest Transfers, Generation-Skipping Trusts, and FLP Valuation Discounts*, 57 B.C. L. REV. 999, 1001 (2016) ("The correct solution is to tax retained-interest transfers (broadly construed to include powers to revoke and possibilities of receiving back income or corpus) when the interest expires, but otherwise to tax transfers when made.").

enacted in 1976,[190] Congress retroactively repealed and replaced it in 1986.[191] The purpose of the GST tax is straightforward. It is designed to curtail taxpayers from transferring wealth to beneficiaries situated two or more generations younger than themselves[192] (in the parlance of the Code, these remote heirs are referred to as *skip persons*[193]). By making transfers to skip persons, taxpayers could delay estate tax application for decades and centuries to come, eroding the estate tax base at future generational levels.

Consider how the GST tax operates. Suppose a taxpayer has $20 million of Amazon stock. The GST tax can apply at three different points in time, referred to in the Code as direct skips, taxable distributions, and taxable terminations.[194] First, if the taxpayer immediately gifts or bequeaths this stock directly to skip persons (e.g., his grandchildren or more remote heirs such as great-grandchildren), in addition to incurring a gift or estate tax, the GST tax would apply and impose another layer of tax on the transfer.[195] Second, if the taxpayer establishes a lifetime trust for the benefit of a nonskip person (e.g., the taxpayer's daughter) funded with the same Amazon shares and, during the course of trust administration, the trustee distributes such shares to one or more skip persons (e.g., the taxpayer's grandchild or grandchildren), the transfer would constitute a taxable distribution and the then fair market value of the transferred property would be subject to GST tax.[196] Third, had the trust terminated at the demise of the nonskip person and the then assets of the trust were to pass to one or more skip persons, the transfer would constitute a taxable termination, and, as such, the then fair market value of the transferred property would be subject to GST tax.[197]

The Code presently provides that every taxpayer has a GST exemption amount equivalent to his or her lifetime exemption amount (currently, $11,200,000 and annually adjusted for inflation);[198] the GST tax exemption amount permits taxpayers to transfer this sum free of GST tax imposition.[199] Taxpayers commonly (i) leverage the GST tax exemption amount and (ii) employ the GST tax exemption amount to transfer wealth to multiple generations.

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190. Tax on Certain Generation-Skipping Transfers, Pub. L. No. 94-455, 90 Stat. 1879 (1976).

191. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085.

192. H.R. REP. NO. 1380-94, at 46–47 (1976); S. COMM. ON FIN. SUPPLEMENTAL REP. ON ADDITIONAL COMM. AMENDMENT TO TAX REFORM ACT OF 1976, H.R. 10612, S. REP. NO. 94-938, 94TH CONG., 2D SESS. 19, pt. 2 (1976); U.S. TREASURY DEP'T, TAX REFORM STUDIES AND PROPOSALS, at pt. 3 (Joint Publication of House Comm. on Ways & Means and Sen. Comm. on Fin., 91st Cong., 1st Sess. 1969), *reprinted in* STAFF OF HOUSE COMM. ON WAYS & MEANS, 94TH CONG., 2D SESS., BACKGROUND MATERIALS ON FEDERAL ESTATE AND GIFT TAXATION 183–309 (Comm. Print 1976).

193. I.R.C. § 2613(a) (2006).

194. I.R.C. § 2612(a), (b), (c) (1997).

195. *Id.* § 2612(c).

196. *Id.* § 2612(b).

197. *Id.* § 2612(a).

198. *Id.* § 2631(c).

