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# Interstate Competition and State Death Taxes: A Modern Crisis in Historical Perspective

Jeffrey A. Cooper\*

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## I. INTRODUCTION

In the summer of 2005, the State of Connecticut enacted a new state death tax.<sup>1</sup> From a historical perspective, the new legislation was unremarkable. After all, Connecticut had imposed various state death taxes nearly continuously since 1889.<sup>2</sup> The editors of the *Wall Street Journal*, however, took a different view. In an editorial devoted to the subject, the *Journal* dubbed the new tax an “act of masochism” and suggested that state leaders had better “build a Berlin Wall around the state” if they wished to prevent wealthy residents from fleeing Connecticut in response.<sup>3</sup> The editorial chastised state leaders elsewhere for imposing similar taxes, suggesting that these “soak-the-rich schemes” would precipitate “a stampede of retirees and family businesses” to migrate towards Florida and other states that impose no such taxes.<sup>4</sup> State death taxes have always been unpopular,<sup>5</sup>

1. 2005 Conn. Pub. Act 05-251 § 69, available at <http://www.cga.ct.gov/2005/act/Pa/2005PA-00251-R00HB-06940-PA.htm>. The term “death tax” is a generic term that refers to two specific types of taxes imposed upon the death of an individual, namely “estate taxes” and “inheritance taxes,” the latter also often being referred to as “succession taxes.” BLACK’S LAW DICTIONARY 429, 1497-99 (8th ed. 2004). Simply defined, an “estate tax” is a tax imposed upon the decedent’s estate and is generally calculated as a percentage of the decedent’s total wealth transmitted at death. *Id.* at 1497. In contrast, an “inheritance” or “succession tax” is a tax not on the decedent’s transmission of property at death, but rather upon the receipt of that property by his or her heirs or beneficiaries. *Id.* at 1497-99. These taxes normally are calculated by reference to the amount to be received by each beneficiary and the degree of relationship between a given beneficiary and the decedent. To the extent that most modern estate plans provide for all death taxes to be paid out of estate assets prior to division and distribution, the distinction between estate taxes and inheritance taxes is relevant only to the computation of death taxes and not as to the source of payment. See Jonathan G. Blattmachr, *Are You Using the ‘Wrong’ Tax Apportionment Clause?*, PROB. AND PROP., Nov.-Dec. 1989, at 23 (observing that most wills provide for all death taxes to be paid out of the residuary estate without apportionment).

2. See GAYLE B. WILHELM, CONNECTICUT ESTATES PRACTICE: DEATH TAXES §§ 1:1-:20 (3d ed. 1998).

3. Editorial, *Estates of Pain*, WALL ST. J., Aug. 1, 2005, at A8.

4. *Id.*

5. Death taxation often provokes disproportionately emotional reactions. As observed by Michael Graetz,

For several decades, total revenues raised by estate and gift taxes have roughly equaled those raised by excise taxes on alcohol and tobacco. Yet, . . . [w]e do not hear of the suffering of widows and orphans (or even of farmers and small businesses) because of alcohol and tobacco taxes. Philosophers and economists do not routinely debate the

but the recent anti-tax rhetoric seems to have reached a new level. State death taxes, a form of tax revenue nearly two centuries old, are in crisis.

The roots of this crisis span back through the centuries. When Congress enacted the modern federal estate tax in 1916,<sup>6</sup> nearly every U.S. state<sup>7</sup> already imposed a state death tax. Only six states did not.<sup>8</sup> By 1924, the number of state governments imposing death taxes had increased to forty-six, with only three states remaining free of all death taxes.<sup>9</sup> That year, total state death tax collections were nearly three times what they had been just eight years before<sup>10</sup> and comprised some seven percent of total state tax revenues.<sup>11</sup> At first blush, these figures would suggest that state governments had tapped the full potential of this form of taxation. A deeper analysis, however, reveals that they had not.

By 1924, state death taxes had actually entered a period of relative decline.<sup>12</sup> In large part, interstate competition precipitated this trend.<sup>13</sup>

merits of such taxes. Perhaps most significantly, increases in such excise taxes do not arouse fears that we are about to eliminate the concept of private property in this country and embrace socialism, or even communism. The estate tax, however, evokes just such responses.

Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 259 (1983) (footnote omitted). A modern empirical analysis concluded that taxpayers are indeed more likely to relocate to avoid state death taxes than to avoid, for example, income taxes and property taxes. Jon Bakija & Joel Slemrod, *Do the Rich Flee from High Tax States? Evidence from Federal Estate Tax Returns* 36 (Nat'l Bureau of Econ. Research, Working Paper No. 10645, 2004); see also Lee Anne Fennell, *Death, Taxes, and Cognition*, 81 N.C. L. REV. 567 (2003) (exploring the psychology behind the public opposition to estate taxation).

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

7. For convenience, any generic use of the terms "state" and "states" in this Article will encompass both the duly-admitted states of the United States and the District of Columbia.

8. In 1916, no state death taxes were imposed in Alabama, District of Columbia, Florida, Mississippi, New Mexico, and South Carolina. Eugene E. Oakes, *Development of American State Death Taxes*, 26 IOWA L. REV. 451, 468 (1941) (footnotes omitted).

9. During this period, new state death taxes were imposed by Mississippi (in 1918), New Mexico (in 1919), and South Carolina (in 1922), leaving Alabama, Florida, and the District of Columbia as the three jurisdictions not imposing a death tax in 1924. *Id.*

10. ANALYSIS STAFF, TAX DIVISION, U.S. TREASURY DEP'T, OVERLAPPING TAXES IN THE UNITED STATES 20 tbl.7 (1954) [hereinafter OVERLAPPING TAXES].

11. *Id.* at 21 tbl.7.

12. Although the actual amount of revenue created by the state death taxes had increased during this period, the overall percentage of revenue coming from the state death taxes steadily declined. See *id.* at 20-21 tbl.7.

13. The impact of interstate competition on state laws has been studied extensively in other contexts, such as corporate law. See, e.g., Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1437 (1992) (analyzing "state competition for corporate charters"); William L. Cary, *Federalism & Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 666 (1974) (using the term "race to the

During this era, some states actively began to lure wealthy residents with the promise of favorable tax rates. The State of Florida, in particular, endeavored to create a domestic “tax haven” free from the evils of winter snowstorms, income taxation, and death taxation.<sup>14</sup> Florida’s efforts to attract wealthy citizens, as well as similar efforts in Alabama and Nevada,<sup>15</sup> worried politicians elsewhere. In the age of automobiles, taxpayers were becoming increasingly mobile.<sup>16</sup> If taxation in any state became too high—particularly a tax as universally loathed as a death tax—a taxpayer could simply relocate.<sup>17</sup> Many state leaders thus came to worry that imposing death taxes would precipitate an exodus of their most wealthy, and often most industrious, taxpayers.<sup>18</sup> Such an exodus would undermine not only a state’s death tax revenues, but also that state’s industry, other tax collections, and overall fiscal health.

This interstate competition threatened the very existence of state death taxes—a problem so significant that it inspired three national conferences

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bottom” to describe the battle among state governments to attract corporations into the state by providing the most favorable laws); Daniel R. Fischel, *The “Race to the Bottom” Revisited: Reflections on Recent Developments in Delaware’s Corporation Law*, 76 NW. U. L. REV. 913 (1982) (“Since founders of corporations have the option of incorporating in any of the fifty states, each state has strong incentives to enact a statute that will attract new incorporators. This competition in corporate charters ensures that, as in any other competitive market, only the efficient will survive.” (footnote omitted)). Recently, this model of interstate competition has been applied to the field of trusts and estates. See, e.g., Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005) (examining the “domestic jurisdictional competition for trust funds”); Stewart E. Sterk, *Asset Protection Trusts: Trust Law’s Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000) (describing the role of trust mobility in state competition for trust business).

14. See discussion *infra* Part III.A.2.

15. Alabama repealed its state death tax before 1892. JAMES A. MAXWELL, *THE FISCAL IMPACT OF FEDERALISM IN THE UNITED STATES* 332 (1946). While Nevada still imposed a state death tax in 1924, state leaders were working to position the state as a death tax haven. *Id.* at 333. In July 1925, as part of this process, the state followed Florida’s lead and passed an amendment to the Nevada State Constitution prohibiting the imposition of state death taxes. *Id.*

16. See KEVIN PHILLIPS, *WEALTH AND DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN RICH* 58 (2002) (“More than any other innovation, automobiles dominated the 1920s, relocating everything from residential patterns to prostitution . . .”); see also 67 CONG. REC. 3580, 3597 (1926) (statement of Sen. Fletcher) (“Last year, for instance, 500,000 people went into the State of Florida in automobiles. They could not have done that five years ago.”).

17. Interstate competition to attract wealthy taxpayers and important businesses shaped broad state tax policies in this era. See E. M. Perkins, *The Influence of State Competition in the Adoption of Regressive Taxes: The North Carolina Sales Tax*, 14 N.C. L. REV. 53 (1936) (criticizing state leaders for turning towards regressive forms of taxation as a means of attracting and retaining wealthier residents).

18. Modern empirical analyses have confirmed that taxpayers will seek to relocate in order to avoid state death taxation, although the impact may be relatively modest. See Bakija & Slemrod, *supra* note 5. Notwithstanding the relevance of this cited empirical work, this Article focuses on the stated opinions of state politicians and the actions they take in response, rather than assessing the merit of those opinions. Justified or not, state politicians have consistently believed that state death taxes prompt taxpayer relocations and have acted based on that belief. That dynamic is the focus of this Article.

devoted to finding a solution and ultimately prompted congressional action designed to end the competition. In 1924, Congress amended the Internal Revenue Code to allow a taxpayer's federal estate a dollar-for-dollar credit for all or a portion of the state death taxes paid by that estate.<sup>19</sup> In 1926, in response to demands from state leaders, Congress increased the maximum amount of this "state death tax credit" to eighty percent of the federal estate tax otherwise payable under the 1926 rate tables.<sup>20</sup>

Since the federal estate tax absorbed the impact of state death taxes up to the limit of the state death tax credit, this credit enabled state governments to generate significant death tax revenue without imposing any net tax burden on decedents' estates.<sup>21</sup> With the state death tax credit in place, a wealthy domiciliary of New York, for example, would pay the same aggregate federal and state death taxes as a domiciliary of Florida.<sup>22</sup> The state death tax credit thus was the great equalizer for the states, enabling states to impose death taxes without fear of competitive disadvantage. A taxpayer might still elect to change her state of domicile to avoid winter snows, but migration south would no longer serve to reduce the bite of death taxation at journey's end. Congress had neutralized the tax havens.

The tax havens did not go down without a fight,<sup>23</sup> but they eventually relented. By 1932, Alabama and Florida each adopted a state death tax exactly equal to the maximum federal credit,<sup>24</sup> a tax known as a "pick-up tax."<sup>25</sup> At that point, every state but Nevada and the District of Columbia imposed at least a pick-up tax, severely narrowing the gap between the tax

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19. Revenue Act of 1924, Pub. L. No. 68-176, § 301(b), 43 Stat. 253, 304. The credit was limited to the lesser of (i) the state death taxes paid and (ii) twenty-five percent of the federal estate tax otherwise payable.

20. See Revenue Act of 1926, Pub. L. No. 69-20, § 301(b), 44 Stat. 9, 70.

21. See *id.* If a state declined to impose a death tax sufficient to fully absorb the available credit, the federal estate tax would increase commensurately. No net—combined federal and state—death tax savings would result for taxpayers in that state.

22. As will be explored later, this statement is a bit of an oversimplification. With respect to several smaller estates, New York and many other states imposed an additional state death tax that exceeded the state death tax credit. See *infra* Part IV.C.1. Nevertheless, for estates of the nation's wealthier taxpayers—the taxpayers the states were most concerned about retaining—state death tax rates, in general, matched the available credit exactly. See *infra* note 214 and accompanying text.

23. Florida unsuccessfully challenged the imposition of the state death tax credit on Constitutional grounds. See *infra* Part IV.B (discussing *Florida v. Mellon*).

24. Oakes, *supra* note 8, at 469.

25. The term "pick-up" tax refers to the fact that such a tax enabled the state government that imposed it to pick up the available state death credit offered by the federal government. Such taxes alternatively are referred to as "soak-up," "sop-up," or "sponge" taxes. Michel G. Kaplan, *Will the Disappearing State Death Tax Credit Deliver a Knock-Out Punch to the Tennessee Inheritance Tax?*, 39 TENN. B.J. 28, 29 (2003).

havens and the rest of the states.<sup>26</sup> Throughout the balance of the twentieth century, this trend towards uniform state death taxes continued. Nevada, the last hold-out, adopted its pick-up tax in 1987.<sup>27</sup> By 2001, a pick-up tax was the only death tax imposed by thirty-eight states.<sup>28</sup>

Then, everything changed.

In the spring of 2001, Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”).<sup>29</sup> This comprehensive piece of tax legislation contained a major surprise for state governments:<sup>30</sup> EGTRRA repealed the state death tax credit.<sup>31</sup> The elimination took place in stages over a four year period, from 2001 through 2004.<sup>32</sup> As of January 1, 2005, some eighty years after its birth, the state death tax credit simply ceased to exist.<sup>33</sup>

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26. As noted, the gap was narrowed but not completely eliminated, since many states still imposed death taxes in addition to the pick-up tax. *See supra* note 22; *infra* Part IV.C.

27. *See* NEV. REV. STAT. § 375A.025 (2003). By waiting until 1987 to adopt a pick-up tax, Nevada remained stubborn far longer than Florida or Alabama. The state’s failure to adopt a pick-up tax cost it millions of dollars in state revenue.

28. The other thirteen states imposed both a pick-up tax and a separate state death tax. Federation of Tax Administrators, State Responses to Estate Tax Changes Enacted as Part of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) (2002), <http://www.taxadmin.org/fta/rate/Estatetax.html>.

29. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 1, 115 Stat. 38, 38. President Bush signed EGTRRA into law on June 7, 2001. *See id.*

30. At least one pair of scholars had warned that Congress might attempt to indirectly increase federal estate tax revenues by repealing the state death tax credit, a form of tax increase that “could be accomplished in a manner that would invoke little, if any, public attention.” John M. Janiga & Louis S. Harrison, *The Case for the Retention of the State Death Tax Credit in the Federal Transfer Tax Scheme: ‘Just Say No’ to a Deduction*, 21 PEPP. L. REV. 695, 715 (1994). As EGTRRA worked its way through Congress, state governments indeed remained largely silent, and “shot themselves in the foot by not protesting until too late.” MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 209* (2005). Authors Graetz and Shapiro contended that the states failed to respond in part due to the difficulty of organizing state leaders from different political parties to act on a national level. *Id.* Additionally, Graetz and Shapiro argued that the states failed to speak up about EGTRRA because of the perceived futility of state leaders arguing against a federal tax decrease just to save their own tax revenue. *Id.* at 210 (“That argument would not fly.”).

