

## Ghosts of 1932: The Lost History of Estate and Gift Taxation

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## GHOSTS OF 1932: THE LOST HISTORY OF ESTATE AND GIFT TAXATION

by

*Jeffrey A. Cooper\**

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**ABSTRACT**

In 1932, the United States confronted a bleak economic landscape. Amid the financial carnage caused by the 1929 stock market crash and the ensuing Great Depression, economic activity had ground to a halt, tax revenues had plunged, and the nation's debt had soared. The declining government revenues and soaring debt threatened both the viability of American industry and the stability of the nation's credit rating. Congress took bold action that year, enacting a massive tax bill ("the Revenue Act of 1932") designed to balance the federal budget without further stifling economic growth.

As has been true through nearly a century of tax legislation, Congress included estate and gift taxes as a component of the Revenue Act of 1932. The architects of the 1932 estate and gift tax provisions made a number of crucial legislative choices that fateful year, implicating issues of tax policy that remain as relevant today as they were some eighty years ago. Yet, histories of American taxation typically devote frustratingly little analysis to the specific estate and gift tax provisions included in the Revenue Act of 1932. As a result, despite their continued relevance, the details of key decisions, and the motivations of those who made them, effectively have been lost to history.

In this paper, I seek to reclaim this lost history of estate and gift taxation. While the ensuing analysis certainly will enable us to more fully appreciate the events of 1932 and evaluate the actions Congress took in that fateful year, my inquiry is not of mere historical interest. Rather, the choices made in 1932 have helped shape the fundamental structure of U.S. estate and gift taxation for nearly eight decades, including our modern estate and gift tax code. Accordingly, understanding the events of 1932 can help us to understand why our estate and gift taxes operate the way they do as well as help inform future debate about the optimal structure of our wealth transfer tax system.

## INTRODUCTION

In 1932, the United States confronted a bleak economic landscape. Amid the financial carnage caused by the 1929 stock market crash<sup>1</sup> and the ensuing Great Depression,<sup>2</sup> economic activity had ground to a halt,<sup>3</sup> tax revenues had plunged,<sup>4</sup> and the nation's debt had soared.<sup>5</sup> The declining government revenues and soaring debt threatened both the viability of American industry<sup>6</sup> and the stability of the nation's credit rating.<sup>7</sup>

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1. In 1929, the U. S. stock market crashed, beginning a multi-year decline that would result in the market losing 86.2% of its value. Floyd Norris, *Stocks Surge, Ending Streak Of Six Weeks With Losses*, N.Y. Times, Oct. 12, 2002, at C1, available at 2002 WLNR 4048795. For a history of the market decline and its aftermath, see John Kenneth Galbraith, *The Great Crash 1929* (Houghton Mifflin Co. 1997) (1955).

2. During much of the 1930's, the American economy endured "the most devastating economic collapse in modern history," a contraction so severe and so prolonged that it has come to be known simply as the Great Depression. T. H. Watkins, *The Great Depression: America in the 1930's* 23 (1993).

3. Between 1929 and 1932, the U.S. economy "went into a fatal tailspin" as some 5,000 banks and 50,000 other businesses went bankrupt, unemployment rates soared from 3% to 25% and manufacturing activity declined by more than 50%. Don Nardo, *Introduction to The Great Depression* 3, 13 (Don Nardo ed., 2000). The economic carnage was felt even more profoundly in major American industries. For example, by 1933, domestic automobile production had declined by 80%, while U.S. steel mills were operating at a mere 12% of capacity. William K. Klingaman, *1929: The Year of the Great Crash* 337 (1989).

4. In Senate hearings, Treasury Secretary Mills projected that tax revenues would decline by nearly 44% from \$4.18 billion in fiscal 1930 to \$2.38 billion in 1932. An Act to Provide Revenue, Equalize Taxation and for Other Purposes: Hearing on H. R. 10236, Before the S. Comm. on Finance, 72nd Cong. 2 (1932) [hereinafter 1932 Senate Hearings] (statement of Ogden L. Mills, Sec'y of the Treasury of the United States). Mills characterized the situation as a "collapse in our revenue system." *Id.* at 2.

5. Although the federal government enjoyed a budget surplus in fiscal 1930, the national budget deficit for fiscal 1931 ultimately exceeded \$900 million—an amount 400% larger than Treasury Secretary Andrew Mellon had forecast at midyear. Harris Gaylord Warren, *Herbert Hoover and the Great Depression* 160 (1959). The deficits for 1932 and 1933 were projected to be even worse, and were expected to add an additional \$3.2 billion to the nation's debt. *Id.* at 159.

6. *Id.* at 159 ("The government could not borrow much more without destroying confidence, denuding commerce and industry of their resources, extending unemployment, and demoralizing agriculture.").

7. See 1932 Senate Hearings, *supra* note 4, at 48 (statement of Ogden L. Mills, Sec'y of the Treasury of the United States) (warning Senators that if they allowed the national debt to grow any further, the result would be "a rapid and precipitous decline in the value of all Government securities . . .").

Congress took bold action that year, enacting a massive tax bill<sup>8</sup> (“the Revenue Act of 1932”) designed to balance the federal budget without further stifling economic growth. By securing additional revenue through a combination of increased tax rates and exploitation of new forms of tax revenue, Congress sought to bring the United States out of the Great Depression with both its economy and its credit rating intact.<sup>9</sup>

As has been true through nearly a century of tax legislation,<sup>10</sup> Congress included estate and gift taxes as a component of the Revenue Act of 1932. Yet, histories of American taxation typically devote frustratingly little analysis to these specific estate and gift tax provisions. Leading authorities cast these provisions as simple and straightforward ones: estate tax rates were increased as a means of generating additional revenue and preserving the nation’s credit rating,<sup>11</sup> while a gift tax was enacted to prevent wealthy taxpayers from circumventing the estate tax by making *intervivos* gifts.<sup>12</sup> These sources also note the prevailing populist sentiment underlying these changes, as Congress took aim at the nation’s increasingly dramatic concentrations of family wealth.<sup>13</sup> The standard analysis typically ends there.

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8. Revenue Act of 1932, ch. 209, 47 Stat. 169 (1932).

9. Although “practically all whom [President] Hoover listened to or read agreed that an increase in taxes was needed” to help balance the budget, Martin L. Fausold, *The Presidency of Herbert C. Hoover* 159 (1985), the decision to raise taxes was, and remains, controversial. For a sampling of contemporaneous opinions, see Sidney Ratner, *American Taxation: Its History as a Social Force in Democracy* 447 (1942). For citations to numerous sources indicating that the U.S. economy began a dramatic rebound in mid-1932, see Herbert Hoover, *The Memoirs of Herbert Hoover: The Great Depression 1929-1941* 164-166 (1952). For a modern critique, see Jim Powell, *FDR’s Folly: How Roosevelt and His New Deal Prolonged the Great Depression* 49 (2003) (contending that the Revenue Act of 1932 resulted in further contraction of the U.S. economy, exacerbating unemployment by stifling consumer spending and discouraging business investment). See also *infra* Part II.A.3 (discussing Congress’s decision to attempt to balance the federal budget for 1933).

10. As discussed more fully *infra* Part I, the modern estate tax was enacted in 1916 and has been a fixture in the Internal Revenue Code ever since, while gift taxes were imposed from 1924 through 1926 and again from 1932 until the present day.

11. See, e.g., Ratner, *supra* note 9, at 447 (stating that the Act “attempted to balance the federal budget and uphold the national credit . . .”); Randolph E. Paul, *Taxation in the United States* 157 (1954) (estate and gift taxes were proposed to raise substantial revenue).

12. Ratner, *supra* note 9, at 449 (*noting* that gift tax proponents “regarded the gift tax as necessary to prevent wholesale avoidance of the federal estate tax . . .”). For additional authority on this point, see *infra* notes 153 to 154 and accompanying text.

13. Ratner, *supra* note 9, at 449-50 (indicating that proponents of the Act intended to “prevent the concentration of the national wealth in the hands of a few

This prevailing characterization, while accurate, is woefully incomplete. Congress did indeed expand gift and estate taxation in 1932 with the goal of both raising revenue and curtailing concentration of wealth. However, a deeper analysis reveals a far more interesting story. In crafting the estate and gift tax provisions of the Revenue Act of 1932, Congress made a number of crucial legislative choices, implicating issues of tax policy that remain as relevant today as they were some eighty years ago.<sup>14</sup> Yet, despite their continued relevance, the details of significant legislative choices, and the motivations of those who made them, effectively have been lost to history.

In this paper, I seek to reclaim this lost history of estate and gift taxation. While the ensuing analysis certainly will enable us to more fully appreciate the events of 1932 and evaluate the actions Congress took in that fateful year, my inquiry is not of mere historical interest. Rather, the choices made in 1932 have helped shape the fundamental structure of U.S. estate and gift taxation for nearly eight decades, including our modern estate and gift tax code. Accordingly, understanding the events of 1932 can help us to understand why our estate and gift taxes operate the way they do as well as help inform future debate about the optimal structure of our wealth transfer tax system.<sup>15</sup>

This paper is organized in three major parts. In Part I, I provide a brief summary of estate and gift taxation through the early 20th century, culminating with an analysis of the core estate and gift tax provisions of the Revenue Act of 1932. In Part II, I detail the events of 1932, both exploring the motivation of key proponents of estate taxation, most notably Iowa Congressman C. William Ramseyer,<sup>16</sup> and analyzing the tax legislation they created. In Part III, I discuss three significant policy decisions that helped shape the 1932 Act, evaluating both the historical impact and the continued relevance of these crucial policy choices.

Through this analysis, I seek to shed a new light on a key era in the history of American estate and gift taxation, analyzing long-forgotten actions of long-forgotten actors and gleaning distinctly modern lessons from these ghosts of 1932.

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families,” and “lighten the tax burden of the masses”); Paul, *supra* note 11, at 157 (estate and gift taxes prevented undue concentration of wealth).

14. Attributing these crucial decisions to “Congress” as a whole may overstate the actual involvement of most members of the legislature. As discussed *infra* Part II.C, the estate and gift tax provisions of the Revenue Act of 1932 were produced by a limited group of draftsmen and given relatively superficial consideration by many members of Congress.

15. For purposes of this Article, the term “wealth transfer taxes” refers to the federal estate and gift taxes.

16. For a more detailed discussion of Ramseyer, his background and his vision for U.S. estate taxation, see *infra* Part II.B.

## I. THE EARLY HISTORY OF ESTATE AND GIFT TAXES

In this Part I, I briefly review the history of federal estate and gift taxation prior to 1932.<sup>17</sup>

### A. 1797 to 1916

Federal estate taxes scarcely existed during the eighteenth and nineteenth centuries.<sup>18</sup> On just three brief occasions did Congress resort to estate taxation as a means of collecting revenue: from 1797 to 1802,<sup>19</sup> from 1862 to 1872,<sup>20</sup> and again from 1898 to 1902.<sup>21</sup> Congress proposed and implemented all three of these taxes as emergency measures to raise revenue in times of war or threat of war.<sup>22</sup> Consistent with that rationale, Congress

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17. For a more comprehensive legislative history of history of federal estate and gift taxation, see Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 *Tax L. Rev.* 223 (1956) (detailing the history of federal death taxes); see also Staff of J. Comm. on Taxation, 107th Cong., *Description and Analysis of Present Law and Proposals Relating to Federal Estate and Gift Taxation* 10-18 (Comm. Print 2001) (JCX-14-01) [hereinafter *Description and Analysis*] (providing a legislative history of federal estate taxes from 1797 to 2001).

18. Sacrificing accuracy in the name of readability, I use the term “federal estate taxes” to refer generically to federal taxes collected upon the occasion of a taxpayer’s death, without regard to the method of computation and payment of such taxes. Although such distinctions are not relevant for purposes of this Article, many of the taxes generically referred to herein as “estate taxes” technically should be classified as “inheritance taxes,” “transfer taxes,” or simply “death taxes.”

19. *An Act Laying Duties on Stamped Vellum, Parchment, and Paper*, ch. 11, 1 Stat. 527 (1797), *repealed by* *An Act to Repeal the Internal Taxes*, § 1, 2 Stat. 148, 148 (1802).

20. *An Act to Provide Internal Revenue to Support the Government and to Pay Interest on the Public Debt*, § 110, 12 Stat. 432, 483 (1862), *modified by* *An Act to Provide Wages and Means for the Support of the Government, and for Other Purposes*, § 1, 13 Stat. 218, 218 (1864) and by *An Act to Provide Internal Revenue to Support of the Government, to Pay Interest on the Public Debt, and for Other Purposes*, § 126, 13 Stat. 223, 285-91 (1864), *repealed in part by* *An Act to Reduce Internal Taxes, and for Other Purposes*, § 1, 16 Stat. 256, 256 (1870), and *repealed in full by* *An Act to Reduce Duties on Imports, and to Reduce Internal Taxes, and for Other Purposes*, § 36, 17 Stat. 230, 256 (1872).

21. *An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes*, § 29, 30 Stat. 448, 464-65 (1898), *repealed by* *An Act to Repeal War-Revenue Taxation, and for Other Purposes*, Pub. L. No. 57-67, ch. 500, 32 Stat. 96, 96 (1902).