199. *Id.*

GST Tax Exemption Leverage. A common tactic that taxpayers employ to minimize their transfer tax burdens is as follows: A taxpayer establishes an irrevocable trust; has the trustee secure a life insurance policy on the taxpayer's life; and then annually funds the trust, enabling it to keep premium payments current.[200] With respect to trust contributions, the taxpayer may allocate GST exemption amounts; this practice shelters the trust assets (and whatever they appreciate to) from future GST tax imposition. To illustrate, suppose a taxpayer establishes a trust and the trustee secures a $20 million life insurance policy on the taxpayer's life. Assume that the annual insurance premiums for this policy are $500,000 per year and the premiums vanish after ten years. If a GST exemption amount is allocated to each trust contribution (which is then used to cover the life insurance premium payment due), the trust will have a so-called zero inclusion ratio.[201] As a practical matter, this means that the $20 million of life insurance proceeds would be entirely sheltered from GST tax imposition; and, depending on the trust terms, the trust beneficiaries would not have to fear estate tax imposition on these proceeds for years, decades, and even centuries to come.

Multiple Generations. Congress designed the GST tax with the idea that an estate tax should be imposed at least once upon every generation.[202] At the time of GST enactment, Congress relied on the rule against perpetuities to preclude taxpayers from establishing trusts that extended multiple generations.[203] The rule against perpetuities essentially requires that property must vest within twenty-one years of a life in being lest the transfer be void *ab initio*.[204] Over the course of the past two decades, to attract capital investments, many state legislatures have

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200. *See* Robert J. Adler, *Impact of Generation-Skipping Tax on Life Insurance Trusts*, 24 EST. PLAN. 105 (1997) (explaining how to allocate GST exemption to life insurance trusts).

201. *See* Lawrence W. Waggoner, *Congress Promotes Perpetual Trusts: Why?* 9–10 (U. of Mich. L. & Econ., Working Paper No. 80, 2014), https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwj287qSqr7YAhXNRN8KHUZhDcUQFggnMAA&url=http%3A%2F%2Frepository.law.umich.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1190%26context%3Dlaw_econ_current&usg=AOvVaw3jIxX_ld6uM44MUQLE6ZG5&httpsredir=1&article=1190&context=law_econ_current [https://perma.cc/H7ZQ-TMF7].

202. *See* JOINT COMM. ON TAXATION, HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM (2015), https://www.jct.gov/publications.html?func=startdown&id=4744 [https://perma.cc/PZQ4-QGPT] ("Another significant change in 1976 was the imposition of a new transfer tax on generation-skipping transfers generally equal to the additional estate or gift tax that the decedent's children would have paid if the property had passed directly to the children instead of skipping that generation and passing to, for example, a donor's or decedent's grandchildren.").

203. Mary Louise Fellows, *Why the Generation-Skipping Transfer Tax Sparked Perpetual Trusts*, 27 CARDOZO L. REV. 2511, 2511, 2518–19 (2006); Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465 (2006); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005); Note, *Dynasty Trusts and the Rule Against Perpetuities*, 116 HARV. L. REV. 2588 (2003).

204. UNIF. STATUTORY RULE AGAINST PERPETUITIES WITH 1990 AMENDS. § 1 U.L.A. 15 (1990).

repealed or emasculated their rules against perpetuities.[205] This has opened up an opportunity for taxpayer exploitation of long-term and perpetual trusts that allow taxpayers' heirs to avoid estate tax imposition essentially into perpetuity (assuming that the appropriate GST exemption allocations have been made).[206]

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Akin to the need to have a vibrant and well-enforced gift tax, the integrity of the estate tax base also requires a vibrant and well-enforced GST tax. What is essential to bear in mind is that, in general, only the wealthiest of wealthy taxpayers consider having their wealth skip one or more generations, targeting their fortunes to descendants far down generational lines.[207] In the Automation Era, when wealth disproportionately inures to the owners of capital, the goal is simple: Congress should restrict this echelon's ability to safeguard its wealth from estate tax.

Achieving this goal, however, will take a bit of finesse. Two legislative measures could put an immediate end to the GST tax being upended. First, Congress should dramatically reduce the GST tax exemption amount to, say, $50,000. Putting a significant cap on the GST exemption amount would (i) end the largesse that the Code currently extends to the nation's wealthiest and (ii) curtail the ability of the nation's wealthiest from leveraging this exemption (while, at the same time, protecting minor gift giving and bequests to grandchildren or more remote heirs). Second, Congress should preclude GST exemption allocation with respect to gifts and bequests made to skip persons situated three or more generations removed from the transferor.[208] Adoption of both of these proposed measures would go a long way toward making the GST tax a meaningful tool to protect the integrity of the estate tax base and preclude it from being compromised.