31. Economic Growth and Tax Relief Reconciliation Act of 2001 § 531(a)(1)-(3).

32. *Id.* During 2001, estates were entitled to the full state death tax credit. I.R.C. § 2011(a) (2002). Thereafter, the credit was reduced by 25% per year. *See* Economic Growth and Tax Relief Reconciliation Act of 2001 § 531(a)(1)-(3). Accordingly, the credit was reduced to 75% of its historical amount in 2002, 50% in 2003, and 25% in 2004. *Id.* As of January 1, 2005, the credit was replaced with a deduction against the federal estate tax for state death taxes paid. *Id.* § 532(a)-(b) (codified as amended at I.R.C. § 2058 (2002)). While this deduction serves to mitigate the effect of double federal and state death taxation, it does not eliminate double taxation in the way the prior state death tax credit did. Specifically, a dollar of state death tax which previously generated an exactly offsetting one dollar credit will now generate a deduction worth forty-six cents (assuming a top federal estate tax rate of 46% in 2006). Accordingly, that dollar of state death tax actually reduces the estate by a net of fifty-four cents, whereas under the prior regime it would have had no net impact on estate assets.

33. EGTRRA contains a “sunset provision” that provides for all changes made by the Act to disappear on January 1, 2011, thus restoring the state death tax credit. Economic Growth and Tax

Since EGTRRA repealed the state death tax credit, it also repealed the pick-up state death taxes calculated by reference to that credit. In a process that has come to be known as “decoupling,” some, but not all, of the affected states responded by imposing independent state death taxes in lieu of their defunct pick-up taxes.<sup>34</sup> As of January 1, 2005, twenty-four states imposed some form of state death tax.<sup>35</sup> Florida and twenty-six other states did not. After eighty years of dormancy, the tax havens thus breathe new life. Interstate competition begins anew.

How will the competition end? The question is a crucial one. State leaders, facing the loss of billions of dollars of state tax revenue, certainly want to know.<sup>36</sup> Taxpayers seeking to plan for the disposition of their

Relief Reconciliation Act of 2001 § 901. See Jeffrey A. Cooper et al., *State Estate Taxes After EGTRRA: A Long Day's Journey Into Night*, 17 QUINNIPIAC PROB. L.J. 317, 320 (2004); see also Ronald Aucutt, *Still Debating the Prospects for Estate Tax Repeal*, 28 EST. PLAN. 383 (2001). Most commentators consider it exceedingly likely that Congress will 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, 138 (2002), available at <http://ntj.tax.org/> (“Virtually no one believes the bill will sunset as written.”).

34. As a general rule, these state death taxes are designed to replicate the state taxes that would have been due had EGTRRA not become law and if the state death tax credit had continued in effect. For example, Rhode Island law provides:

For decedents whose death occurs on or after January 1, 2002, a tax is imposed upon the transfer of the net estate of every resident or nonresident decedent as a tax upon the right to transfer. The tax is a sum equal to the maximum credit for state death taxes allowed by 26 U.S.C. § 2011 as it was in effect as of January 1, 2001. Any scheduled increase in the unified credit provided in 26 U.S.C. § 2010 in effect on January 1, 2001, or thereafter, shall not apply.

R.I. GEN. LAWS § 44-22-1.1(a)(2) (Supp. 2005).

35. States imposing state death taxes as of January 1, 2005 were as follows: District of Columbia (DC CODE §§ 47-3701, 47-3702 (2001)); Illinois (35 ILL. COMP. STAT. § 405/2, 405/3 (1996 & Supp. 2005)); Indiana (IND. CODE §§ 6-4.1-1-1 to 6-4.1-11-7 (Supp. 2004)); Iowa (IOWA CODE § 451.2 (2004)); Kansas (KAN. STAT. ANN. §§ 79-15,101(a), 79-15,102 (2004)); Kentucky (KY. REV. STAT. ANN. § 140.010-990 (2004)); Louisiana (LA. REV. STAT. ANN. §§ 9:2431, 9:2438 (2005)); Maine (ME. REV. STAT. ANN. tit. 36, § 4062 (1990 & Supp. 2004)); Maryland (MD. CODE ANN., TAX-GEN. §§ 7-304, 7-309 (2004)); Massachusetts (MASS. GEN. LAWS ch. 65, §§ 2A(a) (2004)); Minnesota (MINN. STAT. §§ 291.005, 291.03, 289A.10(1) (1999 & Supp. 2005)); Nebraska (NEB. REV. STAT. §§ 77-2101 to 77-2116 (2003)); New Jersey (N.J. STAT. ANN. § 54:38-1 (West 2002)); New York (N.Y. TAX LAW §§ 951, 952 (McKinney 1999 & Supp. 2005)); North Carolina (N.C. GEN. STAT. ANN. §§ 105-32.1, 105-32.2 (West 2003)); Ohio (OHIO REV. CODE ANN. §§ 5731.01-.03 (LexisNexis 2003)); Oklahoma (OKLA. STAT. tit. 68, § 2907 (2001)); Oregon (OR. REV. STAT. § 118.010 (2004)); Pennsylvania (20 PA. CONS. STAT. §§ 3701-3705 (2005)); Rhode Island (R.I. GEN. LAWS § 44-22-1.1(a)(2) (Supp. 2005)); Tennessee (TENN. CODE ANN. § 30-2-614 (2005)); Vermont (VT. STAT. ANN. tit. 32, §§ 7101-7475 (2005)); Virginia (VA. CODE ANN. §§ 58.1-901 to 58.1-930 (2005)); and Washington (WASH. REV. CODE § 11.104A.050 (2005)).

36. The repeal of the state death tax credit could potentially cost states \$5 billion to \$9 billion in annual revenues. Elizabeth C. McNichol et al., *Center on Budget and Policy Priorities, States Can Retain Their Estate Taxes Even as the Federal Estate Tax is Phased Out*, <http://www.cbpp.org/1-31-02sfp.pdf> (last revised Feb. 4, 2003) (estimate of \$5.7 billion); see also Elizabeth C. McNichol et al.,



estates struggle to predict the answer, as do the attorneys retained to assist them. An entire form of state taxation faces a very uncertain future, leaving state leaders to debate tax policy while taxpayers debate their choice of domicile.

The current landscape is not wholly without precedent. Interstate competition has impacted state death taxes since their inception. The keys to understanding the challenges confronting modern state death taxes thus may lie in a study of their history. Yet what little modern literature exists relating to state death taxation largely has ignored the events preceding EGTRRA.<sup>37</sup> This Article attempts to fill that void.

In this analysis, I explore the history of interstate competition to attract and retain wealthy residents in an effort to help inform the debate as to how such competition will impact modern state death taxes. Although it is impossible to anticipate with certainty what state politicians will do in the future, I seek to offer guidance by placing the current climate in historical perspective and studying what past political leaders said and did when confronted with similar considerations.

The following sections of this Article approach this subject in chronological order. Part II covers the history of federal and state death taxation from 1797 through 1924, as governments tentatively experimented with this form of tax revenue. Part III turns to the crucial years of 1924 through 1926, when the states turned to Congress for help and Congress delivered the state death tax credit. Part IV studies the initial state responses to enactment of the state death tax credit, as states rapidly moved to incorporate the new credit into their state tax laws. Part V explores the longer-term state responses, focusing on two trends in state legislation that would imperil the future of state death taxes. Part VI brings the analysis to the modern day, post-EGTRRA, as a long-dormant competition begins anew between the states that impose death taxes and those that do not.

The conclusion reached from this analysis is a grim one for the future of state death taxes. The states with decoupled estate taxes now confront the

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Center on Budget and Policy Priorities, *Repeal of the Federal Estate Tax Would Cost State Governments Billions in Revenue*, <http://www.cbpp.org/8-30-00sfp.pdf> (last revised Dec. 12, 2000) (noting that by 2010, repeal could cost state governments nearly \$9 billion annually).

37. There exist a number of comprehensive historical analyses of state death taxes that have become quite dated. See, e.g., MAX WEST, *THE INHERITANCE TAX* (2d ed., Columbia Univ. Press 1908) (1893); Oakes, *supra* note 8; MAXWELL, *supra* note 15, at 331-53. Modern analyses, including this Author's prior work, largely have ignored this history, focusing instead on the policy implications of EGTRRA and techniques for estate planning amid the current uncertainty. See, e.g., Jeffrey A. Cooper, *Wrestling With Decoupling*, TR. & EST., Feb. 2006, at 61; Cooper et al., *supra* note 33; David Keene & Marcia K. Fujimoto, *EGTRRA's Changes to the State Death Tax Credit: Good News for Some Estates, Bad News for Some States*, 81 TAXES 23 (2003); Bruce D. Steiner, *Coping with the Decoupling of State Estate Taxes After EGTRRA*, 30 EST. PLAN. 167 (2003); Anthony E. Woods, *Decoupling's Dilemma: As States Unhook Their Estate Tax Systems From the Feds, Clients Can Owe More Than Ever Before*, TR. & EST., Apr. 2004, at 50.

same competitive pressures that plagued states seeking to impose death taxes prior to 1924. In the earlier era, Congress provided a bold solution in the form of the state death tax credit, preventing interstate competition from destroying the state death taxes. Now, that credit is gone. As such, it may be only a matter of time before modern state leaders resume where long-forgotten predecessors left off, completing the migration away from death taxation and towards other forms of tax revenue. A new state tax landscape will thus emerge, shaped by pressures and influences that began not in 2001 but decades before.

## II. SETTING THE STAGE: 1797-1924

The history of death taxes in the United States traces back to 1797. Yet for over a century of this history, death taxes were an exception, both geographically and temporally, rather than the rule. The early period of death taxation began slowly, with federal and state governments taking the first tentative steps into the field.

Towards the end of the nineteenth century, the pace of activity rapidly increased. What had been a barren landscape turned into a crowded one. By 1924, the federal government and nearly every state imposed some form of death taxation. At that point, state governments competed not only with the federal government but also among themselves to exploit what had become a mainstream source of tax revenue.

### A. *The Early History of Federal Death Taxes*

The federal government enacted and subsequently repealed death taxes three times during the eighteenth and nineteenth centuries.<sup>38</sup> While each iteration of the federal death tax varied widely in form and rate, these early federal death taxes shared a common origin insofar as each was imposed as an extraordinary revenue measure during times of military activity, and each was repealed as soon as the conflict came to an end and the need for extra revenue abated.<sup>39</sup>

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38. 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 JOINT 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) [hereinafter DESCRIPTION AND ANALYSIS] (providing a legislative history of death taxes from 1797 to 2001).

39. DESCRIPTION AND ANALYSIS, *supra* note 38, at 10 (“Federal death taxes in the United States, for most of its history, were imposed primarily to finance wars or the threat of war.”).

Congress enacted the first federal death tax in 1797,<sup>40</sup> with proceeds earmarked to pay for a buildup of the U.S. Navy in response to heightened tension with France.<sup>41</sup> The tax was structured as a “stamp tax,” generating revenue through the sale of documentary stamps required to be affixed to probate inventories and receipts for transmitted property.<sup>42</sup> The rate was relatively modest, ranging from \$0.25 on a legacy of \$50 to \$100 (a rate of 0.25% to 0.5%) to \$1 per \$500 of a larger legacy (a rate of 0.2%).<sup>43</sup> Congress abolished the tax just five years later, in 1802.<sup>44</sup>

In 1862, the second enactment of a federal death tax served to defray the cost of the U.S. Civil War.<sup>45</sup> As modified in 1864,<sup>46</sup> the tax relied on two forms of revenue—a stamp tax on probate documents and a “succession tax” or “legacy tax” imposed on the transmission of real or personal property.<sup>47</sup> The stamp tax imposed on probate of wills and letters of administration was assessed at a rate of \$1 for the first \$2,000 of estate value plus \$0.50 per \$1,000 thereafter, a nominal rate of 0.05%.<sup>48</sup> Tax rates for the legacy and succession taxes were far more meaningful, varying from 1% to 6% depending on the degree of relationship between the decedent and the legatee.<sup>49</sup> After making several other modifications, Congress repealed the succession and legacy taxes in 1870,<sup>50</sup> with elimination of the stamp taxes following in 1872.<sup>51</sup>

Congress enacted the third federal death tax in 1898 to finance the next U.S. military endeavor, the Spanish-American War.<sup>52</sup> This tax was similar in structure to the prior legacy and succession taxes, yet its 15% top rate made it far more progressive than any previous federal death tax.<sup>53</sup> In 1902, the war having ended, Congress repealed the tax.<sup>54</sup>

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40. An Act Laying Duties on Stamped Vellum, Parchment, and Paper, ch. 11, 1 Stat. 527 (1797).

41. DESCRIPTION AND ANALYSIS, *supra* note 38, at 10-11.

42. *Id.*

43. WEST, *supra* note 37, at 88.

44. An Act to Repeal the Internal Taxes, § 1, 2 Stat. 148, 148 (1802).

45. An Act to Provide Internal Revenue to Support the Government and to Pay Interest on the Public Debt, § 110, 12 Stat. 432, 483 (1862).

46. An Act to Provide Wages and Means for the Support of the Government, and for Other Purposes, § 1, 13 Stat. 218, 218 (1864).

47. 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).

48. WEST, *supra* note 37, at 91.

49. *Id.* at 90.

50. An Act to Reduce Internal Taxes, and for Other Purposes, § 1, 16 Stat. 256, 256 (1870).

51. An Act to Reduce Duties on Imports, and to Reduce Internal Taxes, and for Other Purposes, § 36, 17 Stat. 231, 256 (1872).

52. An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes, § 29, 30 Stat. 448, 464-65 (1898).

53. *See id.*

54. An Act to Repeal War-Revenue Taxation, and for Other Purposes, Pub. L. No. 57-67, ch. 500, 32 Stat. 96, 96 (1902).

In 1916, Congress continued the pattern of imposing death taxes during wartime<sup>55</sup> by enacting a new tax just prior to U.S. entry into World War I.<sup>56</sup> While the 1916 federal estate tax shared with its predecessor death taxes a wartime origin, this version of the estate tax proved to be far more than a mere ephemeral source of revenue. Long after the peace treaty was signed in Versailles and the last American soldier returned from the theater of battle, the federal estate tax remained.<sup>57</sup>

The tax's longevity cannot be explained by a need for revenue. The U.S. government ran a sizable surplus between 1920 and 1924.<sup>58</sup> Even the Secretary of the Treasury, Andrew Mellon,<sup>59</sup> argued that the need for federal estate tax revenue had ended with the end of the war.<sup>60</sup> But the estate tax found support in those who touted it as an agent of social change, as a force to counteract the concentration of wealth and excesses of the Gilded Age.<sup>61</sup>

Ten years earlier, President Theodore Roosevelt had envisioned such a tax. In a message on December 4, 1906, Roosevelt argued in favor of a graduated national estate tax. As Roosevelt reasoned,

55. In addition to imposing the three wartime death taxes enacted above, Congress considered implementing death taxation during the War of 1812 and probably would have done so "if the war had continued a few weeks longer." WEST, *supra* note 37, at 88.