22. *Description and Analysis*, supra note 17, at 10-11 (indicating that the first three federal estate taxes were used to finance a naval buildup in response to strained U.S.-French relations, the U.S. Civil War, and the Spanish-American War).



repealed each of these taxes once the associated military exigency had passed.<sup>23</sup>

In 1916, Congress again turned to estate taxes to fund another looming military conflict, enacting a new estate tax just prior to U.S. entry into World War I.<sup>24</sup> However, the fourth act in the nation's story of federal estate taxation did not end as had the prior three. Rather, even after the war had ended and the fiscal demands of wartime had been replaced by budget surpluses,<sup>25</sup> the federal estate tax remained in place, as it has ever since.

The 1916 estate tax thus was fundamentally different than prior taxes. Nominally a wartime measure, it ultimately embodied loftier ambitions. It became a core element of the nation's increasingly progressive tax system, an agent of social change embracing the ideals of Theodore Roosevelt<sup>26</sup> and Andrew Carnegie<sup>27</sup> and designed to help reverse the inequitable division of wealth resulting from the Gilded Age.<sup>28</sup>

#### B. 1917 to 1926

The first few years in the history of the modern U.S. estate tax were relatively uneventful ones. In 1917, to meet pressing wartime revenue needs,

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23. *Id.*

24. An Act to Increase the Revenue, and for Other Purposes, Pub. L. No. 64-271, § 1, 39 Stat. 756, 756-57 (1916).

25. Paul, *supra* note 11, at 132.

26. In his 1906 State of the Union Address, Roosevelt, the 26th President of the United States, urged Congress to enact a national estate tax. Theodore Roosevelt, President of the United States, 6th Annual Message to Congress (Dec. 3, 1906), (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29547>). In an oft-quoted phrase, Roosevelt argued that “[t]he man of great wealth owes a peculiar obligation to the State, because he derives special advantages from the mere existence of government.” *Id.* For more on Roosevelt's life, see generally Nathan Miller, *Theodore Roosevelt: A Life* (1992).

27. A prominent American industrialist and generous philanthropist, Carnegie contended that estate taxation was “the wisest” of all possible forms of taxation. Andrew Carnegie, *Wealth*, *North American Review*, June 1889, *reprinted in* *The Andrew Carnegie Reader*, at 129, 136 (Joseph Frazier Wall ed., 1992). Carnegie's pronouncements on the subject of estate taxation have become a mainstay of American political discourse. See *infra* note 55 and accompanying text. For more on Carnegie's life, see generally David Nasaw, *Andrew Carnegie* (2006).

28. See William H. Gates, Sr. & Chuck Collins, *Wealth and Our Commonwealth: Why America Should Tax Accumulated Fortunes* 41 (2002) (“Early in the twentieth century, Gilded Age corruption and inequality, powerful and popular social movements, and growing moral misgivings within the wealthy elite all converged on America's political stage. Out of that convergence came America's first lasting estate tax.”).

Congress increased estate tax rates.<sup>29</sup> The following year, Congress responded to the war's end by modestly reducing those rates.<sup>30</sup>

This relative stability would be short-lived. The 1920's brought a major battle over the future of estate taxation, with opposing factions alternatively advocating for the tax's immediate elimination or its dramatic expansion. In 1924, those advocating expansion carried the day, as legislation altered the tax in three major ways. First, it increased marginal tax rates, raising the top rate from 25% to 40%.<sup>31</sup> Second, it introduced a new gift tax, designed in significant part to prevent taxpayers from evading the estate tax by making *intervivos* gifts.<sup>32</sup> Third, it created a new estate tax credit for state death taxes paid, a change which effectively reserved 25% of estate tax revenues for the states.<sup>33</sup>

Just two years later, the tide of estate taxation shifted again as opponents of the estate tax, led by Treasury Secretary Andrew Mellon,<sup>34</sup> reorganized after their 1924 defeat and coordinated a "propaganda campaign of considerable magnitude" against the estate tax.<sup>35</sup> While these vocal opponents didn't succeed in convincing Congress to enact a full repeal, they achieved considerable traction towards their goal. Legislation enacted in 1926 restored the pre-1924 tax regime in three major ways: reducing the top marginal rate from 40% to 20%,<sup>36</sup> increasing each taxpayer's lifetime exemption from estate tax from \$50,000 to \$100,000,<sup>37</sup> and repealing the 1924 gift tax.<sup>38</sup> In addition, the 1926 legislation also fundamentally altered the relationship between federal and state estate taxes by increasing the maximum state death tax credit from 25% to 80% of the federal tax otherwise due.<sup>39</sup> The end result of these legislative changes was an estate tax that impacted significantly fewer taxpayers and generated dramatically lower federal revenues. For Secretary Mellon, it was "one of the happiest days of his life."<sup>40</sup>

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29. Description and Analysis, *supra* note 17, at 11.

30. *Id.* at 12.

31. Revenue Act of 1924 § 301(a).

32. *Id.* §§ 319-324.

33. *Id.* § 301(b).

34. Secretary Mellon was not exactly a neutral observer on issues of taxation. In 1924, he had paid \$1,900,000 in annual income taxes, the fourth highest amount paid by any American that year. W. Elliot Brownlee, *Federal Taxation in America: A Short History* 73 n. 13 (2d ed. 2004).

35. Paul, *supra* note 11, at 138.

36. Revenue Act of 1926 § 301(a).

37. *Id.* § 303(a)(4).

38. *Id.* § 1200.

39. *Id.* § 301(b).

40. Paul, *supra* note 11, at 139.

C. 1927 to 1932

During this period, the federal estate tax remained largely static. The most dramatic changes occurred on the state level, as those jurisdictions began to fully comprehend the potential impact of the state death tax credit and altered their state death tax regimes to maximize this new revenue source.<sup>41</sup>

By the early 1930's it thus might have seemed that the modern estate tax had achieved stability. That impression would be short-lived. In 1932, Congress set U.S. estate taxation down yet another new path by increasing estate tax rates across-the-board,<sup>42</sup> restoring the 45% top marginal rate,<sup>43</sup> lowering the exemption from \$100,000 to \$50,000<sup>44</sup> and reenacting the federal gift tax.<sup>45</sup> At the same time, seeking to ensure that the federal government, and not the states, would capture all of the incremental revenue generated from these changes, Congress froze the state death tax credit at its prior, 1926, level.<sup>46</sup> The result was a federal estate tax regime more robust than any in prior American history and capable of generating far greater federal revenues than ever before.

As discussed later in this Article,<sup>47</sup> in designing the estate and gift tax provisions of the Revenue Act of 1932, Congress made several questionable legislative choices and introduced considerable inefficiencies into the transfer tax regime. Those poor decisions were in considerable part a response to forces that transcended well beyond issues of estate and gift taxation. Congress debated the Revenue Act of 1932 during a very unique time in history, and powerful political and social forces impacted legislators' viewpoints and ultimately shaped their legislative choices. Thus, before turning in greater detail to a critical analysis of the choices made in 1932, it is necessary to explore the relevant political backdrop. That exploration follows in Part II.

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41. I have analyzed these state developments at length in an earlier Article. Jeffrey A. Cooper, *Interstate Competition and State Death Taxes: A Modern Crisis in Historical Perspective*, 33 *Pepp. L. Rev.* 835, 859-61 (2006).

42. Revenue Act of 1932 § 401(b).

43. *Id.*

44. *Id.* § 401(c).

45. *Id.* § 501 *et seq.*

46. *Id.* § 402(a).

47. See *infra* Part III.

## II. POLITICS OF 1932

### A. *The Background*

#### 1. *Economic Disparity*

The decade of the roaring 1920s had resulted in a markedly unequal distribution of American wealth. Between 1921 and 1928, the number of Americans with annual incomes over \$1,000,000 increased from 21 to 511, while the number earning between \$500,000 and \$1,000,000 annually increased from 63 to 983.<sup>48</sup>

Then the bubble burst. As the nation spiraled towards economic depression, a populist backlash developed against the wealthiest Americans, their excessive lifestyles and speculative investments being blamed for much of the economic carnage that followed. Proponents of increased taxation thus urged that the Revenue Act of 1932 should be designed not merely to raise revenue but should also “have for its purpose the redistribution of a part of these tremendously large private fortunes.”<sup>49</sup>

The populist rhetoric advocated imposing significant estate taxes on these great fortunes, in tones that grew increasingly scathing. As one Congressman contended: “After allowing the big boys to play with their money during their lifetime and after allowing them the pleasure and pride of piling up dollar on dollar, while living, a generous estate tax should be levied on their death.”<sup>50</sup> Characterizing wealthy Americans as the “tax dodgers of the higher brackets,”<sup>51</sup> proponents of the 1932 estate tax saw in America’s great fortunes “a menace to the security and continuation of American institutions.”<sup>52</sup>

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48. 75th Cong. Rec. 6159 (1932) (statement of Rep. Rankin).

49. 75th Cong. Rec. 5906 (1932) (statement of Rep. Swing).

50. *Id.*

51. 75th Cong. Rec. 5889 (1932) (statement of Rep. LaGuardia).

52. 75th Cong. Rec. 5897 (1932) (statement of Rep. Swing). The concept of concentrated wealth as a “menace” to American society became a common rallying-cry in the Congress. See, e.g., 75th Cong. Rec. 6257 (1932) (Statement of Rep. Davis) (“the greatest menace to America to-day is the vast accumulation of wealth into the hands of a few and the tremendous power which they wield...”); 75th Cong. Rec. 6476 (1932) (statement of Rep. Simmons) (“The greatest menace this country faces is the accumulation of great wealth in the hands of a few individuals.”). While the concentration of American wealth may well have been highly undesirable, those Congressman who considered it the “greatest menace” to America in 1932 perhaps should have paid greater attention to international affairs. See Warren, *supra* note 5, at 161 (discussing Hitler’s rise to power in Germany and increased military tensions between China and Japan).

Even the more moderate voices on the issue conceded that amid the growing economic crisis, taxing the wealthy was simply a lesser evil than seeking to raise revenue from poorer Americans struggling to survive in the Great Depression. As one Congressman concluded: “I do not want to ‘soak’ anybody, but it would be better to soak the rich than to starve the poor.”<sup>53</sup> Another stressed the same concept even more pointedly, contending that taxing decedent’s estates was preferable to “taxing the school boy’s lunch basket and widow’s bowl of soup.”<sup>54</sup>

Yielding to this growing public sentiment, and paying requisite homage to the populist writings of Andrew Carnegie,<sup>55</sup> the Congress of 1932 set out to erode America’s most significant family fortunes.

## 2. *The Politics of Crisis*

While debating the Revenue Act of 1932, Congress was operating in a highly-charged political climate. As the nation spiraled deeper into depression and closer towards upcoming elections, members of Congress missed no opportunity to extract maximum political value from the daunting challenges facing the nation, while an anxious administration urged the legislature to produce less political rhetoric and more decisive action. The resulting environment made for great political theatre but was not necessarily conducive to reflective deliberation.<sup>56</sup> Compounding these woes was the fact that Congress expended much of its legislative time and energy debating an unsuccessful proposal to enact a comprehensive national sales tax rather than

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53. 75th Cong. Rec. 6258 (1932) (statement of Rep. Davis).

54. 75th Cong. Rec. 6171 (1932) (statement of Rep. Cannon).

55. Albert Atwood, a staff writer for the Saturday Evening Post, once observed how proponents of increased taxation seemingly always invoked Andrew Carnegie in support of their efforts. National Tax Association, *Inheritance and Estate Taxes*, Proceedings of Preliminary Conference and of the Sixth Session of the Seventeenth National Tax Conference 106 (1925) (asking rhetorically: “Did any of you ever read a speech in Congress . . . in fulsome favor of higher death duties, that did not begin and generally end by quoting Andrew Carnegie in their favor?”). Members of the Seventy-second Congress lived up to Atwood’s expectations. See, e.g., 75th Cong. Rec. 5842 (1932) (statement of Rep. Selvig) (calling Carnegie “an intelligent, enthusiastic, and persistent advocate of estate and inheritance taxes”); 75th Cong. Rec. 5896 (1932) (statement of Rep. Ramseyer) (quoting from Carnegie’s writings); 75th Cong. Rec. 6257 (1932) (statement of Rep. Davis) (calling Carnegie “a real patriot” and quoting from his writings).

56. See Paul, *supra* note 11, at 155 (characterizing the tenor of debate in the House as “bickering” and indicating that House “leaders deplored the lack of a proper frame of mind for legislation”). For further discussion of this issue, see *infra* note 61 and accompanying text.

carefully considering key details of the income and estate tax legislation they ultimately enacted.

Congress had responded aggressively to the economic challenges presented by World War I. Although prosperity had followed the war, the tide of fortune had quickly turned again as the nation entered the Great Depression. By 1932, significant budgetary surpluses had morphed into major shortfalls, and the United States confronted the largest budget deficit of any country on Earth.<sup>57</sup> The prevailing sentiment in Congress was that the resulting economic challenges were as great as the military ones faced during the (First) World War. Stoking the passions of an election year, Congress presented itself to be once again leading a nation at war, this time waging “a war against ruin, starvation and despair” rather than confronting a military foe.<sup>58</sup>

Amid this backdrop, the Administration pressured Congress to act with haste. This sense of urgency was reflected in Treasury Secretary Mills’s growing frustration with Congress for failing to enact tax legislation more rapidly. Mills lambasted Congress for the slow pace of legislation, arguing that in a time of war Congress “would pass an emergency revenue bill in less than a week; and this emergency is greater than war.”<sup>59</sup> President Hoover shared Mills’s frustration and repeatedly accused Congressional leaders of dragging out the tax debate for political ends.<sup>60</sup>

Resisting the administration’s repeated calls for more urgent legislation, Congress did hold hearings and extensively debated major elements of the tax act. However, much of that debate concerned the merits

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57. 75th Cong. Rec. 5892 (1932) (statement of Rep. Watson).