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205. Mark L. Ascher, *But I Thought the Earth Belonged to the Living*, 89 TEX. L. REV. 1149 (2011); Grayson M.P. McCouch, *Who Killed the Rule Against Perpetuities?*, 40 PEPP. L. REV. 1291 (2013); Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000).

206. *See, e.g.*, Jeramie J. Fortenberry, *Use of Dynasty Trusts for Multigenerational Wealth Transfers*, 44 EST. PLAN. 35, 36–37 (2017) (explaining how the dynamics of GST trusts operate).

207. *See* Michelle Canerday & Robert Gerber, *Dynasty Trust Planning: A Tax-Efficient Way to Manage Wealthy Families' Assets*, INVESTMENT NEWS (2015), https://www.investmentnews.com/article/20150831/BLOG09/150839997/dynasty-trust-planning-a-tax-efficient-way-to-manage-wealthy [https://perma.cc/2BJL-RJ6Q] ("Wealthy families have been taking advantage of an extremely beneficial estate-planning tool that advisers should be aware of. It allows individuals to pass millions—and in some cases billions—of dollars to children, grandchildren and future generations without ever having to pay estate, gift or generation-skipping transfer taxes on such assets, so long as they remain in the dynasty trust. This strategy is often referred to [as] dynasty trust planning.").

208. Lawrence W. Waggoner, *Effectively Curbing the GST Exemption for Perpetual Trusts*, 2012 TAX NOTES TODAY 1267, 1267. Professor Waggoner's proposal is actually more complex. *See* Dennis I. Belcher et al., *Federal Tax Rules Should Not Be Used to Limit Trust Duration*, 136 TAX NOTES 832, 833 (2012) ("Waggoner suggests that the Internal Revenue Code be revised to prohibit the allocation of GST exemption to a trust that does not have a required ending date that is either (1) 21 years after the death of lives in being; (2) 90 years after creation; or (3) the death of the last living beneficiary who is no more than two generations younger than the settlor.").

B. Implications Associated with Proposed Estate Tax Reform

In the Automation Era, having a reimagined estate tax is imperative. In its absence, vast amounts of wealth can cascade down the generations tax-free. And while a reimagined estate tax alone will not lessen the need to reform the income and corporate tax regimes, it could put the Code on more secure financial footing.

The four foremost goals that a reimagined estate tax would likely achieve are as follows: (1) enhancing fiscal solvency, (2) fostering greater wealth equity, (3) making capital gains recognition more attractive, and (4) minimizing capital flight risk. The prospects for each goal's success are considered below.

1. Enhancing Fiscal Solvency

The federal government is in dire financial straits. In terms of absolute dollar amounts, the national debt has never been larger,[209] and entitlement spending is poised to swell as the nation's median age surges.[210] To address the pending financial calamity, cutting government spending is a possible option, but unless appropriately framed (e.g., the elimination of government waste), it is a politically unpopular choice. Raising taxes is another option, but unless it is appropriately framed (e.g., closing loopholes), it is also a politically unpopular choice.

In the Automation Era, estate tax proponents have the opportunity to frame the estate tax in a new fashion. They should refer to it as a deferred capital tax, designed to compensate for the multitude of tax benefits that inure to capital owners during their lifetimes.[211] Packaged in this fashion, a meaningful estate tax is a necessary recapture tax, recouping the financial benefits that the Code accords taxpayers—primarily those who are wealthy[212]—during their lifetimes.

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209. Kathryn Watson, *Under Trump's Watch, National Debt Tops $21 Trillion for First Time Ever*, CBS NEWS (Mar. 17, 2018), https://www.cbsnews.com/news/under-donald-trump-national-debt-tops-21-trillion-for-first-time-ever/ [https://perma.cc/WGH6-4ATB].