56. An Act to Increase the Revenue, and for Other Purposes, Pub. L. No. 64-271, § 1, 39 Stat. 756, 756-57 (1916). The U.S. did not formally enter the war until April 6, 1917, later prompting one member of Congress to challenge the characterization of the estate tax as a war revenue measure. 67 CONG. REC. 3580, 3621 (1926) (statement of Sen. Lenroot) (chiding the Democrats for characterizing the estate tax as a war measure when they had run for re-election in 1916 claiming that the party's leadership had kept the country out of war).

57. See *supra* note 6 and accompanying text.

58. NAT'L TAX ASS'N, PROCEEDINGS OF THE SECOND NATIONAL CONFERENCE ON INHERITANCE AND ESTATE TAXATION 35 (1925) (statement of Mr. Berry) [hereinafter SECOND CONFERENCE PROCEEDINGS].

59. Mellon, one of the wealthiest men in the United States, was not exactly a disinterested participant in the debate regarding the future of federal estate taxation. See DAVID E. KOSKOFF, THE MELLONS: THE CHRONICLE OF AMERICA'S RICHEST FAMILY 236 (1978) ("As a man of sixty-nine, and the most visible of those Americans whose estates might approach \$10 million, he might have thought that the estate and gift tax proposals were directed against him personally.").

60. SECOND CONFERENCE PROCEEDINGS, *supra* note 58, at 34 (statement of Mr. Berry).

61. 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."); see also Edward J. McCaffery, *A New Understanding of Tax*, 103 MICH. L. REV. 807, 834 (2005) (arguing that income taxes and estate taxes "furthered the progressive cause"); Martin J. McMahon, Jr., *The Matthew Effect and Federal Taxation*, 45 B.C. L. REV. 993, 1050-51 (2004) ("The purpose of the estate tax is not primarily to raise revenue. It is 'antidynastic.' The purpose of the estate tax is to reduce wealth inequality." (footnotes omitted)).

The man of great wealth owes a peculiar obligation to the State, because he derives special advantages from the mere existence of government. Not only should he recognize this obligation in the way he leads his daily life and in the way he earns and spends his money, but it should also be recognized by the way in which he pays for the protection the State gives him.<sup>62</sup>

Roosevelt was not the only voice in favor of using federal death taxation as a social policy tool. The great philanthropist, Andrew Carnegie, also frequently advocated death taxation.<sup>63</sup> As Carnegie argued,

Of all forms of taxation[, death taxation] seems the wisest. Men who continue hoarding great sums all their lives, the proper use of which for public ends would work good to the community from which it chiefly came, should be made to feel that the community, in the form of the State, cannot thus be deprived of its proper share.<sup>64</sup>

The 1916 estate tax thus served a major purpose not in terms of the revenue it raised, but rather in its very existence. Congress wanted an estate tax to serve social purposes, not simply to provide revenue for a specific governmental need. This feature differentiated the 1916 estate tax from its predecessor taxes and would prove a crucial factor explaining the tax's longevity.<sup>65</sup> This defining characteristic also helps explain Congress's later willingness to give up a significant portion of the resulting tax revenue by implementing the state death tax credit.<sup>66</sup>

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62. WEST, *supra* note 37, at 10.

63. Carnegie was so often quoted as an advocate for progressive death taxation that Albert Atwood, a staff writer for *The Saturday Evening Post*, posed the following rhetorical question to the delegates to the Preliminary Conference on Inheritance and Estate Taxes: "Did any of you ever read a speech in Congress, or an article, or a book in fulsome favor of higher death duties, that did not begin and generally end by quoting Andrew Carnegie in their favor?" NAT'L TAX ASS'N, INHERITANCE AND ESTATE TAXES, PROCEEDINGS OF PRELIMINARY CONFERENCE AND OF THE SIXTH SESSION OF THE SEVENTEENTH NATIONAL TAX CONFERENCE 106 (1925) [hereinafter PRELIMINARY CONFERENCE PROCEEDINGS]. Carnegie remains a popular figure in American history, with a recent survey conducted by Forbes.com ranking him "as the fourth most influential businessman of all time." Forbes.com, [http://www.forbes.com/business/2005/07/26/carnegie-steel-industry-cx\\_0726bizmancarnegie.html](http://www.forbes.com/business/2005/07/26/carnegie-steel-industry-cx_0726bizmancarnegie.html) (last visited Mar. 15, 2006).

64. Andrew Carnegie, *Wealth*, N. AM. REV. (1889), reprinted in THE ANDREW CARNEGIE READER 136 (Joseph Frazier Wall ed., 1992).

65. Although barely recognizable after countless modifications and amendments—some quite substantial—this 1916 estate tax has remained in place continuously until the present day. See *supra* note 6 and accompanying text.

66. See *infra* Part III.

### B. *The First Century of State Death Taxes*

Nearly every state enacted some form of death taxation between 1826 and 1924.<sup>67</sup>

In 1826, Pennsylvania became the first state to impose a state death tax, collecting an inheritance tax of 2.5% on estate assets passing to collateral heirs.<sup>68</sup> As initially would be true in many other states adopting state death taxes, assets passing to a decedent's parents, spouse, or lineal descendants were exempt from the tax.<sup>69</sup>

During the period of 1826 through 1891, a relatively small number of other states followed Pennsylvania's lead and experimented with this form of taxation.<sup>70</sup> However, state death taxes during this era developed little traction as a form of tax revenue: even states that imposed these taxes repeatedly tinkered with their governing statutes<sup>71</sup> or simply repealed them.<sup>72</sup>

Between 1892 and 1916, the landscape quickly changed. During that period, thirty-four state legislatures enacted death taxes.<sup>73</sup> In addition to an increase in the sheer number of state death taxes, this era saw significant changes in the nature of such taxes. States began to adopt more robust and progressive rate structures, and increasingly were likely to tax assets passing

67. See Oakes, *supra* note 8, at 455-68 (providing a historical overview of the early history of state death taxes); see also WEST, *supra* note 37 (providing an exhaustive, state-by-state treatment of the same subject).

68. See WEST, *supra* note 37, at 97-98 (noting that the Pennsylvania Act "ha[d] directly or indirectly served as the model for much of the subsequent American legislation on this subject" and then quoting the first section of the Act).

69. *Id.*

70. See Oakes, *supra* note 8, at 452-54.

71. For example, Max West, writing in 1908, observed: "The New York inheritance tax was first imposed in 1885, but amendments of greater or less importance have been made at nearly every subsequent session of the legislature." WEST, *supra* note 37, at 126 (footnote omitted). Additionally, Alabama's death tax was modified at least five times during its short, twenty-year life from 1848 and 1867. *Id.* at 113.

72. For example, Massachusetts imposed a death tax in 1841 and repealed it in 1843. *Id.* at 131. Alabama's 1848 death tax was repealed in 1868. *Id.* Wisconsin's 1868 death tax was repealed in 1872. *Id.* at 115; see also Oakes, *supra* note 8, at 453-54 (detailing the repeal of state death taxes in several states between 1866 and 1885).

73. While nine states imposed death taxes in 1891, that number increased to forty-three by 1916. MAXWELL, *supra* note 15, at 332.

to lineal as well as collateral heirs.<sup>74</sup> State death taxes thus had increased not only in their prevalence, but also in their fiscal impact.<sup>75</sup>

### C. *The Battle over Tax Havens*

Despite all the state legislation related to death taxes between 1826 and 1916 and the widespread nature of state death taxes by the end of that period, these taxes had already entered a period of relative decline.<sup>76</sup> In 1915, the year before Congress implemented the modern estate tax, the states collected \$29 million in death taxes.<sup>77</sup> By 1924, the figure had risen to \$79 million.<sup>78</sup> In gross terms, the increase seems significant. In relative terms, however, it was not.

During the same 1915 to 1924 period, annual state income tax collections increased fifty-fold.<sup>79</sup> By 1924, income taxes, gasoline taxes, and automobile registration and license fees each had surpassed death taxes as a component of state tax revenues.<sup>80</sup> A near tripling of death tax revenue thus failed to even remotely keep pace with far more dramatic increases in other forms of state taxation.<sup>81</sup>

States turned to these other forms of taxation because they feared the consequences of imposing more onerous state death taxes. Specifically, the states worried that the imposition of significant death taxes might precipitate a “mass exodus” of their most wealthy—and often most productive—taxpayers.<sup>82</sup> Individuals who moved out of state in response to death taxes

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74. Ohio's 1893 death tax statute was the first to feature progressive rates and the first to tax lineal descendants. WEST, *supra* note 37, at 135; *see also* Oakes, *supra* note 8, at 457 (characterizing this period as marking “the evolution of what came to be the traditional American state death duty—a progressive inheritance tax on both direct and collateral heirs”).

75. Total state death tax revenues increased from \$710,000 in 1886 to approximately \$10 million in 1907 and nearly \$31 million by 1916. Oakes, *supra* note 8, at 459-60; *see also* LEON GILBERT SIMON, INHERITANCE TAXATION 24-37 (1925) (summarizing state death tax laws as they existed at this time).

76. *See infra* notes 80-81 and accompanying text.

77. OVERLAPPING TAXES, *supra* note 10, at 20 tbl.7.

78. *Id.*

79. During this period, annual state income tax revenues increased from just \$2 million to \$101 million. *Id.*

80. *Id.* In 1915, death taxes represented 7.9% of total state tax collections. *Id.* at 21 tbl.7. Automobile registration and license taxes contributed 4.1% and income taxes contributed just 0.5%. *Id.* By 1924, the relevant figures were: 19.9% automobile registration and license taxes, 8.9% income taxes, 7.0% gasoline taxes, and 6.9% death taxes. *Id.*

81. As is self-evident from this statement, total state tax revenue increased dramatically during this time period: from \$368 million in 1915 to over \$1.13 billion in 1924. *Id.* at 20 tbl.7; *see also* 67 CONG. REC. 3580, 3619 (1926) (statement of Sen. Bruce) (“State and municipal taxation is increasing like a rolling snowball.”).

82. Max Oliver Cogburn, *The Credit Allowable Against the Basic Federal Estate Tax for Death Taxes Paid to State Statutes Enacted to Take Advantage Thereof—Constitutional Difficulty and Some Suggested Solutions*, 30 N.C. L. REV. 123, 123 (1952).

would neither spend their money in their former state of domicile nor pay taxes to that state. Such a migration would deprive these states of these important citizens and their capital.<sup>83</sup>

The notion that aggressive death taxation would drive wealthy taxpayers out of state<sup>84</sup> was especially problematic for many of the wealthier, industrialized, states. A few rogue states had purposely bucked the early twentieth century trend towards the imposition of state death taxation.<sup>85</sup> Leaders in these states believed that a comparatively favorable tax climate would attract migrants of wealth and industry.<sup>86</sup> Florida became the best known of these domestic “tax havens,” as it pursued its belief that a low overall state tax burden, combined with a complete absence of state death taxes, was a powerful means of generating a continued influx of wealthy residents, especially from higher-tax states.<sup>87</sup> Florida had open tracts of inexpensive real estate, inviting weather, and an equally comfortable tax climate.<sup>88</sup> Leaders of that state actively and visibly welcomed wealthy taxpayers with open arms, rather than with outstretched palms.<sup>89</sup>

By 1924, the list of tax havens appeared poised to grow. Alabama had repealed its state death taxes.<sup>90</sup> Nevada residents were debating a

83. For an estimate of revenue generated from state death taxes, see *supra* note 80. In addition to the loss of death tax revenue, an out-migration of wealthy residents likely would reduce other tax collections. See Bakija & Slemrod, *supra* note 5, at 34-35.

84. See *supra* notes 17-18 and accompanying text; see also Robert W. McGee, *Principles of Taxation for Emerging Economies: Lessons from the U.S. Experience*, 12 DICK. J. INT'L L. 29, 75 (1993) (noting that when taxes are assessed “at the state or local level . . . tax competition often occurs”).

85. See E. M. Perkins, *State Action Under the Federal Estate Tax Credit Clause*, 13 N.C. L. REV. 271, 271-72 (1934) (listing Alabama, Florida, and Nevada as states that either prohibited or repealed a state inheritance tax during the early twentieth century). Additionally, Alabama companies boldly advertised their state as having no inheritance tax. *Id.* at 271.

86. At first blush, it may seem counterintuitive that a state would seek to attract wealthy residents but then decline to capture any fruits of that wealth through the imposition of income and death taxes. The tax havens believed that even without income and death taxes, an influx of wealthy taxpayers would mean an influx of capital to assist in the growth of state businesses and develop state jobs. Florida continues to pursue this model of taxation today. See *infra* note 259 and accompanying text; see also McGee, *supra* note 84, at 79 (“The State of Florida . . . attracts the accumulated wealth of many retirement-age people by not having an inheritance tax. Retirees move to Florida bringing lifetime savings and causing a small boom in the trust and wealth management industries. Accordingly, a government that abolishes these taxes would notice little change in the amount of revenue raised.”)

87. See Perkins, *supra* note 85, at 271-72.

88. See *infra* notes 114-17 and accompanying text for a brief discussion of Florida’s decision to prohibit an inheritance tax.

89. See Perkins, *supra* note 85, at 271-72 (illustrating how the death tax havens “advertised” the tax benefits of living in these states).

90. See *supra* note 15 and accompanying text.



constitutional amendment prohibiting state death taxation.<sup>91</sup> California considered a similar repeal.<sup>92</sup>

Something had to be done.

### III. BIRTH OF THE STATE DEATH TAX CREDIT (1924-1926)

By 1924, state death taxes faced competitive pressures on two fronts: not only had Congress invaded the death tax field, but the states continued battling among themselves. As the tax havens continued to target wealthy citizens and their capital, individual state leaders elsewhere were powerless to stem this tide. These state leaders thus weighed two equally distasteful options: abandon this form of state revenue, or drive away some of their wealthiest residents.

State leaders preferred the former choice to the latter.<sup>93</sup> As such, interstate competition likely would have soon destroyed state death taxes. However, instead of simply abandoning the field, state leaders pursued a collective solution. Between 1924 and 1926, state leaders organized national conferences to consider the problems plaguing state death taxation and ultimately turned to Congress for relief. Congress responded to the states' pleas with the 1926 state death tax credit. Instead of marking the end of state death taxes, the period from 1924 to 1926 thus represents their rebirth.