58. 75th Cong. Rec. 5900 (1932) (statement of Rep. Huddleston). See also 75th Cong. Rec. 5905 (1932) (statement of Rep. Swing) (“[W]e are to-day confronted with a crisis equal to that of the World War; a crisis that has caused the American people more suffering, more in loss of property than the World War.”); 75th Cong. Rec. 5841 (1932) (statement of Rep. Selvig) (“The present emergency equals in intensity that of our war-time period . . .”). President Hoover employed similar rhetoric. Herbert Hoover, Special Message to Congress on the Economic Recovery Program (Jan. 4, 1932), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=23021> (“Combating a depression is indeed like a great war . . .”).

59. 1932 Senate Hearings, *supra* note 4, Supplement No. 4 at 5. (statement of Ogden L. Mills, Sec’y of the Treasury of the United States).

60. In his memoirs, Hoover dismissed the Congressional debates as largely political posturing, designed to defer an economic recovery until after the 1932 elections. Hoover, *supra* note 9, at 138-41, 159-60. Hoover repeatedly expressed these concerns to Congress, ultimately telling the Senate that their actions would determine “whether democracy has the capacity to act speedily enough to save itself in an emergency.” Paul, *supra* note 11, at 159, 161. The Senate passed the Revenue Act of 1932 that same day. *Id.*

of two conflicting approaches to tax policy: institution of a national sales tax versus expansion of the existing progressive income and estate tax regime. Many key Congressional leaders focused their time and energies on this overarching policy debate, joining in “an avalanche of wild gestures and screaming hysterical speeches”<sup>61</sup> rather than deliberating the more mundane nuts and bolts of the proposed income and estate tax legislation.

In the end, the deteriorating economic climate and the time-consuming and divisive sales tax debate minimized the potential for detailed deliberation of key provisions of the Revenue Act of 1932.<sup>62</sup> As one observer concluded: “The law as passed was the work of the committees and their draftsmen, not the work of the whole of Congress. There is no evidence that even important details of the bill received the studied attention of Congress.”<sup>63</sup>

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61. 75th Cong. Rec. 6367 (1932) (statement of Rep. Cross). Congressman Cross urged his colleagues “to calm themselves, wipe the froth from their lips, and let reason get back on its throne.” *Id.* Other Members of Congress offered similar advice. For example, on Mar. 19, 1932, just days before the Revenue Act passed the House, Acting Ways & Means Committee Chairman Crisp opined as follows: “I do not believe the House is in a proper frame of mind to legislate to-day. I think it would do us all good to have an opportunity to cool off and to think.” 75th Cong. Rec. 6512 (1932) (statement of Rep. Crisp). Congressman Rainey, a member of the Ways & Means Committee, concurred. Rainey lambasted his fellow Congressmen: “This is a crucial hour in the history of this Republic, and there are many of you who do not seem to me to realize it. . . . This house, I realize, at the present time is a runaway House. You are adopting measures here without proper consideration . . .” 75th Cong. Rec. 6512 (1932) (statement of Rep. Rainey). See also *House Cheers Outcome*, N.Y. Times, Mar. 25, 1932, at 1 (contending the legislative process had been “reduced to chaos”).

62. For example, Congressman Ramseyer initially was allotted just twenty minutes to explain his detailed proposal for revision of estate tax rate brackets and contrast it with two counterproposals. 75th Cong. Rec. 6671 (1932). Ramseyer spouted a variety of statistics and drew numerous graphs on a blackboard he had brought into the House chamber for the occasion. *Id.* After Ramseyer’s presentation, Congressman Johnson contended that “not five men can stand up here now and say what the various proposals really are, as indicated on the blackboard,” an assertion which drew laughter and applause. 75th Cong. Rec. 6674-75 (1932) (Statement of Rep. Johnson). Apparently, Congressman Johnson was correct. Although the House voted in favor of the Ramseyer Amendment that same day, many members later conceded that they were confused about what exactly which tax rates they had approved. *Sales Levy Foes Boost Estate Tax: Amendment Bearing 45 Per Cent Rate Forced Upon House*, *The Salt Lake Tribune*, Mar. 23, 1932, at 1.

63. C. Lowell Harriss, *Legislative History of Federal Gift Taxation*, 18 *Taxes* 531, 538 (1940). Although Harriss was referring specifically to the gift tax provisions of the act, his observation is equally applicable to the Act’s other provisions. See Paul, *supra* note 11, at 156 (indicating that the House adopted many

### 3. *Rejection of Borrowing*

A final crucial aspect of the legislative climate of 1932 was the extent to which certain legislative options were summarily rejected. Most noteworthy among these was the possibility of borrowing, rather than taxing, to fund the government's fiscal shortfall.

Members of Congress were unified in the belief that a balanced budget was an essential step towards recovery. Speaker of the House Garner repeatedly advocated that theory, urging his colleagues that "the worst taxes you could possibly levy would be better than no taxes at all" and predicting that Congress's failure to enact tax legislation "would result in the insolvency of every single American bank within two months time."<sup>64</sup> When Garner implored any member of the House who didn't wish to balance the budget to stand up to be recognized, not a single Congressman stood.<sup>65</sup> Across the Capitol, members of the Senate Committee on Finance unanimously agreed that the budget had to be balanced without additional borrowing.<sup>66</sup> Excess debt had devastated the economies of other nations, and the Congress simply would not follow a similar course.<sup>67</sup>

Even within the Executive branch, the notion of balancing the budget quickly came to be seen as politically inevitable. Secretary Mills feared that there were no buyers willing to purchase additional U.S government debt.<sup>68</sup> President Hoover agreed. Even though Hoover initially advocated that the budget be balanced through a combination of tax increases and additional government borrowing, he also warned that the national government would soon "reach the utmost safe limit of its borrowing capacity."<sup>69</sup> Ultimately, he concluded that that nation had reached that limit and that further borrowing would lead to higher interest rates and undermine the value of the dollar.<sup>70</sup>

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provisions of the Revenue Act of 1932 "without mature consideration."). See also *supra* note 61.

64. Paul, *supra* note 11, at 155.

65. *Id.*

66. S. Comm. on Finance, Report on Revenue Bill of 1932, S. Rep. No. 72-665, at 1 (1932) [hereinafter Senate Report].

67. Indeed, one member of Congress went so far as to suggest that it would be "criminally negligent" not to balance the budget. 75th Cong. Rec. 5906 (1932) (statement of Rep. Andrew).

68. See 1932 Senate Hearings, *supra* note 4, at 49 (statement of Ogden L. Mills, Sec'y of the Treasury of the United States) (warning the Senate that if they failed to balance the budget "no one will buy your securities.").

69. President Herbert Hoover, President of the United States, Annual Message to the Congress on the State of the Union (Dec. 8, 1931), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=22933>.

70. Brownlee, *supra* note 34, at 82. See also Robert S. McElvaine, *The Great Depression: America 1929-1941* 86 ("Although there are indications that in



Ultimately, thus, the administration and the Congress agreed that the revenues needed to confront the Great Depression would come from taxation, not government borrowing. Although some legislators continued to advocate for more borrowing as a stop-gap measure,<sup>71</sup> their voices largely fell upon deaf ears. For a clear majority in Congress, the idea of relying on borrowing, instead of taxation, to finance the nation's economic recovery had become simply "unthinkable."<sup>72</sup>

*B. The Architect*

In 1932, Iowa Congressman C. William Ramseyer was serving his ninth term in Congress.<sup>73</sup> It would be his last.<sup>74</sup> Ramseyer is hardly a household name, and legal scholarship provides almost no analysis of his

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private Hoover said he believed moderate deficits might be as necessary in depressions as in wars, he concluded that this position was politically untenable." Hoover should not be overly-criticized for adopting "what was then conventional thinking about budgets." Steven R. Weisman, *The Great Tax Wars* 352 (2002). In fact, during the 1932 campaign, Hoover's eventual successor, Franklin D. Roosevelt, pledged to balance the budget. Brownlee, *supra* note 34, at 85. The philosophy of 'deficit spending' as a means of stimulating growth, the approach advocated by economist John Maynard Keynes and ultimately adopted by Roosevelt, would not achieve widespread acceptance until the latter part of the 1930s. Weisman, *supra*, at 353. Keynesian economics has remained in vogue ever since, such that "[n]o modern American president would repeat the fiscal mistake of 1932, in which the federal government tried to balance its budget in the face of a severe recession." Paul Krugman, *Fifty Herbert Hoovers*, N.Y. Times, Dec. 29, 2008, at A25, available at 2008 WLNR 24868372. President Obama certainly has not done so. Jeff Zeleny and Edmund L. Andrews, *Obama Warns of Prospect For Trillion-Dollar Deficits*, N.Y. Times, Jan. 7, 2009, at A1, available at 2009 WLNR 288234 (quoting Obama's prediction that governmental efforts to reverse the current economic crisis would lead to "trillion-dollar deficits for years to come.")

71. See, e.g., 75th Cong. Rec. 6248 (1932) (statement of Rep. Gilchrist) (suggesting that Congress borrow on a short-term basis in anticipation of estate tax revenues); 75th Cong. Rec. 6033 (1932) (statement of Rep. Parsons) (suggesting that Congress borrow an additional \$600 million on a short-term basis); 75th Cong. Rec. 6367 (1932) (statement of Rep. Cross) ("[A]n unbalanced budget now and then is not an unmixed evil.")

72. 75th Cong. Rec. 5807 (1932) (statement of Rep. Crowther).

73. Christian William Ramseyer, in *Biographical Directory of the United States Congress*, available at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=R000031>.

74. *Id.* In January 1933, President Roosevelt appointed Ramseyer as a Judge of the United States Customs Court. Roosevelt to Have Record Patronage, N.Y. Times, Jan. 3, 1933, at 10. Previously Ramseyer had been under consideration as a possible Supreme Court nominee to replace the retiring Oliver Wendell Holmes. Twenty are Mentioned for Supreme Court, N.Y. Times, Jan. 16, 1932, at 17.

legislative career. By way of illustration, the entire universe of law review articles in Westlaw reveals just five mentions of his name.<sup>75</sup> The same Westlaw database suggests that Muppet Kermit the Frog has received more than six times the scholarly attention accorded to Ramseyer,<sup>76</sup> while the trials and tribulations of singer Britney Spears have earned her more than 300 scholarly references.<sup>77</sup>

While lacking the iconic celebrity status accorded to others, Ramseyer achieved something that neither a frog nor a pop singer ever has: he single-handedly designed many of the estate and gift tax provisions included in the Revenue Act of 1932.<sup>78</sup> The exemption, tax brackets, and rate tables were all included in the “Ramseyer Amendment,” which the Congressman from Iowa successfully offered as an alternative to the estate tax provisions proposed by the House Ways & Means Committee.

This achievement was a fitting capstone to Ramseyer’s career as one of Congress’s experts on matters of estate and gift tax.<sup>79</sup> Ramseyer had been a vocal proponent of increased estate taxation as early as 1921, seeing in America’s growing wealth “a large and inexhaustible reservoir” of potential tax revenue<sup>80</sup> and contending that the federal government had “hardly scratched the surface of the possibilities of the estate tax as a revenue getter.”<sup>81</sup> By more aggressively tapping that revenue source, Ramseyer

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75. Search of Westlaw “JLR” database performed on Aug. 10, 2009 located 5 documents.

76. Search of Westlaw “JLR” database performed on Aug. 10, 2009 located 31 documents. Kermit the Frog is one of the best known of the “Muppets,” a series of large puppets created by Jim Henson and featured on the children’s television show “Sesame Street” for the past four decades. Kermit’s popularity in law reviews is attributable in part to his frequent performance of a song entitled “It’s Not Easy Being Green,” a phrase often-repeated in law review articles dealing with environmental law matters.

77. Search of Westlaw “JLR” database performed on Aug. 10, 2009 located 309 documents.

78. While Ramseyer deserves full responsibility for designing many of the 1932 estate and gift tax provisions, he did not personally design the rate table adopted in 1932. The rate table itself was produced by L. H. Parker, Chief of Staff of the Joint Committee on Taxation, who designed it in response to Ramseyer’s request that Parker design an estate tax rate table that would generate \$500,000,000 of tax annually with a \$50,000 exemption. Revenue Revision, 1932: Hearings Before the H. Comm. on Ways and Means, 72nd Cong. 433 (1932) [hereinafter 1932 House Hearings].

79. Ratner, *supra* note 9, at 449 (calling Ramseyer the “veteran champion of the estate and gift taxes”).

80. Hearings on Internal-Revenue Revision Before the H. Comm. on Ways and Means, 67th Cong. 200 (1921) [hereinafter 1921 House Hearings] (statement of Rep. Ramseyer).