210. *See* CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: 2016 TO 2026, at 20 fig.1-3 (2016), https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51129-2016outlook.pdf [https://perma.cc/GKK2-56PS] (projecting increases in overall spending for Social Security and other health care–related programs); Romina Boccia, *Think the National Debt Is Large? Well, the Entitlements Deficit Is Even Bigger*, DAILY SIGNAL (2014), http://dailysignal.com/2014/08/06/think-national-debt-large-well-entitlements-deficit-even-bigger/[https://perma.cc/TV26-CKCM] (projecting increases in overall spending for Social Security and other health care–related programs).

211. *See* Revenue Act of 1916, *supra* note 138, and accompanying text; I.R.C. § 2010(c) (2018), *supra* note 139, and accompanying text; Eisenstein, *supra* note 18, and accompanying text.

212. *See* CONG. BUDGET OFFICE & JOINT COMM. ON TAXATION, THE DISTRIBUTION OF ASSET HOLDINGS AND CAPITAL GAINS 16 (2016), https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51831-Capital_Gains.pdf [https://perma.cc/2BMW-P2UR] ("The proportion of families in a given income group that owned capital assets in 2010 was larger for higher-income groups than for those with lower income. That pattern was especially pronounced for nonresidential assets. Among families earning $20,000 or less, 38 percent owned a personal residence, but only 13 percent held other capital assets. In the highest income group, nearly all families owned both a home and some other type of asset.").

In terms of revenue generation, consider the financial benefits that a reimagined estate tax would produce. Suppose that the estate tax exemption were lowered to $1 million (at this rate, approximately 10 percent of U.S. decedents would be subject to estate tax in 2016[213]) and the estate tax rate set at 60 percent. Applying these adjustments in 2013 (the last year that data is available), the number of estates that exceeded the $1 million threshold was approximately 259,699.[214] Assuming the mean net worth of those dying in this wealth echelon was $3,327,300,[215] the annual estate tax revenue generated would be approximately $362 billion (i.e., 259,699 [the number of estates that exceed the $1 million threshold] x .6 [proposed estate tax rate] x $2,327,300 [i.e., $3,327,300 average-sized estates – $1,000,000 exemption]). Few other Code reforms could yield such significant revenue generation.[216]

2. Fostering Greater Wealth Equity

The United States has a long history of wealth inequality, which automation may only exacerbate.[217] It is axiomatic that in the absence of a transfer tax regime, vast amounts of wealth can pass to future generations, perpetuating wealth inequality; by contrast, the presence of a vibrant estate tax—formulated in the manner proposed—can go a long way toward helping eradicate wealth disparities.

An example illustrates the virtues of utilizing a reimagined estate tax to help mitigate wealth disparities. Suppose Rich is a widower with $10 million in stock equity. Suppose further that Rich has two children, Bea and Kay, and that he dies after Congress has hypothetically reformed the estate tax (i.e., when the estate tax exemption is $1 million and the estate tax rate is 60 percent). Rather than Bea and Kay each inheriting $5 million, they would each inherit $2.3 million (($10 million – (($10 million – $1 million) x .6) / 2). This effective 55 percent reduction in receipts

213. According to the Survey of Consumer Finances, 2017, 10 percent of taxpayers had a net worth of $1,182,390 or more. PK, *United States Net Worth Brackets, Percentiles, and Top One Percent in 2017*, DQYDJ (Sept. 15, 2018), https://dqydj.com/net-worth-in-the-united-states-zooming-in-on-the-top-centiles/ [https://perma.cc/5HNF-CEYC]. This $1 million figure was affirmed by Professor Edward Wolff. *See* Jeff Sommer, *Retirees Face Up to the "Million-Dollar Illusion*,*"* CNBC (June 10, 2013), https://www.cnbc.com/id/100803102 [https://perma.cc/XDH6-K54B] ("Including a home in the calculations, such a family ranks in the top 10.1 percent of all households in the United States, according to Professor Wolff's estimates."); *see also* Jesse Bricker et al., *Changes in U.S. Family Finances from 2010 to 2013: Evidence from the Survey of Consumer Finances*, 100 FEDERAL RESERVE BULLETIN (2014), https://www.federalreserve.gov/pubs/bulletin/2014/pdf/scf14.pdf [https://perma.cc/25CT-82R9].