#### A. *The States Pray for Relief*

A century of ad hoc efforts to achieve interstate cooperation had produced little success. In his message transmitting the Revenue Act of 1924 to Congress, President Coolidge called upon state leaders to meet and pursue a collective solution.<sup>94</sup> William Bailey, the President of the National Tax Association, answered this call. By letter sent to federal and state officials, Bailey cited the "imperative need for concerted action."<sup>95</sup> He summoned a group of state officials and academics from across the country to St. Louis for a national conference to discuss issues of concern with respect to state death taxation, as well as to devise proposed legislative

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91. NAT'L COMM. ON INHERITANCE TAXATION, REPORT TO THE NATIONAL CONFERENCE ON ESTATE AND INHERITANCE TAXATION 11-12 (1925) [hereinafter REPORT]. The Amendment passed, and Nevada repealed its state death tax as of July 1, 1925. *Id.* at 12.

92. *Id.* at 11-12; see also MAXWELL, *supra* note 15, at 333 ("California, which had up to this time been the natural competitor of Florida as a domicile for retired millionaires, discussed the need for parallel action.").

93. This notion is explored below in greater detail. See *infra* Part III.A.3.

94. PRELIMINARY CONFERENCE PROCEEDINGS, *supra* note 63, at 108-09 (statement of Mr. Winston, Undersecretary of the Treasury).

95. *Id.* at 2.

solutions for Congress and the state governments.<sup>96</sup> It would be the first of three such meetings.

The records of these national conferences provide a vivid history of the contemporaneous thoughts of state leaders as they wrestled with the ongoing problem of interstate competition and the heightened threat posed by the emerging tax havens. As such, they provide relevant insights not only into the way past leaders viewed the challenges confronting the field of death taxation, but also how modern leaders likely view a similar landscape.

### 1. Chronology of the National Tax Association Conferences

Bailey's 1924 letter to state leaders resulted in three conferences devoted to discussion of the problems plaguing state death taxation.

The first event, the Preliminary Conference on Inheritance and Estate Taxation ("Preliminary Conference"), was held in St. Louis, Missouri on September 15, 1924 in conjunction with the National Tax Association's seventeenth annual conference.<sup>97</sup> While a valuable first step towards collective action, this conference rightly was called "preliminary." The meeting initially generated a questionable level of interest among state governors, "not a great number of" which even replied to Bailey's 1924 letter.<sup>98</sup> Furthermore, not a single federal official addressed the Preliminary Conference.<sup>99</sup> Treasury Undersecretary Winston did address the National Tax Association meeting two days later, but did so only after clarifying that he did not appear on behalf of the administration and did not expect to offer any specific solutions to the problems confronting state death taxes.<sup>100</sup>

While the Preliminary Conference was a timid first step towards unified state action, the next conference represented a giant leap in that direction. That follow-up meeting, the National Conference on Inheritance and Estate Taxation ("First Conference"), was held in Washington, D.C. on February

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96. *Id.* at 1-3.

97. *See id.* at 1.

98. *Id.* at 3. Chairman Belknap, who had reported the lack of written response from state governors, was heartened to observe that "the size of the audience argues that a good many of [the Governors] took more interest than their replies would indicate." *Id.* The Chairman was less happy two days later, when many of the delegates apparently opted to attend a baseball game rather than the National Tax Association's Annual Conference. *See id.* at 102. The delegates making this choice saw the New York Yankees defeat the St. Louis Browns in both games of double-header. *See* Historical Standings, <http://www.baseball-reference.com/games/standings.cgi?date=1924-09-17> (last visited Mar. 15, 2006).

99. *See* PRELIMINARY CONFERENCE PROCEEDINGS, *supra* note 63, at 3-124.

100. *Id.* at 109 (statement of Mr. Winston).

19 and 20, 1925.<sup>101</sup> One need merely review the list of attendees at the First Conference to comprehend its importance. Twenty-six states sent a total of seventy-six delegates to the First Conference, while nearly 100 registered guests observed the proceedings.<sup>102</sup> Eight federal officials attended as well, including President Coolidge, Treasury Secretary Mellon, and the Chairman and three other members of the influential House of Representatives Committee on Ways and Means.<sup>103</sup>

After two days of presentations and debates, the delegates formed a committee (later referred to as the Delano Committee, after its Chairman) to complete the work begun at the First Conference.<sup>104</sup> The Delano Committee was directed to further consider the relevant issues, develop specific proposals for submission to the Congress at state legislatures, and to report back to a future national conference.<sup>105</sup>

On November 10, 1925, some 250 delegates representing forty-two states reconvened in New Orleans, Louisiana for a final conference, the Second Conference on Inheritance and Estate Taxation ("Second Conference").<sup>106</sup> Participants at this meeting debated and ultimately ratified the report prepared by the Delano Committee ("Report"), and approved its transmission to Congress.<sup>107</sup>

## 2. Delegates Explore the Florida Problem

Delegates to the national tax conferences agreed that the root cause of the interstate competition plaguing state death taxes had a name: Florida.<sup>108</sup> Speaker after speaker at these conferences criticized Florida for engaging in a calculated effort to establish itself as a death tax haven and draw wealthy taxpayers away from other states.<sup>109</sup>

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101. See NAT'L TAX ASS'N, PROCEEDINGS OF NATIONAL CONFERENCE ON INHERITANCE AND ESTATE TAXATION 1, 113 (1925) [hereinafter FIRST CONFERENCE PROCEEDINGS].

102. *Id.* at 195-200.

103. The following federal officials delivered formal addresses at the convention: President Calvin Coolidge, Congressman William Green (Chairman, Committee on Ways and Means), Congressman Ogden L. Mills (Member, Committee on Ways and Means), Congressman Cordell Hull (Member, Committee on Ways and Means), Congressman W.A. Oldfield (Member, Committee on Ways and Means), and Charles S. Dewey (Assistant Secretary of the Treasury). REPORT, *supra* note 91, at 7. Secretary of the Treasury Andrew Mellon and Undersecretary Garrard Winston attended a portion of the convention but did not deliver formal remarks. *See id.*

104. FIRST CONFERENCE PROCEEDINGS, *supra* note 101, at 192-93.

105. *Id.*

106. See SECOND CONFERENCE PROCEEDINGS, *supra* note 58, at 1.

107. See REPORT, *supra* note 91, at 7-10. In fact, the Report already had been presented to Congress. *See infra* notes 157-60 and accompanying text.

108. See REPORT, *supra* note 91, at 11-12.

109. *See, e.g.*, SECOND CONFERENCE PROCEEDINGS, *supra* note 58, at 17, 38 (statements of Mr. Graves and Mr. Berry).

At the Preliminary Conference, William Belknap, a Kentucky legislator and the conference chairman, wasted no time in turning the discussion towards Florida. During his opening remarks, Belknap bemoaned Florida's death tax policies:

I think Florida is going to cause us as much trouble as any other state . . . . They are making a bid for the rich people of the country to come down there, and they are going to cause all sorts of trouble, because they wont [sic] come in on a fairly equitable basis with the rest of the states.<sup>110</sup>

Mr. Dunn of Ohio, the second speaker at the same event, was more diplomatic in tone but no less clear in his view of Florida's intent. "Florida undoubtedly is throwing out lines for capital to come into the state."<sup>111</sup> Dunn further postulated that Florida's tax policy was specifically intended to lure the Rockefeller family to establish Florida domicile.<sup>112</sup>

Florida was represented at the Preliminary Conference,<sup>113</sup> but the State's delegate offered no apologies for the course Florida had chosen to pursue.<sup>114</sup> He readily conceded that Florida indeed utilized its tax policies as a tool to lure wealthy taxpayers to the State, a tool the State had "especially emphasized in the last few years."<sup>115</sup> Undeterred by the criticism of his State, the Florida delegate indicated that his State would continue to compete for wealthy citizens not only by offering a currently-favorable tax climate, but the promise of a permanently-favorable one.<sup>116</sup> For this reason, Florida was in the process of implementing a constitutional amendment barring the future imposition of a separate state death tax in Florida.<sup>117</sup>

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110. PRELIMINARY CONFERENCE PROCEEDINGS, *supra* note 63, at 6-7 (statement of Mr. Belknap).

111. *Id.* at 10.

112. *Id.* John D. Rockefeller is an interesting case study on the issue of state death taxation, as he had documented contacts with several states and the resources to organize his affairs in the most tax-favorable manner. Certainly, the entire battle over state death taxes was not centered upon one individual, although the number of wealthy taxpayers of concern was rather small. For example, in 1924, a mere ninety-eight estates accounted for more than fifty percent of the total death tax revenue collected by the state of New York. SECOND CONFERENCE PROCEEDINGS, *supra* note 58, at 15 (statement of Mr. Graves).

113. Florida, perhaps deciding that it had heard enough criticism, did not send a delegation to the subsequent national conferences.

114. See PRELIMINARY CONFERENCE PROCEEDINGS, *supra* note 63, at 88.

115. *Id.*

116. *Id.*

117. *Id.* Florida voters approved the constitutional amendment in 1924. See Perkins, *supra* note 85, at 271. The amendment may have had more public relations significance than legal impact, as

Throughout the duration of the national conferences, no other state rushed to Florida's defense, and the Report reached the same conclusion that Chairman Belknap had advocated from day one. The Report stated that Florida was actively "advertising the state as a haven of refuge from inheritance taxes" with the goal of persuading taxpayers to "transfer their legal residence to Florida so as to escape inheritance taxes imposed elsewhere."<sup>118</sup>

### 3. The Pending Race to the Bottom<sup>119</sup>

The delegates to the 1924 and 1925 conventions agreed not only as to Florida's actions but also as to their likely effect. The prevailing view was that unless Florida could be convinced to change its ways, or unless the State's allure otherwise could be negated, Florida's tax policies<sup>120</sup> ultimately would undermine the death tax collection efforts of all other states. States would rather abandon their own death taxes than endure the continued flight of capital to Florida.

One speaker predicted that leaders in states that experienced an exodus of taxpayers to Florida would "begin to clamor for the most favorable legislation," and would replicate Florida's death tax laws.<sup>121</sup> A speaker from Kentucky similarly predicted that Florida's posture might compel every state to "appoint a tax commission to reform the whole tax system of the state . . . ."<sup>122</sup> He concluded, "I would not be surprised if you were to find a good many Floridas throughout the United States before you get done with the proposition."<sup>123</sup> Mark Graves of New York similarly predicted that

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the Florida Constitution already seemed to prohibit the imposition of death taxes. *See id.* at 272 n.3 (citing *Afro-Am. Indus. & Benefit Ass'n v. State*, 54 So. 383 (Fla. 1911)).

118. REPORT, *supra* note 91, at 11.

119. The term "race to the bottom" refers to the phenomenon of governments pursuing increasingly favorable laws in order to attract and/or appease an important category of individuals or entities. The term is perhaps most commonly used to refer to the evolution of Delaware's pro-management corporate laws, which the state successfully used to attract significant numbers of corporations to incorporate under Delaware laws. *See supra* note 13 and accompanying text. The term applies equally well to the subject of state death taxes. In theory, if states sufficiently fear that death taxes will precipitate wealthy taxpayers to flee across those states' borders, they will abandon that source of tax revenue. As more and more states make that choice, the competitive pressures only increase on the other states, and the process intensifies. Eventually, no state death taxes will remain. All of the states will have raced to the bottom.

120. *See supra* Part III.A.2.

121. PRELIMINARY CONFERENCE PROCEEDINGS, *supra* note 63, at 9 (statement of Mr. Dunn).

122. SECOND CONFERENCE PROCEEDINGS, *supra* note 58, at 56 (statement of Mr. Nahm). As discussed *infra* Part III.A.4, Nahm believed that continued federal involvement in the area of death taxation was the key to avoiding the scenario he outlined.

123. *Id.*

Florida would force the other states towards “a uniformity of no inheritance taxes throughout this country.”<sup>124</sup>

Henry Long from Massachusetts was one of only a few delegates who expressed a rosier view. Long not only indicated his personal belief that taxpayers from his State would not relocate to Florida to avoid death taxes, but he was far more cavalier than his colleagues regarding his State’s likely response to such a flight if it were to occur.

[I]f the people want to go to Florida and really become domiciled in Florida, let them go . . . . [T]hese people who will fly from one state to another for the sake of avoiding taxes are the kind, using the language of the street—the kind of ‘hosses’ that don’t stay hitched. They won’t stay there, they won’t make good citizens; and our states, if we lose that type of citizen, will be better off.<sup>125</sup>

Long, however, was part of a small minority. The Delano Committee’s Report concluded on this issue that when death taxes vary widely from state to state, “there is a strong incentive for owners of estates to fix their residence and invest their capital where their property will be most lightly taxed in the event of death rather than where the capital is most needed in industry.”<sup>126</sup> The Report considered the resulting “spasmodic shifting” of wealth to be “abnormal” and “uneconomic.”<sup>127</sup>

While the Report did not officially predict likely legislative responses in other states, it did express concern that Nevada had already repealed its state death tax and California was considering a similar repeal.<sup>128</sup> A race to the bottom already had begun.

124. *Id.* at 16 (statement of Mr. Graves).

125. *Id.* at 48; *see also* AESOP, *The Fox and the Grapes*, in *THE FABLES OF AESOP* 12 (David Levine ed., Patrick Gregory & Justina Gregory trans., Gambit Press 1975) (“Those grapes are probably sour anyway.”).

126. REPORT, *supra* note 91, at 11. The Report also pointed out that domicile for purposes of death taxation is largely a question of the testator’s intent, making it relatively simple for individuals to organize their affairs so as to avoid death taxation. “Consequently it will be easy for many who take their vacations in Florida to effect transfers of legal residence, and thus to escape the inheritance taxes of other states without materially changing their actual places of abode.” *Id.* at 12.

127. *Id.* at 11.

128. *Id.* at 12.

#### 4. A Higher Power: The State Death Tax Credit as a Solution

By 1924, it was clear that the states themselves could do nothing to resolve the brewing interstate competition over state death taxes.<sup>129</sup> Efforts at self-regulation had failed.<sup>130</sup> State death taxes had entered a period of decline, perhaps heading towards their ultimate demise.<sup>131</sup> Increasingly, it became clear to federal and state leaders that only the outside influence of the federal government could help turn the tide.<sup>132</sup> As S. S. Lewis, Auditor General of Pennsylvania, observed, “the states themselves, in matters of this kind, which so vitally affect their individual material welfare, are entirely incapable of establishing and enforcing a satisfactory code of interstate comity.”<sup>133</sup>

Congress had attempted to engineer greater uniformity by enacting the state death tax credit in 1924.<sup>134</sup> Yet the credit’s effectiveness at curtailing interstate competition was limited by the fact that it was capped at 25% of the federal estate tax, below the prevailing level of state death taxation and thus too low to facilitate uniform state death taxes.<sup>135</sup> The delegates to the tax conventions ultimately agreed that this credit, if properly structured, could help inspire uniform state death taxation.<sup>136</sup> As such, they offered a compromise: the federal government could continue to tax estates with the blessing of state governments as long as they expanded the state death tax credit to allow the states to enjoy 80% of estate tax revenue.<sup>137</sup>

The Delano Committee’s Report concluded on this issue as follows:

If Congress will enact a law carrying rates which impose a reasonable burden upon estates and will allow 80 per cent credit for taxes paid to the several states, there will be a strong incentive for all of the states to promote uniformity by adjusting their rates so as to realize neither more nor less than the amount credited on the tax payable to the Federal Government. This provision . . . would unquestionably result in amendments by the states which would

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129. *See id.* at 11.