81. 75th Cong. Rec. 5896 (1932) (statement of Rep. Ramseyer).

argued, Congress would be able to lessen other “burdensome taxes now weighing so heavily on the backs of the people.”<sup>82</sup>

While he cited Andrew Carnegie as the inspiration for his support of inheritance taxation,<sup>83</sup> Ramseyer often broke with Carnegie and many other social progressives on key questions. For example, Ramseyer opposed an unlimited charitable deduction for transfers made at death.<sup>84</sup> While nontaxable charitable transfers indeed would have a redistributive effect, Ramseyer considered them undesirable insofar as they deprived the government of its share of the decedent’s wealth.<sup>85</sup> For Ramseyer, unlike many other progressives, estate taxation was first and foremost a means of revenue generation rather than a tool of social policy.

In 1924, Ramseyer again advocated for increased estate taxation, unleashing a barrage of statistics upon his fellow Congressman and urging that rates of U.S. estate taxation be modeled after Great Britain’s.<sup>86</sup> This time, Ramseyer’s pleas found a sympathetic audience, and Congress enacted his proposal.<sup>87</sup>

But the political tide soon turned against Ramseyer. First, in 1926, Congress reversed many of the estate and gift tax provisions enacted in 1924, while expansion of the state death tax credit undercut the effectiveness of the estate tax as a tool for generating federal revenue.<sup>88</sup> Then, in 1929, considerable annual budget surpluses led Congress to further reduce a variety of tax rates. Ramseyer was the sole member of the House Ways and Means Committee to dissent from these tax cuts,<sup>89</sup> prophetically contending that the projected budget surpluses could prove ephemeral, in which case the tax cut

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82. 1921 House Hearings, *supra* note 80, at 200.

83. *Id.* at 201 (“I got my first ideas about the inheritance tax from Andrew Carnegie . . .”).

84. *Id.*

85. *Id.*

86. Revenue Revision, 1924: Hearings Before the H. Comm. on Ways and Means, 68th Cong. 248-256 (1924) [hereinafter 1924 House Hearings] (statement of Rep. Ramseyer). According to Ramseyer’s figures, in 1922 the British estate tax produced 50% more revenue than the U.S. estate tax, even though U.S. national wealth was three to five times that of Great Britain. *Id.* at 258 (statement of Rep. Ramseyer). By 1932, the gulf had widened further, with annual British estate tax revenue now more than doubling U.S. estate tax revenue. 1932 House Hearings, *supra* note 78, at 427 (statement of Rep. Ramseyer).

87. House Increases Inheritance Taxes, Starting at \$100,000, *N.Y. Times*, Feb. 26, 1924, at 1.

88. See *supra* notes 34 to 40 and accompanying text. Ramseyer’s personal views regarding these developments were thinly-veiled. Indeed, referring to the 1925 and 1926 efforts to repeal the estate tax, Ramseyer sounded more like a worried parent than an experienced statesman, lamenting how “we almost lost the estate tax.” 75th Cong. Rec. 5895 (1932) (statement of Rep. Ramseyer).

89. Tax Reduction Speeded in House, *N.Y. Times*, Dec. 5, 1929, at 5.

would produce a budget deficit.<sup>90</sup> Ramseyer called it an act of “political cowardice” to appease the electorate by reducing taxes when the money would be more prudently spent to retire governmental debts.<sup>91</sup>

As the 1930’s began, Ramseyer shared the view of those who considered the nation’s unequal distribution of wealth a cause for “apprehension and alarm.”<sup>92</sup> Yet, his primary motivation for continuing to advocate increased estate taxation remained a desire to generate revenue. As a result, when the nation’s economic fortunes turned sour, the ensuing need for revenue provided Ramseyer with what would be his final opportunity to tout increased estate taxation as a solution to the nation’s fiscal ills.

The events of 1932 thus brought Ramseyer to the moment he had waited nearly two decades for. In the end, he would make the most of it.

### C. *The Result*

As the U.S. economy continued to spiral downward in 1932, Congress enacted a tax bill designed to provide the revenue needed to balance the federal budget.<sup>93</sup> A significant component of this legislation was the package of estate and gift tax provisions introduced by a Congressman from Iowa, and which bore his name. For proponents of increased wealth transfer taxation, the economic carnage of 1932 had provided an opportunistic moment to enact legislative changes they had long desired. The Ramseyer Amendment had become law.<sup>94</sup>

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90. Id.

91. Tax Cut Passed by House, 282 to 17, N.Y. Times, Dec. 6, 1929, at 1, 2. History would validate Ramseyer’s concerns. See supra note 57 and accompanying text.

92. 1932 House Hearings, supra note 78, at 428 (statement of Rep. Ramseyer).

93. The Act in its entirety was projected to generate just over \$1.2 billion in additional revenue. Final Vote is 327-64, N.Y. Times, Apr. 2, 1932, at 1.

94. The Ramseyer Amendment was one of three competing proposals for estate tax reform. The other two proposals were the original revenue bill as reported by the Committee on Ways and Means and an amendment unsuccessfully offered by Congressman Lewis of Maryland. Lewis’s alternative featured a lower top rate than did the Ramseyer Amendment (40% vs. 45%), yet reached that top rate at a net estate value of just \$500,000, far lower than the \$10,000,000 needed to reach the top bracket under the Ramseyer Amendment. As a result, Lewis’s plan would have raised considerably more revenue than Ramseyer’s proposal. For a detailed comparison of the Lewis and Ramseyer proposals, including debates on their relative merits, see 75th Cong. Rec. 6661-81 (1932). It is worth noting that Ramseyer’s primary objection to Lewis’s proposal was not that the tax rates were too high but merely that Lewis’s proposal attempted to achieve too dramatic a change in estate tax rates too quickly. 75th Cong. Rec. 6671 (1932). Ramseyer contended that the key to achieving a lasting long-term increase in the estate tax was to “develop it

The very inclusion of estate tax reform in the Revenue Act of 1932 was noteworthy given the overarching purpose of that Act as a short-term, emergency, revenue measure. This short-term orientation was made explicit, for example, in the fact that the manufacturers excise taxes included in the Act were enacted solely for limited periods of time and were designed to automatically expire with the passage of time.<sup>95</sup> However, while proponents sought to characterize increased estate taxation as a similarly temporary revenue measure, the estate tax provisions of the Revenue Act of 1932 included no expiration date.

The Report of the Committee on Ways and Means suggests that such was not an innocent omission but rather the product of a legislative sleight of hand. The Report contends that the Committee envisioned that the estate tax be viewed solely as “an emergency measure”<sup>96</sup> and expressed the committee’s “hope”<sup>97</sup> that the tax be revisited once economic conditions improved. However, in the same paragraph, the Committee acknowledged that they consciously did not make the estate tax expire by its own terms, as they did in the case of the proposed special excise taxes.<sup>98</sup> While the report attempts to finesse the issue, Congress’ deeds here spoke louder than its words. The decision to require further legislative action to repeal the supposed “temporary” estate tax suggests that the tax might not have been intended as temporary at all.<sup>99</sup>

The inclusion of a potentially permanent estate tax increase in an emergency revenue act is even more surprising when one considers the estate tax’s long collection cycle. Not only must a taxpayer die in order to generate estate tax revenue, a process presumably beyond the control of the United States Congress, but estate taxes are not due until months after such death occurs.<sup>100</sup> As a result, of all the forms of taxation that Congress could

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gradually.” *Id.* “If you go to excess now,” he warned Congressman Lewis, “you get a reaction later.” *Id.*

95. The manufacturers excise tax under § 605 of the Act was to be effective during the two-year period from Jun. 21, 1932 to Jul. 1, 1934, at which time it would expire by its own terms. Due to subsequent legislation, the tax actually remained in place until 1936. See Revenue Act of 1936 § 809 (repealing the tax effective Jun. 23, 1936).

96. H. Comm. on Ways & Means, Report on Revenue Act of 1932, H.R. Rep. No. 72-708, at 8 (1932) [hereinafter House Report].

97. *Id.* at 8.

98. *Id.*

99. Indeed, Ramseyer envisioned the estate tax as anything but temporary. Rather, he hoped that Congress would gradually continue to increase estate tax rates in future years. See *supra* note 94.

100. At the time, estate taxes were due 12 months after a taxpayers’ death. Revenue Act of 1926 § 305(a); Revenue Act of 1932 § 403. The Commissioner of Internal Revenue could grant an estate an extension of time to pay the tax, in which

impose, estate taxes would be among the most inefficient sources of emergency revenue.<sup>101</sup>

Certainly, some raised this concern. For example, one trade association transmitted a detailed analysis of the entire revenue act which argued that estate taxes should have “no part” in an emergency revenue bill.<sup>102</sup> Yet, Congressional leaders paid mere lip service to such concerns. Ways and Means Committee Chairman Crisp, for example, freely admitted that the estate tax could not provide short-term revenue. Yet he still contended that all of the taxes on wealth would be temporary ones. “I, for one, will be glad when [economic conditions improve] . . . so that these burdensome taxes can be lowered. But for 1933 how are we going to get the revenue needed?”<sup>103</sup> The estate tax, with its long collection cycle, simply did not provide an answer to Crisp’s question. Estate tax increases imposed upon those dying in the latter half of 1932 would not impact federal revenues until early 1934. Yet, while Chairman Crisp didn’t dispute that fact,<sup>104</sup> he also didn’t allow that fact to interfere with his argument.<sup>105</sup>

In the end, such merely technical concerns about the estate tax’s collection cycle yielded to politics and passions. During legislative votes, the climate in the House chamber assumed the spirit of a bullfight, with raucous legislators whistling, stomping their feet and shouting “soak the rich.”<sup>106</sup> With respect to the crucial Ramseyer Amendment, many members of

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case interest would not begin to accrue until 18 months after death. Revenue Act of 1926 § 305(c). Under current law, the deadline for payment of estate tax is 9 months after death. IRC § 6075(a) (2008).

101. Secretary Treasury Mellon had emphasized this point to the House of Representatives. 1932 House Hearings, *supra* note 78, at 7 (1932) (statement of Andrew W. Mellon, Sec’y of the Treasury of the United States) (indicating that estate taxes have a “longer period” from imposition to collection than other forms of taxation).

102. 1932 Senate Hearings, *supra* note 4, at 198 (letter of Channing E. Sweitzer, Managing Director of the National Retail Dry Goods Association).

103. 75th Cong. Rec. 5691 (1932) (statement of Rep. Crisp).

104. *Id.* (“[T]he estate tax will bring in a colossal sum of money to the people of the United States, but it will not do this for the year 1933 . . .”).

105. While I contend that Crisp was simply lost in his own political rhetoric, the estate tax actually did have the potential to *indirectly* generate significant short-term revenues. As discussed *infra* Part III.C, Congress enacted a gift tax as a companion to the estate tax and offered taxpayers significant financial incentives to make *intervivos* gifts rather than retaining assets until death. As a consequence, the estate tax ultimately did bolster short term revenues—not through direct estate tax receipts but by the estate tax’s mere existence incentivizing taxpayers to make *intervivos* transfers subject to gift taxation.

106. Robert S. McElvaine, *The Great Depression: America 1929-1941* 87 (1984).

Congress didn't even bother to vote.<sup>107</sup> While some members were out of town during the vote adopting the Ramseyer Amendment, others reportedly "stayed in their offices answering correspondence," or simply didn't bother to cast a vote on the measure.<sup>108</sup> Whether opponents of the Ramseyer Amendment were demoralized or simply uninterested is not particularly clear. Either way, the result was the same—a supposedly temporary tax bill included a massive, permanent, increase in a tax that wouldn't be collected until years in the future.

### III. CHOICES OF 1932

In the end, Ramseyer and his followers got exactly what they had long hoped for: a more robust estate tax with a broader base, and a comprehensive gift tax. However, we may rightly ask whether the choices Congress made regarding the structure of the 1932 estate and gift taxes were the correct ones. I contend that some were not. Indeed, three crucial estate and gift tax provisions contained in the Revenue Act of 1932 were particularly unwise. While these legislative provisions may have helped Congress address a pressing revenue need, or at least appeared to, they offended far more important principles of tax policy. They thus took our national wealth transfer tax regime in a wrong direction from which we have yet to turn back.

In this Part, I explore these three crucial choices, seeking to both objectively measure and normatively evaluate their impact.

#### A. *Broadening the Base*

##### 1. *The Choice*

Given its dual mission of raising revenue and curtailing concentration of wealth, it is no surprise that the Congress of 1932 sought to increase estate tax rates. However, the structure of those rate increases raises significant questions. The Revenue Act of 1932 didn't impact solely those "bloated fortunes" that provided the most obvious target for those seeking to raise revenue and redistribute wealth. Instead, the Act aggressively sought to broaden the base of the estate tax, actually imposing the most dramatic changes in estate tax rates upon those in the lowest estate tax brackets.

The Revenue Act of 1932 accomplished this base-broadening through two means. First, it replaced the previous rate table with Ramseyer's

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107. Maximum Rate 45 Per Cent, N.Y. Times, Mar. 23, 1932, at 1.

