# Through the Looking Glass: The Politics of Estate Tax Reform

by Edward J. McCaffery
*Los Angeles, California**

Here we go again. Trusts and estates practitioners sleep anxiously, uncertain of what Washington will do next to affect the centerpiece of their professional lives: the gift and estate tax. Repeal or repair? Stronger or weaker? Whither the law?

As we lose sleep over these questions and write or read articles like this one, we ought to bear in mind that we have been down this path before. Many times. The past decade, centered around 2001's EGTRRA law that gave us gradual weakening and then the single-year repeal in 2010,[1] saw multiple votes to abolish estate taxation. When a simple elimination of the tax seemed to lose appeal, we saw a flirtation with a radical rate reduction, to 15 percent, combined with a stepped-up basis that would, in essence, give us a capital-gains-on-death law, much like Canada, of all places.[2] Widening the lens a bit, the decades before the present one saw frequent, major changes to the estate tax—unification of the gift and estate taxes in the Tax Reform Act of 1976, introduction of the unlimited marital deduction in 1981's ERTA,[3] generation-skipping taxes from 1986's TRA,[4] and the anti-estate freeze legislation of OBRA in 1990.[5] The only thing certain seems to be uncertainty.

It is tempting to see all this as a story of Good versus Evil. Well-meaning technocrats try to keep pace with big bad wolves of rich people and their advisors devising ever more clever ruses to escape the legislatively decreed marriage of death and taxes. Like all fairy tales, that would be more false than not. A deeper, more reflective look at the landscape of the estate tax shows that something important has held steady throughout the years. It's one of the oldest professions: making money. Money is at the root of all estate tax reform. The key, however, is to consider not the *government's* money, for the gift and estate taxes have long been small change at best in the federal fisc,[6] but rather the *politicians'* money. Estate tax repeal or reform debates have been good for the business of being an elected official. The insights gained from considering the role of money in the political process have been remarkably helpful to me in navigating through the past decade. Yet I have found in my academic work and various speaking engagements around the country that people cynical about politics in general are remarkably naïve about their own fields. So here, again, is my basic advice on predicting the course of estate tax reform: Follow the money.

A word on my conversion experience: I began writing against the gift and estate tax some fifteen years ago, as a matter of principle.[7] I believe that a consistent progressive spending tax is a better tax—and a better way to get at concentrations of wealth and second and later generations—than what we have now.[8] I came to see that that argument, like sales of my books, was going nowhere. Politicians are, in fact, not



[1] Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (codified as amended in scattered sections of the I.R.C.).

[2] See Joel Friedman, *Estate Tax "Compromise" With Fifteen Percent Rate Is Little Different From Permanent Repeal, Center on Budget and Policy Priorities, May 31, 2006*, available at <<http://www.cbpp.org/cms/?fa=view&id=338>>. Indeed, if the law introduced by Senator Kyl (R- AZ) added a "basis offset," it would in fact give us capital gains at death: (fair market value – basis) x .15.

[3] Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (codified as amended in scattered sections of the I.R.C.).

[4] Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended in scattered sections of the I.R.C.).

[5] Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388.

[6] For example, gift and estate taxes have long accounted for roughly one-fourth to one-fifth of the category of "other receipts" in the federal budget. This entire category has never accounted for more than 1 percent of GDP since the 1930s, and typically accounts for one-tenth or less of what the income tax does. Customs duties and fees and "miscellaneous receipts" from "federal reserve deposits" continue to exceed the gift and estate tax as a source of revenue. Office of Mgmt. & Budget, Exec. Office of the President, Historical Tables, Budget of the United States Government, Fiscal Year 2009 (2008), Tables 2.3 and 2.5. And the gift and estate tax figures are gross. One scholar has speculated that the very existence of the tax costs the government tax revenue, because the kinds of planning devices used to avoid it—such as insurance and charitable trusts—cost the government *income* tax revenue. B. Douglas Bernheim, *Does the Estate Tax Raise Revenue?*, in 1 Tax Policy and the Economy 113 (Lawrence Summers, ed., 1987). By any light there is not much revenue generated for the government from the tax.

[7] Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 Yale L. J. 283 (1994).

[8] See e.g., Edward J. McCaffery, Fair Not Flat: How to Make the Tax System Better and Simpler, (2002).