130. *See supra* Part II.C.

131. *See* REPORT, *supra* note 91 at 23.

132. *See id.* at 12.

133. PRELIMINARY CONFERENCE PROCEEDINGS, *supra* note 63, at 56.

134. Revenue Act of 1924, Pub. L. No. 68-176, § 301(b), 43 Stat. 253, 304.

135. FIRST CONFERENCE PROCEEDINGS, *supra* note 101, at 72 (address of Professor Seligman). Since the credit was below the prevailing level of state death taxes, states would have needed to cut their taxes to achieve uniformity. States were unlikely to do so. *See infra* notes 207-09 and accompanying text.

136. *See* REPORT, *supra* note 91, at 14.

137. *Id.* at 29-30.

tend to unify the state laws on a basis of 80 per cent of the federal tax.<sup>138</sup>

The Report added one more proviso: the arrangement was to be a temporary one, lasting just six years.<sup>139</sup> During that time period, the Report predicted, the states would impose uniform death taxes based on the state death tax credit.<sup>140</sup> Once that was accomplished, Congress could safely, and rightfully, abandon the field, “with little danger of a return of the present chaotic conditions.”<sup>141</sup>

While the proposed compromise was in many ways the ideal solution, it was a lightning rod for controversy at the national conferences. Even its proponents had mixed feelings. Speaking for the committee that had prepared the Report, Mark Graves of New York fully conceded that “the states have a better legal and moral claim to this subject of [death] taxation than has the federal government.”<sup>142</sup>

While supporters of this proposal for continued federal estate taxation were torn, its detractors were not. Many state leaders simply and absolutely could not accept the continued existence of federal estate taxation. As such, the proposal for a continued federal estate tax coupled with an expanded state death tax credit generated the most significant dissent seen at the national conventions. One speaker criticized the proposal as inviting the federal government to “extend [the states] across its metaphorical parental knee and spank them into obedience to its wishes or to its dictates.”<sup>143</sup> A representative from California similarly argued that it was unwise for the states to encourage the federal government to continue “holding a club over the states to force upon them something which they will not take of their own free will . . . .”<sup>144</sup> Numerous other delegates rejected the artful

138. *Id.* Congress adopted this recommendation without modification. *See infra* Part III.B.

139. REPORT, *supra* note 91, at 25.

140. *Id.* at 25-26.

141. *Id.* at 26. Except for the one-year repeal of the estate tax slated to occur in 2010 under EGTRRA, Congress never did abandon the field of death taxation. One of the likely reasons for this change of heart—assuming Congress ever did intend to abandon the field—surely was altered economic fortunes, as the Great Depression undermined federal revenues while increasing the need for governmental services. A second reason was the continued demand for progressive federal estate taxation as a tool of social policy. A third, but perhaps less obvious, reason was a series of state legislative changes that actually served to intertwine federal and state death taxes in a way delegates to the 1925 conventions seemingly did not envision. *See infra* Part V.

142. SECOND CONFERENCE PROCEEDINGS, *supra* note 58, at 14 (statement of Mr. Graves).

143. *Id.* at 63 (statement of Mr. Bradford).

144. *Id.* at 65 (statement of Mr. Vandegrift).



compromise and spent hours<sup>145</sup> calling for the federal government to immediately and unequivocally repeal the federal estate tax.<sup>146</sup>

Perhaps sensing that the death tax credit proposal was in jeopardy, Conference Chairman Page “with regret” abandoned the neutrality of the Chair and spoke in favor of the proposal.<sup>147</sup> Page pleaded with the delegates to defer to the efforts of the Delano Committee, which had spent extensive time thoughtfully debating the proposal and had come to unanimous agreement as to its wisdom.<sup>148</sup> Page also challenged the notion that temporary reliance on the state death tax credit meant the states were compromising their long-held opposition to continued federal taxation.<sup>149</sup> He reasoned:

You do not gather your fruit when it is green . . . . In like manner you do not want immediate repeal of the federal tax if a temporary retention of it will promote the ripening of a more perfect, more uniform and fairer system of inheritance taxation among the states. There is no compromising with principle involved in postponement for the sake of betterment.<sup>150</sup>

Page’s speech became the final word on the subject. Likely buoyed by his plea, Page and the other supporters of the state death tax credit prevailed. As much as the states universally viewed continued imposition of federal estate taxes as an evil, a majority concluded that they would at least give the proposal a try.<sup>151</sup> Without the federal estate tax, state death taxes were doomed. With a federal estate tax that provided a generous state death tax credit, state death taxes at least had a chance to survive.

The states, with great reluctance, had agreed on a plan.

## *B. Congress Delivers*

Thanks in no small measure to Iowa Congressman William Green, Congress heard the states’ pleas for help.

Green, Chairman of the Committee on Ways and Means, and perhaps the most vocal proponent of the state death tax credit, had addressed the

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145. *Id.* at 73-74 (statement of Mr. Armson) (“We have been listening to this debate now for a number of hours . . . I don’t think if we continue for the next two hours it would change a single vote.”).

146. The delegate from Texas was among the most succinct. “We [in Texas] want that estate tax repealed, and we want it repealed now.” *Id.* at 56 (statement of Mr. Woodhall).

147. *Id.* at 74.

148. *Id.* at 75.

149. *Id.*

150. *Id.*

151. *Id.* at 84-86.

First Conference to criticize Florida's death tax policies. As a result of Florida's actions, Green lamented in that address, "[i]sles of refuge would be created, not only by one state but by several . . ." <sup>152</sup> He concluded, "in the long run[,] such a system would be destined to final breakdown and complete failure . . ." <sup>153</sup>

Green was determined not to let this vision come to fruition and took his conviction to the floor of the Congress. There, he launched a blistering verbal assault on the State of Florida. "Let me say to the people of Florida . . ." said Green in one floor debate, "that you never can make a really great State through colonies of tax dodgers or money grabbers; parasites and coupon cutters, jazz trippers and booze hunters." <sup>154</sup> Continuing on, Green urged Florida to cease "filling up your community with members of that ancient and dishonorable order of tax dodgers, who, of all citizens, are the most narrow, the most selfish, and the most unpatriotic." <sup>155</sup>

Green touted the proposed eighty percent state death tax credit as the solution to the problems created by Florida and the other would-be tax havens. <sup>156</sup> In October 1925, he convened hearings on the subject and invited the Delano Committee as his guests. <sup>157</sup> Even though its Report had not yet been printed, the Committee rushed to provide galley proofs to the Congressmen, and then testified on its behalf. <sup>158</sup> The Report was warmly received. <sup>159</sup>

Less than four months later, Green got his way, and so did the Delano Committee. <sup>160</sup> In February 1926, Congress increased the maximum amount of the state death tax credit to eighty percent of the federal estate tax otherwise payable under the 1926 rate tables. <sup>161</sup>

#### IV. INITIAL IMPACT OF THE STATE DEATH TAX CREDIT (1926-1935)

State governments responded rapidly to the new state death tax credit. In less than a decade, the credit inspired new death taxes in nearly three-

152. FIRST CONFERENCE PROCEEDINGS, *supra* note 101, at 91 (statement of Rep. Green).

153. *Id.*

154. 67 CONG. REC. 903, 964 (1925) (statement of Rep. Green).

155. *Id.*

156. *See id.* at 965.

157. SECOND CONFERENCE PROCEEDINGS, *supra* note 58, at 8.

158. *Id.* at 9.

159. *Id.*

160. *See* Revenue Act of 1926, § 301(b), 44 Stat. 9, 70.

161. *Id.*

quarters of the states. Even Florida, after unsuccessfully challenging the constitutionality of the new law, soon adopted a state death tax to take advantage of the available credit. By 1935, the state death tax credit had effectively negated the interstate competition that plagued state governments just a decade before.

### A. State Legislative Responses

As a general rule, state death tax laws in place prior to 1926 generated more tax revenue from smaller estates than could be fully offset by the state death tax credit.<sup>162</sup> With respect to larger estates, however, the reverse was true.<sup>163</sup> Since the federal estate tax was more extensively graduated and carried considerably higher rates than its state counterparts, state death taxes imposed on larger estates, in general, did not fully absorb the available federal credit.<sup>164</sup> As a result, the state death tax credit enabled states to actually increase death taxes on these larger estates without imposing any net tax burden on their residents.<sup>165</sup>

The state governments quickly moved to fully avail themselves of Congress's largess.<sup>166</sup> From coast to coast, states enacted new death taxes or modified their existing tax laws in order to fully absorb the available federal credit.<sup>167</sup> The era of the pick-up tax had begun. Tentative first steps had been taken in this direction back in 1925, as New York, Pennsylvania, and Georgia enacted the first pick-up estate tax laws in response to the 1924 state death tax credit.<sup>168</sup> However, the more generous 1926 state death tax credit inspired a far more widespread response. Five states enacted pick-up taxes in 1926,<sup>169</sup> followed by nine more in 1927.<sup>170</sup> By 1933, thirty-six states had imposed pick-up taxes.<sup>171</sup>

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162. REPORT, *supra* note 91, at 30.

163. *Id.*

164. Perkins, *supra* note 85, at 279.

165. *See id.*

166. *Id.* at 280 nn.32-33.

167. *Id.*

168. *Id.* at 279; 1925 Ga. Laws 63-64; 1925 N.Y. Laws 573-74; 1925 Pa. Laws 806-07. For relevant excerpts from the statutes, see Perkins, *supra* note 85, at 279-80 nn.28-30. The New York and Pennsylvania laws were designed to supplement those states' traditional inheritance taxes, with estates being assessed the larger of the two taxes. *Id.* at 279. Georgia took a different route, utilizing a pick-up tax as its sole death tax. *Id.* at 279-80. Georgia's apparently greater concern that the state's death tax exactly match the state death tax credit in all cases may have been motivated in part by the fact that the State shared borders with the former tax havens of Florida and Alabama. *See id.*

169. *See id.* at 280 n.32. In 1926, Kentucky, Massachusetts, New Jersey, Rhode Island, and Virginia all increased their state death taxes to capture the benefit of the state death tax credit. *Id.* Also that year, Georgia and New York modified their pick-up taxes enacted in 1925 to conform to the 1926 changes to the state death tax credit. *See id.*

The result of all of this legislation was a significant increase in the amount of state death taxes collected. Total state death tax revenues surged from \$80 million in 1924 to over \$180 million by 1930.<sup>172</sup> Whereas from 1917 to 1923, total state tax revenues had grown at a rate 40% higher than state death tax revenues, the period from 1923 to 1930 saw a reversal of that trend.<sup>173</sup> In this latter period, state death tax revenues grew some 45% faster than total state tax revenues.<sup>174</sup> As these new tax dollars flowed into state coffers, the states could claim, quite rightly, that the federal government—not the state’s taxpayers—bore the burden of the tax. The state death tax credit had neutralized the threat of interstate competition and revitalized state death tax collections.

### B. Florida Challenges and Capitulates

Not surprisingly, Florida was no fan of the state death tax credit. State politicians bristled at the thought that an act of Congress had targeted their campaign to attract wealthy taxpayers into the State. Floridians criticized Congress for pursuing “the most dangerous precedent which has ever been offered by . . . Congress in the history of time . . . .”<sup>175</sup> The State responded not only with words but also with legal action: Florida’s government launched a constitutional challenge to the existence of the state death tax credit.<sup>176</sup>

On June 1, 1926, the State of Florida began its legal attack against the state death tax credit by petitioning the U.S. Supreme Court for leave to file

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170. *Id.* The nine states were California, Colorado, Delaware, Maine, Missouri, Montana, North Carolina, Ohio, and Vermont. *Id.* Pennsylvania also modified its 1925 pick-up tax. *Id.*

171. *Id.* at 280. As discussed more fully in Part IV.C, Perkins observed that the “large majority of the states” in this era utilized both a state inheritance tax and a pick-up tax. *Id.* at 281. The tax payable by a given estate was the larger of the two. *See id.*

172. SUBCOMM. OF THE COMM. ON WAYS AND MEANS, 72D CONG., DOUBLE TAXATION 132 (preliminary report) (Comm. Print 1933) [hereinafter DOUBLE TAXATION]. As a percentage of total state revenues, death taxes rose from 7.9% of state revenues in 1915 to 10.1% in 1930. *Id.* This increase is far lower than the raw numbers would suggest, thus reflecting a significant simultaneous increase in various types of state taxes.

173. *See* INTERSTATE COMM. ON CONFLICTING TAXATION, CONFLICTING TAXATION 98 (1935) [hereinafter CONFLICTING TAXATION].

174. *Id.*

175. 67 CONG. REC. 639, 676 (1925) (statement of Rep. Green).

176. Florida argued that the state death tax credit violated not only the United States Constitution, but also the Declaration of Independence and the Articles of Confederation. Brief of Counsel for the State of Florida on Rule Directed to Defendants to Show Cause Why the State Should Not be Allowed to File Bill of Complaint at 35, 37, Florida v. Mellon, 273 U.S. 12 (1926) (no docket number in original).

an official complaint against Andrew Mellon, the Secretary of the Treasury, and David Blair, the Commissioner of Internal Revenue.<sup>177</sup> Florida's Bill of Complaint contained two major arguments. First, the State argued that the 1926 estate tax, with its eighty percent state death tax credit mechanism, represented an invasion of the sovereign rights of the State and was "a direct effort on the part of the Congress . . . [t]o coerce the State of Florida into imposing and levying an estate or inheritance tax . . ."<sup>178</sup> Second, Florida argued that since it imposed no state death tax to absorb the available state death tax credit, Florida decedents would pay net federal estate tax at a higher rate than their counterparts in other states. As such, reasoned Florida, the federal estate tax was unconstitutional insofar as it was not imposed on a "uniform" basis as required by Article I, Section 8 of the U.S. Constitution.<sup>179</sup>

Florida's theory of damages resulting from imposition of the state death tax credit is of particular relevance to this Article. As summarized in the Supreme Court's opinion, Florida argued that the state death tax credit directly injured the State insofar as it would "cause the withdrawal of property from the state with the consequent loss to the state of subjects of taxation."<sup>180</sup> Florida thus argued that if the State lost its competitive death tax advantage, it would face its own exodus of wealth, as residents abandoned the former tax haven and returned to their original home states.