108. Id.

new version—featuring increased tax rates and narrowed tax brackets.<sup>109</sup> Second, the Act lowered the lifetime exemption from estate tax from \$100,000 per taxpayer to \$50,000 per taxpayer.<sup>110</sup> This change not only exposed thousands of previously nontaxable estates to estate taxation but also produced a ripple effect, as all estates above that level were subject to estate taxation on a larger proportion of their assets.

Taken together, these changes resulted in extremely significant estate tax increases for the most modest taxable estates. While the top rate saw the largest nominal increase, more than doubling from 20% to 45%, lower rates actually increased by a far higher relative percentage. For example, the marginal rate imposed upon a \$150,000 net estate increased from 2% to 9%, a more than four-fold increase. Yet, given the structure of the tax and the distribution of the nation's wealth, the significant financial (and administrative) burdens Congress imposed on these relatively modest estates did little to raise significant federal revenue. Indeed, the most significant effects of these efforts to broaden the base of the estate tax were the increased burdens and compliance costs imposed on relatively modest estates.

## 2. *The Impact*

As noted, the Revenue Act of 1932 had a dramatic impact on all estates—significantly increasing the total estate tax due from the wealthiest decedents but also significantly impacting the smallest taxable estates. Table 1 provides a comprehensive view of the results, illustrating the changing estate tax burden confronted by representative estates of various sizes.

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109. Under the 1926 Revenue Act, the first \$50,000 of a decedent's net estate was subject to tax at a 1% rate. Revenue Act of 1926 § 301(a). A 2% rate applied to the next \$100,000 of assets and a 3% rate to the \$100,000 after that. *Id.* Under the Revenue Act of 1932, the five lowest tax brackets were only \$10,000 wide, thus moving an estate much more quickly up the marginal rate scale. Revenue Act of 1932 § 401(b). Four decades later, Professor Bittker decried the continuing existence of these “nervous twitches” of the rate table and advocated their replacement with far broader brackets. Boris Bittker, *Federal Estate Tax Reform: Exemptions and Rates*, 57 *American Bar Association Journal* 236, 240 (1971). The post-2001 iteration of the estate tax comports to Bittker's design, at least insofar as it has fewer, broader, brackets. See IRC § 2001 (2008).

110. Revenue Act of 1932 § 401(c).



**Table 1: Change in Transfer Tax Burden on Representative Estates:  
1926 Rates vs. 1932 Rates**

Gross Estate (in \$)	50,000	100,000	150,000	200,000	500,000	1 million	5 million	10 million
1926 Estate Tax (in \$)	0	0	500	1,500	12,500	41,500	489,500	1,334,500
1932 Estate Tax (in \$)	0	1,500	5,000	9,500	42,500	117,500	1,149,500	3,094,500
% Change	0	infinite	900%	533%	240%	183%	135%	132%

Table 1 reveals much about the true effect of the Revenue Act of 1932. Certainly, in real terms, the largest estates bore the largest brunt of the tax increases. An estate valued at \$10,000,000 would have owed \$1,334,500 in federal estate taxes prior to the 1932 Act and \$3,094,500 thereafter—a massive increase of \$1,760,000. At the margin thereafter, the increase in top rate from 20% to 45% would have increased the estate tax due by \$250,000 per \$1,000,000 of estate value, another significant increase in nominal terms. Thus, at the top end of the wealth spectrum, the Revenue Act of 1932 surely brought significant nominal increases in estate tax rates.

However, the Revenue Act of 1932 didn't merely target the nation's wealthiest. When viewed in relative terms, the impact on smaller estates was far more pronounced than that on larger estates. For example, in the case of a \$150,000 net estate, the tax increased by a full order of magnitude, from \$500 before the Revenue Act of 1932 to \$5,000 thereafter.

As noted above, two factors combined to create this altered tax landscape reflected in Table 1. The first, Ramseyer's new rate table, provides little fodder for detailed mathematical analysis. One might rightly criticize the narrowness of the 1932 tax brackets<sup>111</sup> or suggest other relatively modest revisions to the rate table used. Beyond such criticism, the altered rate table largely does what it professed to do—mechanically and dispassionately increase taxes across-the-board for all taxable estates.

The second factor leading to the results reflected in Table 1 provides a basis for far more interesting analysis. This factor was the decision to lower the lifetime exemption from estate tax from \$100,000 to \$50,000. Ramseyer offered little justification for the \$50,000 exemption beyond the

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111. Indeed, Professor Bittker did just that. See *supra* note 109.

unsubstantiated assertion that it was necessary to raise sufficient revenues.<sup>112</sup> However, my analysis reveals his assertion to be a false one. In actuality, the change generated relatively little additional revenue, while significantly increasing compliance and administrative burdens imposed on thousands of smaller estates. The reduced exemption thus produced far more paperwork than it did revenue.

What is most striking about this aspect of the 1932 legislation was the fact that its relative futility should have been apparent to everyone at the time, including its proponents, had they fully studied the issue. History suggests that proponents of the reduced estate tax exemption never actually calculated the projected fiscal impact of the change. During Congressional debates, Ramseyer freely admitted that he hadn't done so.<sup>113</sup>

However, using data provided by Congressman Ramseyer himself during 1932 Congressional debates,<sup>114</sup> it is possible to reconstruct the projected fiscal impact of the reduced estate tax exemption. That analysis follows in Table 2, which calculates the incremental annual revenue resulting from the reduced exemption.

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112. 75th Cong. Rec. 5896 (1932) (statement of Rep. Ramseyer) (suggesting that the lower exemption would help “make the rates productive”). Interestingly, this same unsubstantiated assertion, that a reduced exemption would materially increase tax collections, is found in a 1931 letter to Ramseyer from former Chairman of the Ways and Means Committee William Green. Letter from William R. Green, Judge, U. S. Court of Claims, to C. William Ramseyer (Apr. 14, 1931) (original located in the University of Iowa Libraries; copy on file with author). In this letter, Green urged Ramseyer to propose a \$50,000 estate tax exemption, a change he indicated would “largely increase the receipts from the inheritance (sic) tax.” *Id.* at 2. Green estimated that this reduced exemption and a new gift tax could together generate an additional \$40 million in annual revenue, but urged Ramseyer to ask Treasury officials to provide a more detailed revenue estimate. *Id.* at 3. Ramseyer, however, did not take this suggestion. See *infra* note 113.

113. 75th Cong. Rec. 6673 (1932) (statement of Rep. Ramseyer) (confirming that Ramseyer did not ask the Treasury to analyze the revenue impact of the Ramseyer Amendment). Indeed, the record suggests that Ramseyer's sole source of technical advice regarding the estate tax was L. H. Parker, Chief of Staff of the Joint Committee on Taxation. As discussed *supra* note 78, while Parker designed the 1932 rate table and opined as to its revenue impact, it was Ramseyer who mandated that the tax feature a \$50,000 exemption. There is no evidence that Parker independently modeled the revenue impact of that exemption.

114. 1932 House Hearings, *supra* note 78, at 434. The data was provided to Congressman Ramseyer by L. H. Parker, Chief of Staff of the Joint Committee on Taxation. As discussed *supra* note 78, Parker designed the 1932 rate table at Ramseyer's request.

**Table 2: Change in Annual Estate Tax Collections Resulting From Reduced Estate Tax Exemption<sup>115</sup>**

Estate Size	Number per year	Federal Tax Due With \$50,000 Exemption	Federal Tax Due With \$100,000 Exemption	Incremental Revenue Per Estate	Total Annual Incremental Revenue
\$70,000	7,500	\$300	\$0	\$300	\$2,250,000
\$120,000	1,835	\$2,740	\$140	\$2,600	\$4,771,000
\$170,000	850	\$6,080	\$2,180	\$3,900	\$3,315,000
\$240,000	975	\$10,940	\$6,440	\$4,500	\$4,387,500
\$380,000	755	\$22,140	\$16,640	\$5,500	\$4,152,500
\$700,000	658	\$51,500	\$44,000	\$7,500	\$4,935,000
\$1,200,000	205	\$109,300	\$99,800	\$9,500	\$1,947,500
\$1,700,000	108	\$174,500	\$164,000	\$10,500	\$1,134,000
\$2,200,000	64	\$245,700	\$234,200	\$11,500	\$736,000
\$2,700,000	37	\$322,900	\$310,400	\$12,500	\$462,500
\$3,200,000	14	\$406,100	\$392,600	\$13,500	\$189,000
\$3,700,000	16	\$495,300	\$480,800	\$14,500	\$232,000
\$4,400,000	23	\$630,100	\$614,600	\$15,500	\$356,500
\$5,400,000	12	\$849,700	\$832,200	\$17,500	\$210,000
\$6,400,000	8	\$1,084,300	\$1,065,800	\$18,500	\$148,000
\$7,400,000	7	\$1,330,900	\$1,311,400	\$19,500	\$136,500
\$8,400,000	5	\$1,589,500	\$1,569,000	\$20,500	\$102,500
\$9,400,000	2	\$1,860,100	\$1,838,600	\$21,500	\$43,000
\$10,400,000	15	\$2,142,700	\$2,120,200	\$22,500	\$337,500
<b>Totals:</b>	<b>13,089</b>				<b>\$29,846,000</b>

As revealed by Table 2, using Ramseyer's own data, reducing the exemption from \$100,000 to \$50,000 could be expected to yield less than \$30 million in incremental revenue—increasing projected federal estate tax receipts by a mere 5%.<sup>116</sup> Certainly, for a country facing a billion dollar

115. For purposes of this table, the "federal estate tax due" is computed net of the state death tax credit based on the assumption that applicable state estate taxes exactly equaled the available state death tax credit.

116. Ramseyer estimated that the 1932 estate tax provisions ultimately would yield \$500 million to \$600 million annually. 75th Cong. Rec. 5896-97 (1932) (statement of Rep. Ramseyer). Ramseyer contended that his figures had been vetted

deficit, every \$30 million of revenue helped. However, that \$30 million annual revenue gain would impose significant administrative costs—adding to the tax rolls approximately 7,500 annual estate tax returns and thus more than doubling the annual number of estate tax returns required to be prepared and filed by taxpayers and processed by the government. On average, these 7,500 marginal annual estate tax returns necessitated by the reduced exemption would generate a paltry \$300 in tax revenue each, a figure which hardly seems worth the administrative and compliance costs imposed on both these taxpayers and the government.<sup>117</sup> In the aggregate, these 7,500 estates would generate more than 55% of the annual estate tax returns filed but would provide less than 1% of the total annual estate tax revenue.

Although the lowered exemption would produce a ripple effect of modestly increasing total tax collections from all larger estates, the combined aggregate increase still amounted to a mere 5% of projected annual estate tax revenues.<sup>118</sup>

Certainly, the Congress of 1932 was in a desperate quest for revenue. However, the decision to reduce the estate tax exemption produced compliance costs which Congress never fully considered and which simply outweighed the benefits of additional tax revenue.<sup>119</sup> Retaining the

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by “experts.” 75th Cong. Rec. 6673 (1932) (statement of Rep. Ramseyer). However, as discussed supra note 113, Ramseyer did not count any Treasury officials among these “experts.” To the contrary, Treasury Secretary Mills vocally disputed Ramseyer’s projections, contending that they were based on data from before the stock market crash and thus reflected “grossly inflated values.” Sales Tax Backers Gird for Test Vote; Both Sides Hopeful, *N.Y. Times*, Mar. 24, 1925, at 1.

117. Of course, many of these estates would have owed state succession or estate taxes even if exempt from the federal estate tax.

118. Estate Tax returns filed in 1924, when the exemption also had been \$50,000, had shown a similar pattern. In a year in which just under 13,800 estate tax returns were filed, filings from 9,500 estates valued at \$50,000 or less after deductions (nearly 70% of the total filings) generated just 3% of total estate tax revenues. Simeon E. Leland, *The Future of the Estate Tax*, 4 *Nat’l. Income Tax Mag.* 9, 11 (1926). Conversely, the 48 largest estates produced more than half of the annual estate tax revenue, with the five largest estates producing 20% of total estate tax revenues. *Id.* Those five largest estates thus produced more than six times the revenue provided by the smallest 9,500. *Id.*

119. Congress took a similar approach to the question of income taxes, by reducing the personal exemption from income tax by \$500. Revenue Act of 1932 § 25(c). Chairman Crisp defended the change as a matter of fairness, reporting that the Ways and Means Committee had concluded that it “was not right or fair” to assess additional taxes on wealthy Americans without imposing additional burdens on the less wealthy. 75th Cong. Rec. 5690 (1932) (statement of Rep. Crisp). He also defended the change as essential for increasing tax revenues, projecting that the lowered exemptions would increase tax receipts by \$39,000,000. *Id.* However, he conceded the administrative burdens resulting from the lowered exemptions. Some

exemption at \$100,000 would have reduced the number of annual estate tax returns by 55% while retaining some 95% of the tax's revenues. That's the choice Congress should have made.

### 3. *The Lesson*

Congress's choice to significantly increase estate taxation on the smallest taxable estates provides a variety of lessons. As an initial matter, it indicates the importance of detailed critical analysis of tax legislation, relying on mathematical modeling rather than unsubstantiated assertions. The modern tax legislative process has sought to remedy that shortcoming.<sup>120</sup> However, the most crucial lesson retains far more current applicability. Specifically, in 2010 as in 1932, the vast majority of estate tax revenues will be generated by the largest taxable estates. As a result, in the modern world as in 1932, attempts to broaden the base of estate taxation through modest reductions in the estate tax exemption will produce dramatically greater compliance burdens but bear little fiscal fruit.