214. *See* Kenneth D. Kochanket et al., *Mortality in the United States, 2013*, 178 NCHS DATA BRIEF 1 (2014), https://www.cdc.gov/nchs/data/databriefs/db178.pdf [https://perma.cc/2BTW-QQLR] (reporting that 2,596,993 deaths were registered in the United States).

215. Bricker et al., *supra* note 213, tbl.2.

216. *See, e.g.*, Leonard E. Burman, William G. Gale & Jeffrey Rohaly, *Options for Reforming the Estate Tax*, 2005 TAX NOTES 379 (2005) (discussing estate tax reforms and the anticipated revenue associated with the adoption of the proposed reforms).

217. *See supra* Section III.B.2.

in Bea's and Kay's hands (and others who are similarly situated) would go a long way toward helping the United States lower its Gini coefficient.[218]

In terms of reducing overall wealth disparities, the estate tax is probably better suited to achieve this objective than any other tax regime. For example, the imposition of a heavier income tax burden might have behavioral effects that cause the economy to constrict or potentially trigger capital flight.[219] In contrast, a heavier estate tax burden could be targeted to apply to only those taxpayers who are in the top 10 percent of the wealth echelon, with few downside economic effects.[220]

3. Making Capital Gains Recognition More Attractive

One reason that capital gains rates are reportedly less than ordinary tax rates is to ameliorate the so-called lock-in effect—that is, when taxpayers choose to retain investments rather than sell them, bear the concomitant taxes, and use the after-tax proceeds to make more favorable investments.[221] With the preferential capital gains tax rate, taxpayers are presumed to be more inclined to sell their investments, which, as a consequence, allows the government to secure additional revenue.[222]

But the presence of a reimagined estate tax may serve as a sledgehammer of sorts to the lock-in effect. Currently, there is inconclusive evidence that the estate tax triggers taxpayer end-of-life consumption (i.e., a greater propensity to make purchases [e.g., vacations] that taxpayers might not otherwise make as a way of circumventing the government's ability to take away a portion of their family's wealth in the form of estate taxes);[223] however, if this theory is proven to be true and if the estate tax rate were raised and the lifetime exemption dollar threshold lowered, more consumption would therefore occur. To secure this additional consumption, taxpayers would, by necessity, have to liquidate investments and recognize corresponding capital gains and losses.

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218. *See* OFFICE OF MGMT. & BUDGET, *supra* note 102.

219. *See, e.g.*, Joseph Isenbergh, *The End of Income Taxation*, 45 TAX L. REV. 283, 290–97 (1990) (describing the impact that income taxes have on consumption and savings).

220. *See generally* David Joulfaian, *What Do We Know About the Behavioral Effects of the Estate Tax?*, 57 B.C. L. REV. 843, 848–49 (2016) (summarizing the research on the behavioral effects that the estate tax may have upon taxpayers).

221. *See supra* note 119.

222. An academic and political debate continues to rage, however, over whether a reduced capital gains tax rate truly entices income recognition and if its costs justify its benefits. *Compare* Martin Feldstein, Joel Slemrod & Shlomo Yitzhaki, *The Effects of Taxation on the Selling of Corporate Stock and the Realization of Capital Gains*, 94 Q. J. ECON. 777 (1980) (reducing capital gains rates can enhance revenue generation), *with* Gerald Auten & Charles Clotfelter, *Permanent vs. Transitory Effects and the Realization of Capital Gains*, 97 Q. J. ECON. 97 (1982) (drawing the opposite conclusion). *See generally* CONG. BUDGET OFFICE, *supra* note 119.

223. *See* CONG. BUDGET OFFICE, FEDERAL ESTATE AND GIFT TAXES 5–6 (2009), https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/108xx/doc10841/12-18-estate_gifttax_brief.pdf [https://perma.cc/B86A-TRCZ] ("The estate tax could have varying effects on consumption, saving, and work effort, depending on people's motives for leaving bequests to heirs. Consensus is lacking about which motives predominate or even about whether people work and save more or less as a result of estate and gift taxes.").