The Supreme Court denied Florida's petition. The Court's unanimous opinion, penned by Justice Sutherland, characterized the alleged injury to Florida as "purely speculative" and "indirect."<sup>181</sup> Furthermore, even if

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177. *Florida Seeks to Initiate Test of Estate Tax Law in Supreme Court*, 4 NAT'L INCOME TAX MAG. 351 (1926); see Arthur W. Machen, Jr., *The Strange Case of Florida v. Mellon*, 13 CORNELL L.Q. 351 (1928) (providing a contemporaneous analysis of the case).

178. Bill of Complaint at 6, *Florida v. Mellon*, 273 U.S. 12 (no docket number in original); see also *Mellon*, 273 U.S. at 16; *Action to Enjoin Collection of Estate Tax in Florida Stopped by Supreme Court*, 5 NAT'L INCOME TAX MAG. 59 (1927).

179. Bill of Complaint at 7, *Florida v. Mellon*, 273 U.S. 12 (1926) (no docket number in original); see also *Florida Begins Action to Test Validity of Estate Tax Law*, 4 NAT'L INCOME TAX MAG. 249-50 (1926) (discussing the contentions made by the Attorney General of Florida on behalf of the State).

180. *Mellon*, 273 U.S. at 16; see also Brief on the Unconstitutionality of the Federal Estate Tax and the Right of the State to Complain Thereof by Original Bill in this Court at 159, *Florida v. Mellon*, 273 U.S. 12 (1926) (no docket number in original) ("The very effect intended by . . . those responsible for the passage of this law, was to stop the flow of people and money into the State of Florida—to check its development.").

181. *Mellon*, 273 U.S. at 18. It is unclear whether Justice Sutherland concluded merely that Florida had failed to meet its evidentiary burden or whether the Court truly believed that taxpayers do not base their choice of domicile at least in part on rates of state taxation. Either way, the Court's opinion rightly can be criticized as based on a fairly rudimentary model of taxpayer behavior that did not envision taxpayers taking any response to changes in tax rates. For example, the Court concluded that if a migration out of Florida were to occur in response to changes in effective state death tax rates, Florida could replace the lost revenue by merely increasing the rate of state tax on

Florida did sustain these injuries, the Court concluded that the law would provide no redress. "If the act interferes with the exercise by the state of its full powers of taxation or has the effect of removing property from its reach which otherwise would be within it, that is a contingency which affords no ground for judicial relief."<sup>182</sup>

Florida's legal challenge to the state death tax credit having failed, the State soon decided to avail itself of the available state death tax credit. In 1931, Florida adopted a pick-up tax.<sup>183</sup>

### C. *The New Landscape*

By 1935, a new state death landscape had begun to take shape. The state death tax credit clearly had made an impact on state leaders and had spurred a movement towards increasingly uniform state death taxes. Yet the vast majority of states had responded to the new credit not by abandoning their traditional state inheritance taxes, but by merely adding additional pick-up taxes to the mix.<sup>184</sup> As such, the new credit had not precipitated true national uniformity. Especially with respect to smaller estates, considerable interstate variation in death tax rates remained.

In order to illustrate this new tax landscape and evaluate the impact of the state death tax credit, this section analyzes three hypothetical estates respectively valued at \$50,000, \$1,000,000, and \$10,000,000.<sup>185</sup> In each case, a hypothetical decedent is assumed to have died in 1935, domiciled in a separate property state.<sup>186</sup> Also, in each case, the decedent is assumed to

those taxpayers who remained. *Id.* The Court did not explain why it felt this further change would not prompt further migration.

182. *Id.* at 17.

183. Oakes, *supra* note 8, at 469.

184. *Id.* at 469-70.

185. As more fully discussed *infra*, data for these case studies is derived from CONFLICTING TAXATION, *supra* note 173.

186. Two major systems of property law exist in the United States. In community property states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin), certain property acquired by a married individual is deemed to be owned by both spouses (the "marital community") even if titled solely in one spouse's name. In contrast, a taxpayer in one of the remaining states—the "separate property" states—owns 100% of the property titled in his or her name. These different property systems have numerous consequences relevant to a variety of fields, including property law, family law, estate planning, and taxation. Of relevance to this Article is that the applicable system of property law in a state impacts the computation of a resident's gross estate for death tax purposes. See generally Arthur W. Andrews, *Community Property With Right of Survivorship: Uneasy Lies the Head that Wears a Crown of Surviving Spouse for Federal Income Tax Basis Purposes*, 17 VA. TAX REV. 577, 578 (1998); Jack M. Kinnebrew & Deborah Cox Morgan, *Community Property Division at Death*, 39 BAYLOR L. REV. 1035 (1987). In order to permit comparisons based solely on differences in state death tax laws, insulated from the effects of

have left 40% of his or her estate to a surviving spouse and 15% to each of four children. These case studies illustrate the new tax landscape confronting decedents of various wealth levels and states of domicile.<sup>187</sup>

### 1. The \$50,000 Estate

In 1934, the federal exemption from estate tax was \$50,000.<sup>188</sup> Estates at or below this level paid no estate tax and generated no state death tax credit. Nevertheless, many of these estates were subject to state death taxes.<sup>189</sup>

Traditional state inheritance taxes were the most likely form of state death tax to impact a \$50,000 estate.<sup>190</sup> Thirty-seven of the thirty-nine states that imposed state inheritance taxes in 1935 applied such taxes to estates below the level of the \$50,000 federal estate tax exemption, even if left to the decedent's spouse and/or children.<sup>191</sup> As such, in these thirty-seven states, state governments routinely calculated, enforced, and collected state death taxes on estates that were exempt from federal taxation and generated no state death tax credit.

In contrast to state inheritance taxes, state estate taxes would have been far less relevant to this hypothetical taxpayer. State estate tax laws in thirty-four of the thirty-nine states that imposed such taxes applied only to those estates also subject to federal estate taxation.<sup>192</sup> Conversely, only five states imposed estate taxes with an exemption below the \$50,000 federal exemption.<sup>193</sup>

Taking into account both inheritance taxes and estate taxes, the disposition of this hypothetical taxpayer's \$50,000 estate would have

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state property laws, the community property states have been excluded from the analysis of the case studies presented in this section. The data source for these studies incorrectly failed to characterize Arizona as a community property state, even though the State has a rich community property tradition. See John D. Lyons, *Development of Community Property Law in Arizona*, 15 LA. L. REV 512 (1955). That error has been corrected in this Article.

187. These case studies also assume that all state death taxes are payable to the decedent's state of domicile, thus ignoring issues relating to tax jurisdiction and interstate apportionment of tax revenue (e.g., taxation of out-of-state real property).

188. CONFLICTING TAXATION, *supra* note 173, at 90.

189. *See id.*

190. *See id.*

191. New Hampshire and Oregon did not tax property passing to either spouse or lineal heirs. All other states imposing inheritance taxes did so. In these states, the exemptions applicable to property left to spouse and descendants most frequently were \$10,000 or \$20,000, with only three state spousal exemptions exceeding \$25,000 (Michigan: \$30,000; Iowa: \$40,000; Kansas: \$75,000). *See id.* at 91 tbl.49.

192. *Id.* at 92 tbl.50.

193. The applicable exemption levels were \$10,000 in Rhode Island and Utah, \$15,000 (plus a \$5,000 homestead exemption and \$20,000 life insurance exemption) in Oklahoma, and \$50,000 in Mississippi. *Id.* North Dakota law featured a \$20,000 exemption for spouse plus an additional exemption of \$5,000 per minor child and \$2,000 for each other "first class heir." *Id.*

generated death taxes in thirty-four of the forty-one states analyzed. The median tax due would have been a mere \$150, ranging from a low of \$0 in several states to a high of \$1,700 in Utah. Table 1 presents a summary of the range of outcomes.

**Table 1**  
**State Death Taxes Imposed Under 1935 Laws For Hypothetical Taxpayer with \$50,000 Estate Distributed 40% to Spouse and 60% to Four Children, Excluding Community Property States<sup>194</sup>**

Tax Imposed	\$0	\$1 to \$300	\$301 to \$600	\$601 to \$900	\$900 to \$1,200	Over \$1,200
Number of States	11	18	8	2	1	1

As Table 1 reveals, a \$50,000 estate in 1935 would have generated only modest death taxes in both nominal and relative terms. In twenty-nine states, total death taxes would have been less than \$300. Even in the two states that imposed taxes over \$900, these taxes could not be said to have reached a level that would be significant in terms of taxpayer behavior.<sup>195</sup>

## 2. The \$1,000,000 Estate

A \$1,000,000 estate would have generated \$169,100 in total death taxes in 1935.<sup>196</sup> An estate of this magnitude would have generated a state death tax credit of \$33,200, reducing the net federal tax to \$135,900.<sup>197</sup> The

194. State-by-state data figures: *No Death Tax*: Alabama, Colorado, District of Columbia, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Mississippi, New Hampshire; *Tax \$1 to \$300*: Maine (\$100), Michigan (\$100), Minnesota (\$100), Missouri (\$100), Nebraska (\$100), New York (\$100), South Carolina (\$100), Vermont (\$100), Indiana (\$150), South Dakota (\$150), Delaware (\$180), Massachusetts (\$200), North Carolina (\$200), North Dakota (\$200), Wyoming (\$200), New Jersey (\$250), Ohio (\$250), Virginia (\$250); *Tax \$301 to \$600*: Arkansas (\$370), Rhode Island (\$400), Montana (\$490), Maryland (\$500), Oregon (\$525), Tennessee (\$525), Wisconsin (\$540), Oklahoma (\$600); *Tax \$601 to \$900*: Connecticut (\$650), West Virginia (\$900); *Tax \$901 to \$1,200*: Pennsylvania (\$1,000); *Tax Over \$1,200*: Utah (\$1,700). *Id.* at 99 tbl.51.

195. Even if these taxes did prompt taxpayers of modest means to relocate out of a state, the state likely would not have been concerned.

196. *Id.* at 100 tbl.52.

197. *Id.* Note that the state death tax credit of \$33,200 is approximately 20% (rather than 80%) of the \$169,100 federal death tax otherwise due. The state death tax credit was permanently tied to 1926 rates. *See id.* at 89. Thus, the federal government reserved to itself the full benefits of any future increase in federal estate tax rates. *Id.* In 1932 and 1934, significant increases in federal estate tax rates served to undermine the relative value of the state death tax credit. *Id.* This trend



existence of the state death tax credit served to level the death tax landscape confronting a \$1,000,000 estate, yet did not equalize state death taxation nationwide.<sup>198</sup> Rather, even at the millionaire level, independent state succession taxes, calculated without reference to the state death tax credit, continued to be extremely relevant and resulted in widespread, but modest, variation in state death tax rates.<sup>199</sup>

Table 2 presents the full summary.

**Table 2:**  
**State Death Taxes Imposed Under 1935 Laws For Hypothetical Taxpayer with \$1,000,000 Estate Distributed 40% to Spouse and 60% to 4 Children, Excluding Community Property States<sup>200</sup>**

Tax Imposed (Gross)	Under \$33,200	Exactly \$33,200	\$33,201 to \$43,200	\$43,201 to \$53,200	\$53,201 to \$63,200	Over \$63,200
Tax Imposed (Net of Credit)	\$0	\$0	\$1 to \$10,000	\$10,001 to \$20,000	\$20,001 to \$30,000	Over \$30,000
Number of States	3	18	10	5	3	2

The state death tax credit had shaped the tax landscape summarized in Table 2 in three major ways.

First, it had served as a basis for increasingly uniform state legislation, especially among states that previously imposed little or no death tax.<sup>201</sup>

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continued in future decades. Whereas the state death tax credit absorbed some 76% of the amount otherwise payable to the federal government in 1931, by 1952 the figure was down to a mere 10%. See OVERLAPPING TAXES, *supra* note 10, at 84 (discussing the issue further with relevant data).

198. See CONFLICTING TAXATION, *supra* note 173, at 100 tbl.52.

199. *Id.*

200. State-by-state data figures: *Tax Under \$33,200*: District of Columbia (\$0), Wyoming (\$19,000), Kentucky (\$32,150); *Tax Exactly \$33,200*: Alabama, Connecticut, Delaware, Florida, Georgia, Indiana, Kansas, Maine, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, Virginia; *Tax \$33,201 to \$43,200*: Missouri (\$34,600), Vermont (\$34,750), Massachusetts (\$35,250), Mississippi (\$36,000), South Carolina (\$37,100), Tennessee (\$38,525), Iowa (\$40,050), Illinois (\$40,800), North Carolina (\$41,150), New York (\$42,500); *Tax \$43,201 to \$53,200*: South Dakota (\$48,250), Utah (\$49,200), West Virginia (\$52,000), Oklahoma (\$52,100), Colorado (\$53,020); *Tax \$53,201 to \$63,200*: Arkansas (\$57,150), Wisconsin (\$61,000), Montana (\$61,990); *Tax Over \$63,201*: Oregon (\$75,775), North Dakota (\$111,700). *Id.*

201. See, e.g., Oakes, *supra* note 8, at 474.

Eighteen states, as a result of pick-up tax legislation specifically designed to achieve this result, imposed a tax exactly equal to the credit.<sup>202</sup>

Second, the credit eliminated any competitive advantage to be gained by imposing a state death tax lower than the available credit. The District of Columbia was the only separate property state that failed to impose any state death tax on a \$1,000,000 estate,<sup>203</sup> and just two other states imposed taxes below the \$33,200 level.<sup>204</sup> Since the federal estate tax correspondingly increased to the extent a state failed to utilize the full available credit, taxpayers in these three states ended up in exactly the same place as taxpayers in the eighteen states where state death tax rates matched the available credit.<sup>205</sup> As such, as a result of the crediting mechanism, the combined federal and state tax burden was exactly equal for taxpayers dying in twenty-one states.

Third, even though combined federal and state death taxes were only exactly uniform for taxpayers in twenty-one of forty-one states, the state death tax credit muted the effect of this continued diversity in state death tax laws. For example, ten states imposed state death taxes between \$33,201 and \$43,200 on a \$1,000,000 estate.<sup>206</sup> After adjusting for the effect of the \$33,200 state death tax credit, the net impact of these death taxes was reduced to below \$10,000, a reduction of seventy percent or more. Taking into account the credit, thirty-nine of forty-one states studied imposed net state death taxes of less than \$30,000. The state death tax credit thus offset more than half of the state death taxes imposed by these thirty-nine states, thus significantly reducing any anti-competitive impact of such taxes.