For much of the past decade it seemed as if Congress had learned this lesson. As a result of the increased federal exemption, annual taxable estate tax return filings declined by more than 50% between 1998 and 2006.<sup>121</sup> The families that dropped from the estate tax rolls as a result needed to focus less of their time, energies, and money on estate planning.<sup>122</sup> Yet, federal estate tax revenues remained largely unchanged.<sup>123</sup>

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2,900,000 additional annual income tax returns would be filed as a result. *Id.* Of these, 1,200,000 would generate no revenue, while the other 1,700,000 would generate "negligible" taxes. *Id.* Borrowing a phrase from Professor Graetz, one might rightly characterize these additional filings as three million unnecessary returns. See Michael J. Graetz, 100 Million Unnecessary Returns: A Simple, Fair, and Competitive Tax Plan for the United States 104 (2008) (proposing elimination of all income taxes for Americans earning under \$100,000 per year, thus eliminating 100 million annual federal income tax returns).

120. For example, the Joint Committee on Taxation now plays a far more expanded role in the analysis of tax legislation than it did in 1932. See generally, Staff of Joint Comm. on Taxation, 109th Cong., Background Information Relating to the Joint Committee on Taxation (Comm. Print 2005) (JCX-2-05) (providing an overview of the role played by the Joint Committee on Taxation in the analysis of proposed tax legislation).

121. Nonna A. Noto, Estate and Gift Tax Revenues: Past and Projected in 2008, Congressional Research Service Report RL34418, at 7 (2008) (reporting a decline in annual taxable returns from 47,475 in 1998 to 22,798 in 2006).

122. Wealthy Americans devote a substantial amount of time, money, and energy to planning for the disposition of their estates and minimizing the impact of wealth transfer taxes. For an overview of some of these planning techniques, including a discussion of their costs, see Richard Schmalbeck, Avoiding Federal Wealth Transfer Taxes, in *Rethinking Estate and Gift Taxation* 113, 121-58 (William

The Congress of 2010 has yet to show similar wisdom. Barring further legislation, the estate tax exemption will revert to \$1,000,000 in 2011,<sup>124</sup> a level which will dramatically expand estate planning and compliance burdens on relatively modest estates<sup>125</sup> yet generate relatively modest tax revenues from these estates. If members of the Congress of 2010 have read their history, or this Article, they will enact a permanent estate tax exemption at or around the \$3,500,000 level.

State governments face a similar decision. Traditionally, most state estate tax regimes mirrored the federal system and featured the same exemption.<sup>126</sup> However, in the last decade, efforts to maximize estate tax revenue have led many state legislatures to ‘decouple’ from the Federal estate tax regime and reduce state estate tax exemptions below the federal level.<sup>127</sup> Such changes create significant estate planning complications for taxpayers, who must plan for two independent taxing regimes, as well as state taxing authorities, who must attempt to administer these independent state tax systems.<sup>128</sup> Yet, these lowered exemptions generate only modest incremental tax revenues. Accordingly, state governments would be well served to rethink this approach.

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G. Gale, James R. Hines Jr. & Joel Slemrod eds.) (2001). For an attempt to quantify the administrative and compliance burdens associated with wealth transfer taxes, see William G. Gale & Joel B. Slemrod, *Life and Death Questions About the Estate and Gift Tax*, 53 Nat'l Tax J. 889, 902-05 (2000).

123. Noto, *supra* note 121, at 7 (reporting a modest increase in total estate taxes paid from \$20.3 billion in 1998 to \$24.7 billion in 2006).

124. IRC § 2010(c) (2008); P.L. 107-16 § 901(a)-(b) (2001).

125. Some may disagree with my characterization of estates of \$1,000,000 to \$3,500,000 as “relatively modest.” By way of comparison, however, the 400 wealthiest Americans (the so-called “Forbes 400”) have a combined net worth exceeding \$1.2 trillion, available at [http://www.forbes.com/2009/09/30/forbes-400-gates-buffett-wealth-rich-list-09\\_land.html](http://www.forbes.com/2009/09/30/forbes-400-gates-buffett-wealth-rich-list-09_land.html) (last visited Jan. 20, 2010). Accordingly, in the grand scheme of potentially taxable American wealth, an estate of under \$3,500,000 is properly characterized as relatively modest.

126. Prior to 2001, the vast majority of state estate taxes were designed to coordinate with the Federal estate tax and structured to maximize an available Federal credit for state death taxes paid up to a specified limit (“the state death tax credit”). Jeffrey A. Cooper, John R. Ivimey & Donna D. Vincenti, *State Estate Taxes After EGTRRA: A Long Day’s Journey Into Night*, 17 *Quinnipiac Prob. L. J.* 317, 318 (2004). As discussed *infra* note 152, Congress repealed the state death tax credit in 2001, leading many state governments to completely redesign their state estate tax regimes.

127. Joel Michael, *State Estate, Inheritance and Gift Taxes Five Years After EGTRRA*, *State Tax Notes*, Dec. 25, 2006, at 871, 873-78. As noted *supra* note 126, this phenomenon was a direct response to Congressional repeal of the state death tax credit in 2001.

128. Cooper, Ivimey & Vincenti, *supra* note 126, at 332-36.

Consider the example of Connecticut, where the state estate tax exemption historically had been \$2,000,000.<sup>129</sup> Recent data from that state shows that more than 57% of taxable estate tax returns reported taxable estates of \$2,000,000 to \$4,000,000.<sup>130</sup> Yet these returns generated less than 15% of the state's estate tax revenue.<sup>131</sup> Vermont's estate tax features a \$675,000 exemption.<sup>132</sup> However, in one recent year estates of \$5,000,000 or less generated nearly 90% of Vermont's estate tax filings but only 20% of the tax revenue.<sup>133</sup> Similarly, estates of \$5,000,000 or less generate more than 90% of the taxable estate tax returns filed each year in New York State yet produce just 30% of the state's estate tax revenue.<sup>134</sup> If these states were to increase their state estate tax exemptions, perhaps to a level as high as \$5,000,000, they would free countless taxpayers from the planning, administrative and compliance burdens associated with state estate taxes while preserving the vast majority of current estate tax revenues.

The first lesson of 1932 thus remains true today. The vast majority of estate tax revenue comes from the largest estates, and thus the revenue-generation potential of the estate tax, is almost entirely a product of the rate

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129. Conn. Gen. Stat. § 12-391(g)(1) (2009). Effective Jan. 1, 2010, the Connecticut estate tax exemption increased from \$2,000,000 to \$3,500,000. Conn. Gen. Stat. § 12-391(g)(2) (2009). Between 2005 and 2009, Connecticut's estate tax features a rather unique feature—a 'cliff' in the rate table whereby estates below \$2,000,000 paid no estate tax while estates above \$2,000,000 were taxed on the entire estate, including the first \$2,000,000 of assets. *Id.* This extremely controversial feature of the tax system actually offered a considerable efficiency advantage by freeing many modest estates from the administrative burdens caused by a lower exemption yet maximizing the revenue collected from larger estates.

130. Connecticut Department of Revenue Services & Connecticut Office of Policy and Management, Estate Tax Study, 13 (2008) (data for fiscal year 2006-07), available at <http://www.ct.gov/drs/lib/drs/research/estatetaxstudy/estatetaxstudyfinalreport.pdf>.

131. *Id.*

132. Vt. Stat. Ann. tit. 32, § 7442(a) (2009) (incorporating the \$675,000 federal exemption in effect on Jan. 1, 2001).

133. Sara Teachout, Joint Fiscal Office, Vermont Estate Tax Brief 7 (2001) (partial data for fiscal year 2001), available at [www.leg.state.vt.us/jfo/Reports/EstateTaxBrief12-2001.pdf](http://www.leg.state.vt.us/jfo/Reports/EstateTaxBrief12-2001.pdf). In 2001, the largest 5 Vermont estates produced 75% of the state estate tax revenue. *Id.* In 2009, a single Vermont estate paid \$13 million in Vermont Estate Taxes, nearly single-handedly balancing the state's budget. State Gets \$13 Million Windfall Inheritance, Rutland Herald.com, Jun. 9, 2009, available at <http://www.rutlandherald.com/article/20090609/THISJUSTIN/906099995>.

134. New York State Department of Taxation and Finance, Office of Tax Policy Analysis, New York State Estate Tax SFY 2000-01: Analysis of Tax Returns 9 (2001) (data for fiscal year 2000-01), available at [http://www.tax.state.ny.us/pdf/stats/stat\\_estate/new\\_york\\_state\\_estate\\_tax\\_sfy\\_2000\\_01.pdf](http://www.tax.state.ny.us/pdf/stats/stat_estate/new_york_state_estate_tax_sfy_2000_01.pdf).

structure applied to these estates. Within reasonable limits, the size of the exemption will have significant administrative implications but produce relatively little revenue effect. The notion that a broader tax base will materially increase estate tax collections is as inaccurate in 2010 as it was in 1932.

B. *Squeezing the States*

1. *The Choice*

The 1926 estate tax had included a “state death tax credit” mechanism, which provided a dollar-for-dollar reduction in federal estate taxes for state estate taxes paid. The limit of the credit was an exceedingly generous one—up to 80% of the federal estate tax otherwise payable. Assuming the applicable state government imposed an estate tax sufficient to maximize the potential of this credit, as most eventually did,<sup>135</sup> the result of the state death tax credit was to effectively redirect 80% of estate tax revenues to the state governments.<sup>136</sup>

Congressional leaders of 1926 envisioned that the 80% state death tax credit would achieve two policy ends. First, since the credit would fully offset the cost of most taxpayers’ state estate tax payments, it largely equalized the total federal and state estate taxes paid by domiciliaries of states that imposed state estate taxes and states that did not. The credit thus eliminated any political advantage to be gained by states such as Florida that declined to impose state estate taxation as a means of luring wealthy elderly residents into the state.<sup>137</sup> Second, the state death tax credit appeased state leaders who contended that estate taxes were a well-established traditional source of state revenue with which the federal government should not interfere.<sup>138</sup>

Although the fiscal crisis of the Great Depression impacted both federal and state governments, the Congress of 1932 simply didn’t feel like sharing the fiscal fruits of increased taxation. Accordingly, they designed the 1932 estate tax as a ‘supertax,’ which would supplement, rather than replace, the 1926 variant of that tax. A crucial consequence of this design was the fact

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135. Cooper, *supra* note 41, at 860-61.

136. Under the 1924 Act, the credit had been 25% rather than 80%. Revenue Act of 1924 § 301(b).

137. Cooper, *supra* note 41, at 852-57.

138. *Id.* at 857-58. *Accord* Paul, *supra* note 11, at 139 (concluding that the state death tax credit “mitigated the alleged invasion of an area reserved to the states.”) Indeed, thirty-two Governors had petitioned for the federal government to completely abandon estate taxation, contending that the field of estate taxation belonged to the states. 32 Governors Ask Congress to Ban Inheritance Tax, N.Y. Times, Oct. 24, 1925, at 1.



that the state death tax credit mechanism was deliberately frozen at its 1926 level.<sup>139</sup> While from a taxpayer's standpoint the difference might be of little consequence, the structure had a crucial impact on federal tax receipts. All of the additional tax imposed by the 1932 Act would pass entirely to the federal government.

In making this choice, Congress effectively ignored both the economic plight of the states and its own legislative history. Whereas the Congress of 1926 had disavowed any notion to tap estate taxation as a major source of federal revenue, the Congress of 1932 set out to do just that.<sup>140</sup>

This evolving federal attitude towards state estate taxes was typified by the changing personal viewpoints of Secretary of the Treasury Ogden Mills. As a member of the House Ways and Means Committee in 1926, then-Congressman Mills had argued that the estate tax "belonged to the states" as a well-established, and much needed, source of state revenue.<sup>141</sup> Indeed, Congressman Mills had advocated outright abolition of federal estate taxes in order to enable state governments to tap the full potential of the revenue source.<sup>142</sup> However, by 1932, his viewpoint had changed significantly. Secretary Mills opined that the existing state death tax credit had preserved sufficient revenue for the states, indeed more than they would ever had been able to collect without the credit.<sup>143</sup> Accordingly, Mills contended, the Federal government was free to appropriate for itself any additional available estate tax revenue.<sup>144</sup> Over the span of six short years, Mills simply abandoned his prior belief that the realm of estate taxation "belonged to the states."<sup>145</sup> Congress did the same.

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139. Revenue Act of 1932 § 402(a).

140. In one of the period's great ironies, proponents of the 1926 state death tax credit envisioned that the mechanism would remain in place for six years, at the end of which time Congress would repeal the federal estate tax and abandon the field of estate taxation to the states. Cooper, *supra* note 41, at 857. That six year period ended in the fateful year of 1932. Rather than abandoning the field of estate taxation, Congress chose to further invade it.

141. Paul, *supra* note 11, at 157.

142. Nathaniel Seefurth, Proceedings of the Inheritance Tax Conference, 3 Nat'l Income Tax Mag. 99, 99 (1925).

143. Paul, *supra* note 11, at 157.

144. *Id.* Mills' predecessor, Andrew Mellon, agreed that sharing the additional estate tax revenues with the states would be an "undesirable result" that should be avoided by structuring the additional estate tax as a 'supertax' exempt from the state death tax credit mechanism. 1932 House Hearings, *supra* note 78, at 7.