4. Minimizing Capital Flight Risk

In the twenty-first century, the world exists in a global economy.[224] Goods and services are exported overseas, and conversely, goods and services are imported here. Every industrial country is bound to industrial counterparts sprinkled across the globe. The economic network is deep, entrenched, and intertwined.[225]

In this global environment, orchestrating appropriate tax rates is challenging. In yesteryear, in the absence of unanticipated circumstances (e.g., a war), Congress could decide how much revenue it needed to meet its expenditures and set tax rates appropriately. That was truly a twentieth-century phenomenon. In the twenty-first century, Congress cannot blindly raise tax rates without a close eye to what other nations' tax rates are.[226] Failure to exercise this sensitivity creates a danger that capital will migrate to lower-tax jurisdictions.[227]

And this is exactly why a reimagined estate tax is an idea worth considering: it may help mitigate the capital flight risk. Through their families, jobs, and social institutions, taxpayers develop deep-seated connections to their domiciles. As such, it's truly a rarity for taxpayers to relinquish their citizenship.[228] Combine national affinity with the fact that none of us are immortal, and—voilà!—estate taxes are essentially unavoidable. That being the case, Congress can use the revenue that the estate tax generates as a tool to trim other tax rates (in particular, the corporate and capital gains tax rates) and thereby attract more capital to the nation's shores.

CONCLUSION

Sometimes people and institutions reinvent themselves. Consider J. K. Rowling, the author of the renowned Harry Potter series. She was a single mother who had never written professionally before, but through hard work and

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224. *See generally* Jacob J. Lew, *America and the Global Economy*, FOREIGN AFF. (2016), https://www.foreignaffairs.com/articles/united-states/2016-04-11/america-and-global-economy [http://perma.cc/8NNN-SW6T]; FREDERICK S. WEAVER, THE UNITED STATES AND THE GLOBAL ECONOMY: FROM BRETTON WOODS TO THE CURRENT CRISIS (2011).

225. WEAVER, *supra* note 224; Lew, *supra* note 224.

226. *See, e.g.*, Gene Epstein, *Cut the Top U.S. Corporate Tax Rate to 22%*, BARRON'S (Nov. 26, 2016), https://www.barrons.com/articles/cut-the-top-u-s-corporate-tax-rate-to-22-1480137247 [http://perma.cc/KD98-EKHB] (citing the need to be sensitive to other countries' tax rates).

227. *See, e.g.*, Laura Tyson, *America's High Corporate Tax Rate Hurts Everyone*, BUS. INSIDER (May 4, 2012), http://www.businessinsider.com/americas-high-corporate-tax-rate-hurts-everyone-2012-5 [https://perma.cc/JA8Q-GXSS] ("In a world of mobile capital, corporate-tax rates matter, and business decisions about how and where to invest are increasingly sensitive to national differences. America's relatively high rate encourages US companies to locate their investment, production, and employment in foreign countries, and discourages foreign companies from locating in the US, which means slower growth, fewer jobs, smaller productivity gains, and lower real wages.").

228. *See* Robert W. Wood, *More Americans Give Up Citizenship in Reverse Trump Bump*, FORBES (Feb. 10, 2017), https://www.forbes.com/sites/robertwood/2017/02/10/more-americans-give-up-citizenship-in-reverse-trump-bump/#5ae3bd11503d [https://perma.cc/67X5-46QD] (noting that even though the number of U.S. citizens renouncing their citizenship is at an all-time high, it is still relatively miniscule (i.e., 5,411 for 2016)).

perseverance, she successfully transformed herself into a best-selling author.[229] Consider, too, the March of Dimes. This charity was established to rid the country and the world of polio. Once this objective was achieved, rather than being relegated to obscurity, the March of Dimes set out to eliminate the occurrence of premature births and related birth defects.[230]