It is crucial to note that while the state death tax credit muted the impact of the state death taxes that exceeded \$32,200, it seems to have done little to inspire the state governments that imposed such taxes to actually cut tax rates. Of the eleven states that would have imposed more than \$32,200 of states death taxes on a \$1,000,000 estate in 1924, only five had reduced those taxes by 1935.<sup>207</sup> Only a single state—Michigan—had reduced its

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202. For a list, see *supra* note 200.

203. Nevada, the only other state without a state death tax in 1935, is a community property state and is thus excluded from these case studies.

204. These two states are Wyoming (\$19,000) and Kentucky (\$32,150). See *supra* note 200.

205. Even though these states offered their taxpayers no financial advantage by failing to capture the full available state death tax credit, the states “left money on the table” by failing to maximize this source of revenue. Steven D. Nofziger, *EGTRRA and the Past, Present, and Future of Oregon's Inheritance Tax System*, 84 OR. L. REV. 317, 320 (2005).

206. See *supra* note 200 and accompanying table.

207. Compare CONFLICTING TAXATION, *supra* note 173, at 100 tbl.52 with *id.* at 101 tbl.53.

state death taxes to exactly conform to the available credit.<sup>208</sup> The state death tax credit had thus shaped the tax landscape merely by diminishing the relative impact of these taxes and not by spurring states to abandon their traditional state inheritance taxes in favor of pick-up taxes.<sup>209</sup>

In sum, this case study clearly reveals the continued relevance of state inheritance tax laws to an estate of \$1,000,000, as well as considerable resulting state-to-state variation in tax rates. Yet it also illustrates that the state death tax credit had achieved significant success in creating a basis for uniform state tax rates and thereby reducing the potential for interstate competition.

### 3. The \$10,000,000 Estate

The hypothetical taxpayer with a \$10,000,000 estate would have owed at least \$4,387,600 in combined federal and state death taxes.<sup>210</sup> Of this amount, \$1,067,600 would have been available to the states via the state death tax credit, while a minimum of \$3,320,000 was reserved for the federal government.<sup>211</sup>

The relative lack of uniformity that still existed at the level of \$1,000,000 estates largely disappeared by the time estates reached the \$10,000,000 level. At this higher level, state inheritance taxes became decreasingly relevant as the state death tax credit exceeded those taxes in nearly every state. State pick-up taxes conversely increased in relevance.

Table 3 summarizes the tax landscape confronting a \$10,000,000 estate.

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208. Compare *id.* at 100 tbl.52 with *id.* at 101 tbl.53.

209. Although the retention of traditional state succession taxes undermined efforts to achieve uniform state death taxation, at least with respect to the \$1,000,000 estate, these taxes provided two crucial benefits to state governments. First, as seen in this and the prior (\$50,000 estate) example, succession taxes helped maximize total state revenues, as many estates continued to generate state death taxes that exceeded the available state death tax credit. At the same time, since the states had enacted pick-up taxes in addition to, and not in lieu of, their traditional death taxes, the states had not become dependant on the continued existence of that credit. As such, the state death tax credit was a luxury and not a necessity. See *infra* Part V.B to explore the later reversal of this trend.

210. CONFLICTING TAXATION, *supra* note 173, at 100 tbl.52.

211. *Id.*

**Table 3**  
**State Death Taxes Imposed Under 1935 Laws For Hypothetical**  
**Taxpayer with \$10,000,000 Estate Distributed 40% to Spouse and 60%**  
**to 4 Children, Excluding Community Property States<sup>212</sup>**

Tax Imposed (Gross)	Under \$1,067,600	Exactly \$1,067,600	\$1,067,600 to \$1,367,600	Over \$1,367,600
Tax Imposed (Net of Credit)	\$0	\$0	\$1 to \$300,000	Over \$300,000
Number of States	8	27	4	2

As demonstrated by Table 3, state death taxes were far more uniform in the case of a \$10,000,000 estate than they had been in the two prior cases. In the case of a \$10,000,000 estate, twenty-seven of forty-one states studied imposed death taxes exactly equal to the available state death tax credit. Eight more states collected less than the available credit, which did nothing to reduce the \$4,387,600 combined death tax burden on their residents.<sup>213</sup> In the aggregate, taxpayers in thirty-five of forty-one states thus would have paid exactly \$4,387,600 in combined federal and state death taxes.<sup>214</sup>

In only six states did state death taxes assessed against a \$10,000,000 estate exceed the available state death tax credit.<sup>215</sup> In five of these states, the excess was relatively modest, ranging from \$7,800 in Mississippi<sup>216</sup> to

212. State-by-state data figures: *Tax Under \$1,067,600*: District of Columbia (\$0), Wyoming (\$199,000), South Dakota (\$391,250), Utah (\$499,200), South Carolina (\$575,100), Kentucky (\$695,650), Oklahoma (\$791,400), Arkansas (\$819,200); *Tax Exactly \$1,067,600*: Alabama, Colorado, Connecticut, Delaware, Florida, Georgia, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Wisconsin; *Tax \$1,067,600 to \$1,367,600*: Mississippi (\$1,075,400), Illinois (\$1,216,000), New York (\$1,335,500), West Virginia (\$1,360,000); *Tax Over \$1,367,600*: Oregon (\$1,415,775), North Dakota (\$2,164,300). *Id.*

213. *Id.* These eight states were District of Columbia (\$0), Wyoming (\$199,000), South Dakota (\$391,250), Utah (\$499,200), South Carolina (\$575,100), Kentucky (\$695,650), Oklahoma (\$791,400), and Arkansas (\$819,200). *Id.* All eventually enacted pick-up taxes.

214. *See id.*

215. *See id.* These six states were Illinois (\$1,216,000), Mississippi (\$1,075,400), New York (\$1,335,500), North Dakota (\$2,164,300), Oregon (\$1,415,775), and West Virginia (\$1,360,000). *Id.*

216. State death taxes of \$1,075,400 versus the state death tax credit of \$1,067,600. *Id.*

\$348,175 in Oregon.<sup>217</sup> In the sixth state, North Dakota, death taxes remained at a level that defies explanation.<sup>218</sup>

In sum, in the case of a \$10,000,000 estate, combined federal and state death tax rates had become increasingly uniform across state lines. At this asset level, the state death tax credit seemed to be functioning exactly as its proponents had hoped. An increasingly uniform pattern of death taxation emerged, enabling more states to collect more tax—especially from the largest estates—without fearing any competitive disadvantage.

Yet as discussed in the following section of this Article, trouble was brewing in the field of state death taxation beneath its placid surface.

## V. TWO STEPS IN THE WRONG DIRECTION

The 1925 Report of the National Tax Committee argued that the state death tax credit should be a temporary measure, serving just long enough to coerce the tax havens back towards the fold and to provide an impetus for passage of uniform state death tax laws.<sup>219</sup> Once states had adopted such laws, Congress would be able to abandon the field, relying on inertia to keep the uniform state death taxes in place.

As state death taxes evolved during the twentieth century, two major trends in state death tax legislation undermined this original plan. These trends, motivated at least in part by interstate competition, ultimately caused uniform state death taxes to become completely dependent on the continued existence of the federal estate tax and the state death tax credit. By oversight or otherwise, the state governments led themselves away from the original intent of the state death tax credit and towards an unforeseen disaster named EGTRRA.

### A. *A Colossal Miscalculation?*

The original proponents of the state death tax credit regime may have made a colossal miscalculation. The Delano Committee's Report seemed to assume that states seeking to avail themselves of the state death tax credit would do so as New York had done: by adopting a state estate tax rate table that mirrored the state death tax credit rates.<sup>220</sup> However, while an increasing number of states indeed came into uniformity with the other states, many did so by defining these new state estate taxes in terms of any

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217. State death taxes of \$1,415,775 versus the state death tax credit of \$1,067,600. *Id.*

218. State death taxes of \$2,164,300 versus the state death tax credit of \$1,067,600. *Id.*

219. See *supra* notes 139-41 and accompanying text.

220. See REPORT, *supra* note 91, at 11-12, 22-25. The Report was not explicit on this point. However, if the authors had expected otherwise, it would have made no sense for them to assume state death taxes would remain in place after repeal of the federal credit.

state death tax credit available from time to time.<sup>221</sup> As such, if the credit ever disappeared, so too would these state death taxes. In these states, and in others that would follow a similar path, state estate taxes and the state death tax credit had become inextricably coupled.

Even as early as 1935, the problem had become a national one. By that year, the governing pick-up statutes in twenty-six states were drafted by reference to the available federal credit, without any independent rate table.<sup>222</sup> With this type of state law in widespread use, continued national uniformity required a permanent federal estate tax. If Congress ever did abandon the field, pick-up taxes would disappear in these twenty-six states, leaving behind only the state's traditional inheritance tax regime, if any.<sup>223</sup> States that had restated the pick-up rates in their statutes, rather than merely referencing them, would retain these taxes after repeal of the credit but would face new competitive pressures as the vast majority of other states ceased imposing equivalent taxes.

Using available tax data and assuming no immediate legislative response to a repeal of the state death tax credit, it is possible to produce a hypothetical model of state death taxes in the event of federal repeal. Table 4 presents one such model, comparing the actual state death taxes imposed on a \$10,000,000 estate in 1935 (from Table 3<sup>224</sup>) with the taxes that would have been imposed on that estate in the event of a 1935 repeal of the state death tax credit.<sup>225</sup>

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221. See Perkins, *supra* note 85, at 283.

222. The states in this category were: California, Connecticut, Delaware, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, and Wisconsin. See CONFLICTING TAXATION, *supra* note 173, at 92 tbl.50.

223. In addition to the twenty-six states referenced above, the State Constitutions in Alabama and Florida restricted the imposition of any tax not offset by a federal credit. Thus, pick-up taxes in twenty-eight states were dependent upon the continued existence of the state death tax credit. *Id.* at 90 n.2.

224. See *supra* note 212 and accompanying table.

225. This model is based on data contained in Tables 50 and 51 of CONFLICTING TAXATION, *supra* note 173, and has been produced as follows. The starting point for the model is Table 51, a state-by-state list of independent state death taxes (excluding pick-up taxes) imposed on a \$10,000,000 hypothetical estate. See CONFLICTING TAXATION, *supra* note 173, at 99 tbl.51. For the reasons detailed previously, I have removed the community property states from this analysis and added the District of Columbia, which has no independent death tax. See *supra* note 186 and accompanying text. As a final adjustment in order to complete the model, I added back those pick-up taxes that would survive repeal of the state death tax credit. In making this adjustment, I concluded that repeal of the state death tax credit would result in elimination of all of twenty-six pick-up estate taxes defined directly by reference to such credit, as well as those in Mississippi (per note "b" to Table 51), Florida (tax would be prohibited by State Constitution) and Alabama (tax

**Table 4**  
**Comparison of State Death Taxes Imposed Under 1935 Laws With Taxes Assuming Repeal of the State Death Tax Credit For Hypothetical Taxpayer with \$10,000,000 Estate Distributed 40% to Spouse and 60% to Four Children, Excluding Community Property States**

**ACTUAL 1935 FIGURES<sup>226</sup>**

Actual Tax Imposed	\$0	\$1 to \$500,000	\$500,001 to \$1,067,599	Exactly \$1,067,600	Over \$1,067,600
Effective Tax (After Credit)	\$0	\$0	\$0	\$0	\$1 or more
Number of States	1	3	4	27	6

**FIGURES ASSUMING REPEAL OF STATE DEATH TAX CREDIT<sup>227</sup>**

Tax Imposed	\$0	\$1 to \$500,000	\$500,001 to \$1,067,599	Exactly \$1,067,600	Over \$1,067,600
Number of States	5	17	10	3	6

As revealed by Table 4, a repeal of the state death tax credit in 1935 would have undermined the uniform tax landscape previously seen in Table 3 in two significant ways. First, repeal of the state death tax credit would have slashed the states' death tax revenues. With the state death tax credit in place, thirty-three states had collected state death taxes of \$1,067,600 or more from an estate of this magnitude. In the event of the credit's repeal,

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would be prohibited by State Constitution). This left just Colorado, Iowa, and Rhode Island with pick-up taxes that would survive repeal of the state death tax credit. These three states thus are reported in Table 4 of this Article as continuing to collect exactly \$1,067,600 of state death taxes. I also have assumed that no states would have taken affirmative action to "decouple" and impose a separate state death tax after repeal of the state death tax credit.

226. See *supra* note 212 for data.

227. State-by-state data figures: *No Death Tax*: Alabama, District of Columbia, Florida, Georgia, New Hampshire; *Tax Under \$500,000*: Nebraska (\$99,500), Maryland (\$100,000), Minnesota (\$158,050), Wyoming (\$199,000), Pennsylvania (\$200,000), Maine (\$283,250), Kansas (\$364,750), Indiana (\$365,800), Delaware (\$382,980), Ohio (\$383,500), Connecticut (\$383,650), South Dakota (\$391,250), Virginia (\$417,250), North Carolina (\$470,300), Vermont (\$480,750), Tennessee, (\$488,525), Utah, (\$499,200); *Tax \$500,001 to \$1,066,999*: South Carolina (\$575,100), Missouri (\$562,600), Michigan (\$567,000), Massachusetts (\$668,750), Kentucky (\$695,650), Montana (\$768,610), Oklahoma (\$791,400), Arkansas (\$819,200), New Jersey (\$894,750), Wisconsin (\$931,000); *Tax Exactly \$1,067,000*: Colorado, Iowa, Rhode Island; *Tax Over \$1,067,000*: Mississippi (\$1,075,400), Illinois (\$1,216,000), New York (\$1,335,500), West Virginia (\$1,360,000), Oregon (\$1,415,775), North Dakota (\$2,164,300). See CONFLICTING TAXATION, *supra* note 173, at 99 tbl.51.

just nine states would have captured that amount of revenue. Second, repeal of the state death tax credit would have destroyed the considerable state-to-state uniformity in effective state death tax rates and reignited interstate competition. While in place, the state death tax credit served to offset the impact of all state death taxes in thirty-five states, leaving just six states that imposed a net state death tax after considering the credit's effect. Assuming repeal of that credit, these figures would have been reversed, with taxpayers in thirty-six of forty-one states facing net state death tax burdens that varied widely based on state of domicile.

From this perspective, the state death tax credit had achieved a false victory. While state death taxes appeared widely uniform, they would remain so only as long as the federal government continued its "temporary" involvement in the field.<sup>228</sup> As decades passed, the situation did not change. A 1961 analysis by two former senior IRS officials concluded that "the continued existence of the state death tax revenue is now dependent upon the support of the federal death tax . . . [T]his source of revenue would dry up if the federal government abandoned this field."<sup>229</sup>

### *B. Without a Net*

By 1975, every state but Nevada imposed some form of death taxation.<sup>230</sup> Yet even half a century after inception of the state death tax credit, only six of these states utilized a pick-up tax as their sole death tax.<sup>231</sup> The other forty-four jurisdictions retained their independent state death

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228. It is unclear why states drafted their laws in this manner. Three intuitive possibilities are (1) tying state law to the available credit made the drafting of state legislation relatively simple; (2) this approach eliminated the need for any future conforming legislation if Congress ever modified the state death tax credit rates; and (3) directly coupling a state's death tax to the state death tax credit appeased those worried about interstate competition, since it ensured that the state's taxpayers would never be subject to a "net" out-of-pocket state death tax.