145. Mills's change of position was even more troubling given that he was fully aware of the desperate fiscal plight of many states and the problematic over-reliance of state treasuries on real property taxes as a primary source of revenue. Indeed, Mills himself had implored Congress to endeavor to find ways to help states raise revenue to redress the "crushing burden" of these real property taxes. 1932 House Hearings, *supra* note 78, at 43.

## 2. *The Impact*

By freezing the state death tax credit at its 1926 level, Congress was able to extract dramatically greater revenue from estate taxes than ever before. Although the Federal treasury could expect to keep just 20 cents of every dollar of gross estate tax imposed under the 1926 estate tax, it would retain every penny of additional ‘supertax’ imposed under the Revenue Act of 1932. By aggressively capturing all of this incremental revenue, Congress fundamentally altered the relationship between federal and state estate taxes. Whereas estate taxes under the 1926 statute had been designed primarily to facilitate state revenue, the Revenue Act of 1932 was designed to fill federal, not state, coffers.

As a result, while the state death tax credit once potentially offset up to 80% of federal estate taxes, that figure fell dramatically after 1932. Table 3 reveals the full results, illustrating for estates of various sizes the percentage of estate tax revenues effectively reserved to the states by the state death tax credit.

**Table 3: State Share of Total Estate Tax Revenue<sup>146</sup>**

Gross Estate (in \$)	50,000	100,000	150,000	200,000	500,000	1 million	5 million	10 million
<b>1926 State Share</b>	0%	0%	80%	80%	80%	80%	80%	80%
<b>1932 State Share</b>	0%	0%	8%	13%	24%	28%	34%	34%

Table 3 reveals a significant weakening of the state death tax credit regime. Whereas the 1926 iteration of the state death tax credit operated to reserve 80% of available estate tax revenue to the states, the Congress of 1932 completely scuttled that regime. In the case of the largest estates, the post-1932 state death tax credit would serve to offset just 34% of the total estate tax payable. In the case of smaller estates, the effect was even more dramatic. A mere 8% of the tax imposed on a \$150,000 estate would pass to the states via the state death tax credit mechanism.

It is crucial to note that the Congress of 1932 didn’t directly cut state estate tax receipts. They merely froze the credit at its existing rates. Accordingly, Congressman Ramseyer could say quite correctly that while he

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146. This table assumes that applicable state estate taxes exactly equaled the available state death tax credit.

had personally opposed enactment of the state death tax credit,<sup>147</sup> his 1932 amendment would “not disturb that provision.”<sup>148</sup> While factually correct, the statement is misleading. Providing states no assistance in an era of declining asset values and preserving for the federal government the full fruits of the incremental rate increases certainly undercut the spirit, if not the letter, of the 1926 state death tax credit.<sup>149</sup> While state estate tax revenue didn’t decline in absolute terms as a result,<sup>150</sup> Congress nevertheless had effectively muscled the state governments out of any incremental estate tax revenue.

By using the frozen state death tax credit as a means of capturing a larger proportion of estate tax dollars, Congress was able to mask the true magnitude of the 1932 estate tax increases. Only when the nominal rate changes are adjusted to reflect the frozen state death tax credit are the federal estate tax increases of 1932 revealed for what they truly were. Table 4 illustrates the true changes in federal estate tax collections resulting from the Revenue Act of 1932.

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147. Ramseyer preferred an alternate regime, by which the federal government would collect all estate tax revenues but remit 50% of those revenues back to the states. *Revenue Revision*, 1925: Hearings Before the H. Comm. on Ways and Means, 69th Cong. 402 (1925) [hereinafter 1925 House Hearings] (statement of Rep. Ramseyer). Ramseyer did not formally propose his alternative, yielding instead to the alternative state death tax provisions which had already garnered a majority of support in the House of Representatives. *Id.* Despite his objection to the structure of the state death tax credit, Ramseyer maintained that he had always favored “some kind of equitable division [of estate tax revenue] with the States . . . .” *Id.* at 403.

148. 75th Cong. Rec. 5897 (1932) (statement of Rep. Ramseyer).

149. One New York Congressman forcefully argued that freezing the state death tax credit at its 1926 level offended “the doctrine of State rights” by “preventing the states from raising revenue in a field which we used to believe belonged exclusively to the States.” 75th Cong. Rec. 6682 (1932) (statement of Rep. O’Connor). He reminded his colleagues: “The states also have to raise money to conduct their governments.” *Id.* The Acting Chairman of the Ways Committee offered a very telling response: “I recognize there is some force in the statement of the Gentleman from New York, but the object of this bill is to provide revenue for the Federal Government . . . .” 75th Cong. Rec. 6682 (1932) (statement of Rep. Crisp). In other words, 1932 was not a time for debating the niceties of states’ rights. It was a time for generating federal revenue. The Chairman was not alone in that view. See 75th Cong. Rec. 6338 (1932) (statement of Rep. Stafford) (“We must view this question [of the state death tax credit] primarily from a national standpoint. Leave it to the states to get their amount of inheritance taxes . . . .”).

150. While state revenue did not decline as a direct result of this change, declining asset values during the Great Depression did result in reduced state estate tax collections.

**Table 4: Net Federal Estate Tax Revenue<sup>151</sup>**

Gross Estate (in \$)	50,000	100,000	150,000	200,000	500,000	1 million	5 million	10 million
1926 Estate Tax (in \$)	0	0	100	300	2,500	8,300	97,900	266,900
1932 Estate Tax (in \$)	0	1,500	4,600	8,300	32,500	84,300	757,900	2,026,900
% Change	0	infinite	4500%	2667%	1200%	916%	674%	659%

Table 4 reveals a startling picture. An estate valued at \$10,000,000 would have generated \$266,900 in federal estate taxes prior to the 1932 Act and \$2,026,900 thereafter—a massive 659% increase. For smaller estates, the impact was even greater, with the net federal estate tax collected from many estates increasing by an order of magnitude, or more.

As seen throughout this analysis, the smallest estates once again were the most impacted by this change. As a result of the Revenue Act of 1932, the federal government could expect to extract 2667% more revenue from a \$200,000 estate and 4500% more revenue from a \$150,000 estate than under prior law. State governments saw no such increase in revenue. After just six years, the era of federal-state cooperation on the issue of state death taxes had come to an end.

### 3. *The Lesson*

The Revenue Act of 1932 marks a stunning reversal in the federal government's attitude towards state estate tax regimes. Just six short years after Congress conceded estate taxes to be a traditional source of state revenue, the federal government assumed primacy in the field, marginalizing the revenue impact of the state death tax credit and reserving for itself the lion's share of estate tax revenues.

Congress has never relinquished this role. Despite enacting subsequent estate tax rate increases, Congress never increased the state death tax credit, refusing to share estate tax revenues beyond the level allowed by the 1926 state death tax credit. Then in 2001, Congress dealt the states an

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151. This table assumes that applicable state estate taxes exactly equaled the available state death tax credit.

even greater fiscal blow—repealing the state death tax credit in its entirety and replacing it with a mere deduction.<sup>152</sup>

Although the Congress of 1932 cannot be charged with all of those subsequent developments, the fact remains that they consciously chose to abandon state governments in the name of federal estate tax revenue needs. To the extent the Congress of 2001 placed an unfair burden upon state governments by repealing the state death tax credit, they were not the first to undermine the original intent of the state death tax credit. Rather, the Congress of 1932 had been the first to do so.

Future Congresses now must decide whether the federal government will ever again honor a promise made in 1926, ignored in 1932 and completely broken in 2001. As a first step towards doing so, Congress should restore the state death tax credit to its pre-2001 level and enable estate taxes to once again become a viable source of state revenue. Yet, the history of 1932 shows that such would be merely a first step. A true resolution requires a much more fundamental re-evaluation of the proper division of estate tax revenues between the federal and state governments and the optimal means of facilitating that division.

### C. *The Gift Tax Loophole*

#### 1. *The Choice*

The Congress of 1932 made a final crucial choice when voting to reinstitute a federal gift tax. However, far more noteworthy than the decision to enact this gift tax was the manner in which Congress structured that tax.

Congressional leaders of 1932 portrayed the gift tax as a mere companion to the estate and income taxes, designed solely to prevent

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152. See generally Cooper, Ivimey & Vincenti, *supra* note 126, at 320 (discussing the repeal of the state death tax credit). The current deduction for state death taxes, found in I.R.C. § 2058, is less valuable to taxpayers than the prior credit. Specifically, unlike a credit, a deduction does not fully offset the impact of a state death tax. As a result, state governments seeking to impose a state estate tax no longer have a ‘free’ source of revenue by virtue of the state death tax credit. State death taxes have become far less politically viable as a result, leading a significant number of states to abandon this traditional source of state revenue. Michael, *supra* note 127, at 880. Note that under current law, the state death tax credit is scheduled to return on Jan. 1, 2011. P.L. 107-16 § 901(a)-(b) (2001). For much of the past decade, commentators contended that Congress would enact some form of permanent estate tax legislation before then. See William G. Gale & Samara R. Potter, *An Economic Evaluation of the Economic Growth and Tax Relief Reconciliation Act of 2001*, 55 *Nat’l Tax J.* 133 (2002) (“Virtually no one believes the bill will sunset as written.”). Time, however, is running short.

taxpayers from avoiding these taxes by making lifetime gifts.<sup>153</sup> Modern scholarship so routinely reiterates this accepted legislative history that it has become accepted as truth.<sup>154</sup> However, the structure of the gift tax reflects a very different intent—a stealth legislative agenda which has been effectively lost to history. Notwithstanding assertions to the contrary, the architects of the 1932 gift tax did not intend to deter lifetime gifts by imposing a gift tax. To the contrary, they sought to incentivize such gifts.

The Congressional logic regarding gift taxation was clear. Congress needed to balance the coming year's budget. Despite their calculated pronouncements to the contrary,<sup>155</sup> key Congressmen understood that estate taxes provide a uniquely slow form of tax revenue. As a threshold matter, a taxpayer had to die in order to trigger imposition of estate taxation.<sup>156</sup> Furthermore, the tax payable by virtue of that death would not be payable

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153. Both the House Committee on Ways and Means and the Senate Committee on Finance characterized the gift tax solely as a means of preventing avoidance of income and estate taxes. House Report, *supra* note 96, at 8 (indicating that gift tax was needed “[t]o assist in the collection of the income and estate taxes, and prevent their avoidance through the splitting up of estates during the lifetime of a taxpayer . . . .”); Senate Report, *supra* note 66, at 11 (“As a protection to both estate and income taxes, a gift tax is imposed.”). Chairman Crisp reiterated this stated purpose in floor debates. 75th Cong. Rec. 5691 (1932) (statement of Rep. Crisp) (“The estate tax, without a mother [gift] tax to protect it, might easily be evaded . . . .”)

154. See, e.g., Boris I. Bittker, Elias Clark & Grayson M.P. McCouch, *Federal Estate & Gift Taxation* 10 (9th ed. 2005) (gift tax was enacted “[t]o block th[e] route by which assets may be transmitted from one generation to another without payment of estate or inheritance tax . . . .”); Elias Clark, Louis Lusky, Arthur W. Murphy, Mark L. Ascher & Grayson M.P. McCouch, *Cases and Materials on Gratuitous Transfers: Wills, Intestate Succession, Trusts, Gifts, Future Interests, and Estate and Gift Taxation* 851 (5th ed. 2007) (“To prevent easy avoidance of the estate tax by means of lifetime gifts, Congress enacted the federal gift tax in 1932.”) (emphasis removed); Mitchell W. Ganz & Jay A. Soled, *Reforming the Gift Tax and Making it Enforceable*, 87 *B.U. L. Rev.* 759, 761 (2007) (“Unlike other taxes, the gift tax does not serve an independent function. Rather, Congress designed it to protect the integrity of the estate tax and income tax.”) (internal citation omitted); William G. Gale & Joel Slemrod, *Overview*, in *Rethinking Estate and Gift Taxation* 1, 15 (William G. Gale, James R. Hines Jr. & Joel Slemrod eds. 2001) (gift tax was enacted “[i]n an effort to stem tax avoidance . . . .”); Jeffrey N. Pennell, *Wealth Transfer Planning and Drafting* 18-1 (2005) (“The federal gift tax buttresses the estate tax.”); Stephanie J. Willbanks, *Federal Taxation of Wealth Transfers: Cases and Problems* 5 (2d. ed. 2008) (“Congress recognized the possibilities of tax avoidance through inter vivos gifts and adopted a gift tax . . . .”).

155. See *supra* note 153.

156. As Chairman Crisp colorfully indicated, “you cannot get blood out of a turnip . . . and you cannot get a tax from an inheritance or as an estate tax until a man dies.” 75th Cong. Rec. 5691 (1932) (statement of Rep. Crisp).

until a full 18 months thereafter.<sup>157</sup> That was simply too long to solve Congress's pressing revenue problems. As one member of the Committee on Ways and Means bluntly put it: "It takes a period of 18 months under existing law before you can get settlements of these estates, and *we need money now*."<sup>158</sup>

The gift tax provided a far more timely solution. Rather than being due 18 months after a taxpayer's death, gift taxes were payable no later than March 15 of the year following a gift.<sup>159</sup> As a result, if wealthy taxpayers could be induced to make large gifts in 1932, the Treasury would receive the resulting tax revenue before the spring of 1933. This more rapid collection cycle made gift taxes a far better source of emergency revenue than estate taxes could ever be.