Just like people and institutions, taxes and their purposes can be thoughtfully reimagined. And, in the case of the estate tax, the time is right to do so. For nearly a century, the estate tax's focus has been on revenue generation and narrowing wealth inequities. While these are commendable goals, the estate tax has gradually lost much of its political allure. Indeed, over the course of the past three decades, there have been repeated calls for its repeal;[231] notwithstanding its retention, Congress has narrowed its application to an anemic sliver of the nation's overall population.[232]

This is now the appropriate time for Congress to reconfigure the estate tax and assign it a new purpose. A redesigned and comprehensive estate tax would serve as a viable vehicle to tax the income that capital generates. Due to globalization, imposing a direct tax on capital income is inherently problematic; imposing heavier taxes on income derived from labor is counterproductive insofar as it might further diminish its use. Imposing an estate tax (which is tantamount to a capital tax) avoids the globalization problem and, at the same time, reduces the likelihood of having to resort to heavier taxes being imposed on labor. In the twenty-first century, where automation is quickly becoming ubiquitous in every sphere of human existence, the estate tax is thus not only an attractive mode of taxation but also a necessary one.

229. *See generally J. K.Rowling*, WIKIPEDIA, https://en.wikipedia.org/wiki/J._K._Rowling [https://perma.cc/MP9H-ZBBJ] (last visited Feb. 4, 2019).

230. *See generally A History of the March of Dimes*, MARCH OF DIMES, https://www.marchofdimes.org/mission/a-history-of-the-march-of-dimes.aspx [https://perma.cc/U9WG-7C6Y] (last visited Feb. 4, 2019).

231. *See* Koba, *supra* note 33 and accompanying text; McCaffery, *supra* note 34 and accompanying text.

232. *See* GATES & COLLINS, *supra* note 36 and accompanying text.

APPENDIX A

TAX YEAR	CAPITAL GAINS TAX RECEIPTS ($MILLIONS)	PAYROLL TAX RECEIPTS ($MILLIONS)	% OF CAPITAL GAINS TAX RECEIPTS RELATIVE TO PAYROLL TAX RECEIPTS
1980	12,459	157,803	12.7
1981	12,852	182,720	14.2
1982	12,900	201,498	15.6
1983	18,700	208,994	11.2
1984	21,453	239,376	11.2
1985	26,460	265,163	10.0
1986	52,914	283,901	5.4
1987	33,714	303,318	9.0
1988	38,866	334,335	8.6
1989	35,258	359,416	10.2
1990	27,829	380,047	13.7
1991	24,903	396,015	15.9
1992	28,983	413,688	14.3
1993	36,112	428,299	11.9
1994	36,243	461,475	12.7
1995	44,254	484,473	10.9
1996	66,396	509,414	7.7
1997	79,305	539,371	6.8
1998	89,069	571,831	6.4
1999	111,821	611,833	5.5
2000	127,297	652,852	5.1
2001	65,668	693,967	10.6
2002	49,122	700,760	14.3
2003	51,350	712,978	13.9
2004	73,213	733,407	10.0
2005	102,174	794,125	7.8
2006	117,793	837,821	7.1
2007	137,141	869,607	6.3
2008	68,791	900,155	13.1
2009	36,686	890,917	24.3
2010	55,017	864,814	15.7
2011	56,682	818,792	14.4
2012	91,178	845,314	9.3
2013	98,798	947,820	9.6
2014	139,127	1,023,458	7.4

Sources: OFFICE OF MGMT. & BUDGET, HISTORICAL TABLES tbl.2.1 (fiscal year 2018), *available at* https://www.whitehouse.gov/omb/budget/Historicals;

OFFICE OF TAX ANALYSIS, DEP'T OF TREASURY, TAXES PAID ON CAPITAL GAINS FOR RETURNS WITH POSITIVE NET CAPITAL GAINS, 1954–2014 (2016), *available at* https://www.treasury.gov/resource-center/tax-policy/tax-analysis/documents/taxes-paid-on-capital-gains-for-returns-with-positive-net-capital-gains.pdf.