Congress faced one problem, however, in the fact that gift tax liability results from a taxpayer's voluntary act. Accordingly, as Congressman Ramseyer warned his colleagues, high gift tax rates will discourage taxpayers from making gifts.<sup>160</sup> As a result, the Congress of 1932 consciously designed the gift tax to induce gift-giving, by setting gift tax rates significantly below the estate tax rates imposed upon a similarly-sized transfer.<sup>161</sup> Congress adopted this structure "with the expressed hope that it would persuade owners of large estates to makes gifts to their heirs as soon as possible."<sup>162</sup>

Congress fully realized that this approach would provide wealthy taxpayers with a significant opportunity to reduce their overall tax burden but were willing to do so as a means of generating immediate federal revenue.<sup>163</sup>

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157. The tax technically was due 12 months after death, although an estate could request a six-month interest-free extension of time to pay the tax. See *supra* note 100.

158. 75th Cong. Rec. 6352 (1932) (statement of Rep. Hill) (emphasis added).

159. Revenue Act of 1932 § 509(a). Under current law, the general due date is now April 15 rather than March 15. IRC § 6075(b)(1) (2008).

160. 75th Cong. Rec. 5896 (1932) (statement of Rep. Ramseyer) ("you can get gift tax rates so high that people will not make any gifts, and, therefore, such high rates would not yield any revenue.").

161. The structure of the gift tax provided an additional benefit to taxpayers, insofar as the gift tax is computed on a tax exclusive basis (the money used to pay gift tax is not subjected to gift tax) while the estate tax is computed on a tax inclusive basis (estate tax is imposed on that portion of a decedent's estate tax that will be used to pay taxes). For a more detailed discussion of this distinction, see Regis W. Campfield, Martin B. Dickinson & William J. Turnier, *Taxation of Estates, Gifts & Trusts* 12, 29 (22nd ed. 2002).

162. 75th Cong. Rec. 5903 (1932) (statement of Rep. Canfield).

163. *Id.* (noting that taxpayers who elected to pay gift tax will "lower their estate tax and increase the income to the Treasury while it is most needed.").

In effect Congress told wealthy taxpayers, you can pay us now or you can pay us later. But, they added one key proviso: If you pay us now, you'll pay far less.

The gift tax thus wasn't designed to prevent estate tax avoidance. Rather, it was carefully designed to encourage such avoidance.<sup>164</sup>

## 2. *The Impact*

In order to encourage significant gifts, Congress needed for taxpayers to perceive paying immediate gift tax as preferable to paying future estate tax. The most obvious way Congress achieved this goal was by enacting a separate rate table for gifts, pegging the rates of tax on gifts 25% lower than the equivalent estate tax rates.<sup>165</sup> However, that was not the only advantage the new gift tax offered wealthy taxpayers. In addition to these separate rate tables, the Revenue Act of 1932 also provided a separate \$50,000 gift tax exemption, use of which did not reduce the taxpayer's equivalent exemption from estate tax.<sup>166</sup> Also, gift tax was computed more favorably than the estate tax insofar as gift tax was assessed solely on the net amount received by a beneficiary, whereas estate tax was imposed on the decedent's entire estate, including the funds ultimately used to pay taxes.<sup>167</sup>

For the wealthiest Americans, these favorable aspects of the gift tax regimes truly added up. For example, consider the possibilities confronting a multi-millionaire taxpayer seeking to avoid the top 45% estate tax marginal rate. If this taxpayer made a single lifetime gift of \$10,000,000, she would owe less than \$2,300,000 of gift tax. She would have reduced her future

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164. Throughout this section, I have suggested that members of Congress were somewhat duplicitous about the gift tax – casting the tax as a mere companion to the estate and income taxes while truly seeing it as a crucial tool for generating short-term revenue. I do not wish to suggest that every member of Congress was involved in some grand conspiracy to mischaracterize the gift tax. Indeed, to the extent such a conspiracy existed, most legislators were likely victims rather than conspirators. Included among these many victims may have been nearly all of the members of the Senate who voted to enact the gift tax. In the Senate, Senator Smoot reported the bill as one designed solely to prevent evasion of the estate tax rather than generate any material revenue. 75th Cong. Rec. 10081 (1932) (statement of Sen. Smoot) (indicating that the “full purpose” of the gift tax was to prevent evasion of estate taxes and not to generate any significant revenue). The Senate did not engage in any debate on the subject. C. Lowell Harriss, *Legislative History of Federal Gift Taxation*, 18 *Taxes* 531, 536 (1940).

165. Revenue Act of 1932 § 502.

166. Revenue Act of 1932 § 505(a)(1).

167. Put more technically, the gift tax was computed on a tax-exclusive basis whereas the estate tax was computed on a tax-inclusive basis. This distinction persists until the present day. See *supra* note 161.



estate by \$12,300,000<sup>168</sup> but paid only \$2,300,000 in tax, an effective rate of 18.7%. That 18.7% tax rate not only compared favorably with the 45% top marginal estate tax rate, but was actually lower than the 20% top estate tax rate in effect under the 1926 Act.<sup>169</sup>

By providing Congress with gift tax revenue right now rather than estate tax revenue in the future, this hypothetical taxpayer would have enjoyed a transfer tax reduction of nearly 60% on her \$10 million gift. At the margin thereafter, her effective tax rate on gifts would have been 25%, a massive discount to the 45% top estate tax rate. The federal government thus would have sacrificed significant future estate tax revenues in order to capture revenue when it was most needed.

However, such is not the end of the analysis. Indeed, once again a seemingly simple story from 1932 is not the accurate one. The twist in the tale arises from the fact that there was no gift tax counterpart to the state death tax credit. Revenue from the gift tax, like the 'supertax' estate tax, thus inured entirely to the federal government.<sup>170</sup> Taking into account this factor, the 25% top marginal federal gift tax rate nearly equaled the 29% top net federal estate tax rate after application of the state death tax credit. Taxpayers who elected to pay gift tax rather than estate tax would receive a significant benefit, but that benefit effectively came at the expense of state governments rather than the federal treasury.

Characterized for decades as a simple means of preventing tax evasion, the gift tax actually has a far different history. Its structure was designed to incentivize, rather than impede, gift giving. It was intended to siphon off future federal estate tax revenues rather than protect those revenues. Although solely a federal tax, it dealt yet another stealth revenue blow to ailing state governments. Such is the lost history of the 1932 gift tax.

### 3. *The Lesson*

In their desire to capture immediate revenue, members of the Congress of 1932 found a simple legislative solution: they offered taxpayers significant long-term tax savings in exchange for short-term revenue. In common parlance, the Congress of 1932 simply accelerated future revenues.

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168. Consisting of \$10,000,000 gifted to the recipient plus \$2,300,000 paid in gift tax.

169. Revenue Act of 1926 § 301(a).

170. Congress seemingly was so concerned with this issue that it modified the state death tax credit to have it operate after the credit for gift taxes paid. Revenue Act of 1932 § 802(a). As a result, once a taxpayer had made a gift of property, the property would not be included in computation of the state death tax credit even if that gift subsequently was included in the taxpayer's estate. See Senate Report, supra note 66, at 49 (1932) (confirming this interpretation).

However, to the extent legislators offered taxpayers a discount for paying gift taxes today rather than estate taxes tomorrow, they ultimately reduced total transfer tax revenues.

Those most able to accept Congress's offer were the wealthiest Americans. Taxpayers uncertain about their own financial futures will not make significant *intervivos* gifts, while those awash in cash and devoid of worries will do so most freely. The 1932 gift tax thus would be most exploited by the wealthy and the well-advised.<sup>171</sup> The Congress of 1932 would receive the resulting revenue. Future generations, and future Congresses, would pay the price.

The Congress of 1932 faced extraordinary times. However, its solution of offering disproportionate benefits to those who provide accelerated revenue has become an all too common theme in modern tax policy. Some examples are subtle, structural, ones. For example, while Congress has largely "unified" the estate and gift taxes since 1932, the gift tax still offers taxpayers a more favorable tax-exclusive regime.<sup>172</sup> Other examples are far more dramatic. For example beginning January 1, 2010, taxpayers can convert their Traditional IRA retirement plans to Roth IRAs regardless of income limits.<sup>173</sup> While taxpayers making such conversions must pay income tax on the assets converted, the Roth IRAs will thereafter grow on a tax-free basis, potentially for generations.<sup>174</sup> To the extent

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171. Indeed the wealthiest Americans were the intended beneficiaries of this tax-saving opportunity. With respect to the wealthiest Americans, Congress wanted to provide a special "invitation to the holders of these enormous estates to dissipate them . . . before death." 75th Cong. Rec. 5691 (1932) (statement of Rep. Crisp).

172. See *supra* note 161.

173. Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222 § 512, 120 Stat. 345, 365-66, amending IRC § 408A(c)(3) effective January 1, 2010. While "Traditional" IRAs and "Roth" IRAs are both types of qualified retirement accounts, they differ in several material respects. For purposes of this Article, the major distinction is the different income tax treatment accorded to these accounts. Specifically, as a general rule, contributions to a Traditional IRA account are deductible from the participant's gross income during the year of contribution while all future distributions from the account will be subject to income tax as ordinary income. The Roth IRA offers the exact opposite regime, with no deduction available for contributions to the account but no income tax imposed on future distributions. For a more detailed discussion of these and other distinctions, see Ray D. Madoff, Cornelia R. Tenney & Martin A. Hall, *Practical Guide to Estate Planning* § 13.04[B] (2010 ed.).

174. Unless the taxpayer elects otherwise, she must recognize half of the income resulting from the Roth conversion on her 2011 individual income tax return and half on her 2012 return. Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222 § 512, 120 Stat. 345, 365-66, amending IRC § 408A(d)(3)(A) effective Jan. 1, 2010. For more on the potential tax-savings

taxpayers elect to convert their plans, these conversions will enrich the Treasury for few fleeting years but will reduce annual income tax revenues for a century thereafter.<sup>175</sup>

The result is a tax code rife with intentional loopholes waiting for those savvy enough to find them and wealthy enough to exploit them. While economists might debate the long-term economic impact of such provisions, the fact remains that Congress typically seems unconcerned with such analysis.<sup>176</sup> Rather, Congress routinely solves its own fiscal problems by creating new ones. The only difference is that the new problems will belong to a different set of politicians.

### CONCLUSION

The events of 1932 brought a perfect storm to the U.S. wealth transfer tax regime. As an unprecedented financial emergency confronted the country, Congressional leaders mired in debate over a proposal to enact a national sales tax. For a group of politicians led by Congressman William Ramseyer, the ensuing political chaos provided the moment they had long been waiting for—an unprecedented opportunity to reinvent the federal wealth transfer tax system.

Histories of American taxation have typically devoted far too little attention to the specific estate and gift tax provisions contained within the Revenue Act of 1932 and to the legislative choices made that fateful year. Indeed, the history of 1932 has become largely a lost one—depriving modern scholars of the opportunity to reconsider the legislative choices made in 1932 and to appreciate their continued relevance to current tax policy.

In this Article, I have attempted to reclaim this lost history. Looking back at the events of 1932, I have demonstrated both the fiscal impact and the policy significance of choices made in that fateful year. The choices of 1932 have helped shape the fundamental structure of U.S. estate and gift taxation for nearly eight decades. As a result, understanding these choices is hardly of mere historical interest. Rather, as our nation confronts new economic challenges in a new century, a deeper understanding of the events

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opportunities resulting from a Roth IRA conversion, see Richard S. Franklin & Lester B. Law, *The Roth IRA – What a Great Deal*, 72 Fla. B.J. 51 (Mar. 1998).

175. The Federal budgetary process encourages this short-sighted result. See Karen C. Burke & Grayson M.P. McCouch, *Lipstick, Light Beer and Back-Loaded Savings Accounts*, 25 Va. Tax Rev. 1101, 1108-09 (2006) (“[T]he budget rules generally require that Congress take account of the cash-flow effects of tax expenditures only over a five-year budget window. This timing gimmick permitted Roth IRA proponents to minimize the short-term budget costs and avoid taking the inevitable long-term revenue shortfalls into account.”) (internal citation omitted).

176. *Id.* at 1108-16.

of 1932 can inform crucial policy debates regarding our modern estate and gift tax code.

The Congresses of 2010 and beyond have vital decisions to make regarding the future of federal wealth transfer tax policy. They must decide the optimal exemption and rate structure for our modern estate and gift tax regime. They must revisit the interplay between federal and state estate taxes and determine the ultimate fate of the state death tax credit. They must reconsider the relationship between U.S. estate taxation and gift taxation as part of a larger reevaluation of short-term and long-term revenue priorities.

This legislative agenda is an ambitious one. But, modern politicians are hardly the first to face all of these crucial policy choices. They thus have much to learn from a study of the long-forgotten decisions embodied in the Revenue Act of 1932 and the motivations of the men who made them. In short, they have much to learn from the ghosts of 1932.