229. Ralph H. Dwan & Earl A. Ruth, *Reallocation of Death Taxes Between the Federal and State Governments*, 45 MINN. L. REV. 559, 564 (1961) (emphasis omitted). Dwan, former Assistant Chief Counsel of the IRS, and Ruth, former Chief of the Estate and Gift Tax Branch, argued that the federal estate tax was so integral to the existence of state death taxes that the two systems should simply be merged, with Congress collecting a single tax and sharing the resulting revenue with the states. *Id.* Similar proposals can be traced back to at least 1925. See FIRST CONFERENCE PROCEEDINGS, *supra* note 101, at 63 (address of Professor Seligman).

230. See generally Deborah Huffman Schenk, *Estate Planning: Toward Reducing State Death Tax Liability Within the Bounds of Maximum Beneficial Federal Estate Tax Treatment*, 41 BROOK. L. REV. 503, 503-40 (1975) (discussing the wide variety of state death tax regimes in place at this time).

231. See *id.*



tax.<sup>232</sup> This two-stage system of death taxation had remained largely unchanged since the 1930s.

In addition to helping maximize state revenue, retention of independent state death taxes formed a crucial safety net for the state governments.<sup>233</sup> If Congress ever repealed the state death tax credit, these independent state death taxes would remain in place and would serve to minimize the fiscal impact resulting from the change in federal law.

As the twentieth century drew to a close, state after state abandoned their traditional inheritance taxes and migrated towards use of a pick-up estate tax as the sole death tax. Once again, interstate competition was one of the motivating factors.<sup>234</sup> A separate state death tax always meant that tax havens like Florida would maintain some incremental benefit in the battle to attract prosperous citizens. In earlier decades, states seemed to accept a modest level of variation in death tax rates. Yet in this era, state politicians began to focus on the issue of uniformity as never before.

Politicians supporting the repeal of independent state inheritance taxes made clear that tax competition was a major motive for this movement. When suggesting the repeal of New York's separate estate tax, Governor Pataki issued a press release touting a pick-up tax as a means of stemming migration from the State. "My proposal will relieve a great tax burden on our middle class and working families, encouraging parents and grandparents to remain here in New York with their children, grandchildren and lifelong friends."<sup>235</sup> The State Senator proposing Connecticut's repeal

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232. *See id.*

233. *See supra* note 209 and accompanying text.

234. Obviously, interstate competition was just one factor. While full consideration of the other factors is beyond the scope of this analysis, it is worth briefly noting two. One likely factor was the 1976 passage of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, followed soon after by the 1981 passage of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172. Taken together, these two acts completely altered the structure of the federal estate tax. *See* David L. Case & Steven W. Phillips, *Death and Taxes—The 1976 Estate and Gift Tax Changes*, 1976 ARIZ. ST. L.J. 321 (1976); Colloquium, *Paradigmatic State Inheritance, State Estate and Gift Taxation, and the ERTA*, 34 RUTGERS L. REV. 699, 700-37 (1982). Abandoning their traditional state death taxes thus spared the states from having to rewrite those tax laws to coordinate with these fundamental federal changes. A second likely factor was a desire to ease administrative burdens, as a state death tax based exactly on the state death tax credit could be collected using very basic tax forms. Whatever the reason, this trend toward uniform death taxation follows a similar trend in state income taxes during the 1960s and 1970s. During that period, many states abandoned separate state income tax laws in favor of new statutes based on federal income tax concepts. These state statutes, known as "tracking" statutes, generally adopted federal gross income or federal adjusted gross income as the starting point for state income tax calculation. *See* Sidney L. Cottingham, *State Adoption of Federal Taxing Concepts—An Approach Offering Simplification of State Income, Death and Gift Taxes*, 51 N.C. L. REV. 834, 836 (1973) (analyzing state income tax "tracking statutes" and arguing for their extension to death taxes).

235. Press Release, Office of Governor George Pataki, Governor Pataki Calls for Elimination of Estate and Gift Taxes (Jan. 9, 1997), [http://www.state.ny.us/governor/press/older\\_years/jan.9.html](http://www.state.ny.us/governor/press/older_years/jan.9.html); *see also* Nancy O'Hagan, *New York Lifts Death Tax Penalty*, 25 FORDHAM URB. L.J. 135, 141 (1997) (describing the repeal of the New York estate tax).

of its succession tax similarly urged his colleagues to eliminate a tax that was making Connecticut “noncompetitive” by “providing a barrier to the retention of retired people and providing an incentive for them to move out of state.”<sup>236</sup> His counterpart in the Connecticut House of Representatives agreed: “By eliminating this tax . . . we will be removing yet another reason for people to leave the State to avoid our taxes.”<sup>237</sup> Leaving no doubt as to which state had inspired the move, he added, “This is a bill . . . I hope will resound from the shuffle board courts of Tampa to the tennis courts of Orlando to the beaches of the Keys.”<sup>238</sup>

These politicians were not isolated voices. Rather, a major empirical study of state activity concluded that the actions taken in states like New York and Connecticut were part of a major national trend “of intense interstate tax competition due to the growing size and political influence of the elderly population.”<sup>239</sup>

While the decision to rely exclusively on the state death tax credit would ultimately prove disastrous,<sup>240</sup> it spread across the country. Between 1976 and 2001, thirty-one states abandoned their traditional stand-alone state death tax in favor of a pick-up tax.<sup>241</sup> Table 5 places this trend in historical context by summarizing state death tax laws as they existed at several times during the twentieth century. The table demonstrates the systematic movement away from state-specific death taxes and towards complete reliance on state estate taxes tied directly to the state death tax credit, a trend that rapidly intensified in the late twentieth century.

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236. 38 S. Proc., Pt. 14, 1995 Sess., p. 3511 (Conn. 1995) (statement of Sen. Nickerson).

237. 38 H.R. Proc., Pt. 18, 1995 Sess., p. 4832 (Conn. 1995) (statement of Rep. Schiessl).

238. *Id.*

239. Karen Smith Conway & Jonathan C. Rork, *Diagnosis Murder: The Death of State Death Taxes*, 42 ECON. INQUIRY 537, 537 (2004).

240. See *supra* Part VI.A.

241. Conway & Rork, *supra* note 239, at 537.

**Table 5**  
**The Changing State Death Tax Landscape 1916-2000<sup>242</sup>**

Year	States with No State Death Tax	States with Independent State Death Tax As Sole State Death Tax	States with Independent State Death Tax Plus Pick-Up Tax	States With Pick-Up Tax As Sole State Death Tax (No Independent State Death Tax)
1916	6	43	—	—
1924	3	46	—	—
1932	2	16	27	4
1953	1	6	36	6
1975	1	4	40	6
1990	0	0	24	27
2000	0	0	15	36

In what would turn out to be unfortunate timing for the states involved, the few years just prior to passage of EGTRRA saw a number of states join this movement towards elimination of separate death taxes. North Carolina repealed its separate state inheritance tax effective January 1, 1999.<sup>243</sup> Mississippi reduced its state estate tax to match the available credit effective January 1, 2000.<sup>244</sup> Montana voters approved a ballot initiative repealing the State's inheritance tax effective December 31, 2000.<sup>245</sup> South Dakota voters approved a constitutional amendment repealing the state's inheritance tax effective June 30, 2001.<sup>246</sup>

## VI. THE MODERN LANDSCAPE

### A. *What Hath EGTRRA Wrought?*

After EGTRRA, the state death tax credit is but a memory. After eighty years of increasing uniformity in the field of state death taxes, EGTRRA completely altered the prevailing state death tax landscape. The vast

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242. Data Sources: 1916, 1932: DOUBLE TAXATION, *supra* note 172, at 123-24; 1924: Oakes, *supra* note 8, at 468; 1953: OVERLAPPING TAXES, *supra* note 10, at 54 tbl.31; 1975: Schenk, *supra* note 230, at 504-08; 1990: 1990 St. Tax Handbook (CCH), at 461-660; 2000: Repeal of the Federal Estate Tax Would Cost State Governments Billions in Revenue, *supra* note 36, at 2 n.2, 3 tbl.1.

243. N.C. GEN. STAT. §§ 105-2 to 105-32, *repealed by* 1998 N.C. Sess. Laws 212 (effective Jan. 1, 1999, and applicable to the estates of decedents dying on or after that date).

244. MISS. CODE ANN. § 27-9-5 (1991) (amended 2000).

245. 2000 Mont. Laws 116 (approved by electorate on Nov. 7, 2000).

246. S.D. CONST. art. XI, § 15.

majority of states, with pick-up estate tax laws drafted by reference to the available state death tax credit, saw their estate taxes fade away.<sup>247</sup> The remaining few states, with pick-up taxes structured to remain in place even if the credit was to be repealed,<sup>248</sup> retained their full death taxes but suddenly imposed a significant net tax burden on their taxpayers. Had the states taken no action in response to EGTRRA, fewer than half would have imposed any form of state death taxes after January 1, 2005,<sup>249</sup> the lowest percentage in a century.

Many state governments did respond to EGTRRA, at least temporarily. Nine states, including Illinois, Maine, Maryland, Massachusetts, Nebraska, New Jersey, Rhode Island, Vermont, and Wisconsin, enacted new death taxes, replacing pick-up taxes tied to the state death tax credit with decoupled estate taxes designed to replace the lost revenue.<sup>250</sup> At least two additional states, Minnesota and Oregon, took legislative action to reaffirm or clarify that their state death taxes were not repealed by passage of EGTRRA.<sup>251</sup> Conversely, three states—Arkansas, South Carolina, and South Dakota—moved in the opposite direction, affirmatively repealing their state estate taxes in light of EGTRRA.<sup>252</sup> Those three states now stand on equal footing with the twenty-three other states that simply took no

247. Due to ambiguities in state death tax laws in effect prior to EGTRRA, it is difficult to precisely determine how many state estate taxes would have survived the repeal of the state death tax credit absent state legislative action. For example, the Washington State Supreme Court needed to interpret the effect of EGTRRA on that state's estate tax law. See *infra* note 255 and accompanying text. State legislatures in several other states took legislative action either to repeal or reaffirm their state estate taxes after EGTRRA, thus mooting the question of how those taxes would have been interpreted in the absence of such legislative action. See *infra* notes 251-52 and accompanying text. The range of estimates runs from five states to eleven. See MINN. HOUSE OF REPRESENTATIVES RESEARCH DEP'T, STATE RESPONSES TO THE 2001 FEDERAL ESTATE TAX CHANGES 5 tbl.B (Feb. 2004) (concluding that eleven states' estate tax laws referenced federal law at a fixed point in time and thus were immune from changes made by EGTRRA); see also Linda O'Brien, *Tax Trends: States Address Declining Tax Revenues*, TAXES, Apr. 1, 2005, at 51, 52 (concluding that estate tax laws in only five states would survive the repeal of the state death tax credit).

248. The pick-up laws in these states referenced federal law at a fixed point in time and thus were immune from changes made by EGTRRA. As noted, *supra* note 247, there were between five and eleven states in this category, depending on the interpretation of the applicable state statutes.

249. See MINN. HOUSE OF REPRESENTATIVES RESEARCH DEP'T, *supra* note 247, at 5 tbl.B (lists ten states with pick-up taxes not automatically repealed by EGTRRA and twelve other states with stand-alone death taxes, for a total of twenty-two states that would continue to impose state death taxes as of 2005). I would modify this analysis by adding the District of Columbia—which was excluded from the source cited but is considered a state for purposes of this Article—and subtracting Louisiana, since the State had enacted legislation to phase-out its separate state death taxes between 2001 and 2005. With these changes, the total remains twenty-two.

250. See *id.* at 8-10, 12.

251. See *id.* at 10-11.

252. See *id.* at 11.

legislative action as EGTRRA repealed their entire state death tax regimes.<sup>253</sup>

The list of states with death taxes remains in flux. Connecticut joined the list on June 30, 2005 when Governor Rell signed legislation imposing a new state estate tax.<sup>254</sup> Washington left the list on February 3, 2005 when the Washington Supreme Court concluded that the State's death tax had been repealed by EGTRRA,<sup>255</sup> but returned to the list on May 17, 2005 when Governor Gregoire signed a new, "decoupled" version of the tax.<sup>256</sup> North Carolina's Governor signed that State's new decoupled estate tax legislation on June 30, 2005, just hours before a twice-delayed repeal of its prior estate tax was due to take effect.<sup>257</sup>

With respect to state death taxes, the nation is now divided. Half of the states impose a state death tax; the other half do not. In just four years, EGTRRA thus undermined eighty years of movement towards uniform national death taxation. The elimination of the state death tax credit eliminated a free source of revenue for the states and rekindled old fears of significant tax-motivated migration from states that impose death taxes to those that do not. No amount of state legislation can reverse what EGTRRA has wrought.

### B. *The State of Death Taxes*

After all of this activity, one might hope that stability has returned to the field of state death taxes. History, however, suggests that it has not. A major reason, once again, is interstate competition. The state death tax uniformity of the late twentieth century is now but a memory. Interstate competition to attract wealthy residents begins anew. This time, Congress has left the fray, leaving state leaders to sort out matters for themselves.

Florida seemingly has no intention of imposing a decoupled state death tax to replace the \$800 million<sup>258</sup> of annual death tax revenue lost to EGTRRA. Rather, State politicians have decided to turn a fiscal challenge into a marketing opportunity. While leaders in many other states focused on drafting new tax legislation, Florida Governor Jeb Bush appointed a

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253. The twenty-three states are Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Texas, Utah, West Virginia, and Wyoming. *See id.* at 18-20.

254. 2005 Conn. Pub. Acts no. 02-251, §§ 66, 69, available at <http://www.cga.ct.gov/2005/act/Pa/2005PA-00251-R00HB-06940-PA.htm>.

255. *Estate of Hemphill v. Dep't of Revenue*, 105 P.3d 391, 393 (Wash. 2005).

256. S.B. 6096, 59th Leg., Reg. Sess. (Wash. 2005).

257. *See* N.C. GEN. STAT. § 105-32.2 (2003), amended by 2005 N.C. Sess. Laws 144.

258. States Can Retain Their Estate Taxes Even as the Federal Estate Tax is Phased Out, *supra* note 36, at 14 tbl.4 (estimating revenue loss for year 2007).

“Destination Florida Commission” on July 29, 2002 in order to “evaluate Florida’s competitive position in attracting retirees and to recommend ways to make Florida more retiree friendly.”<sup>259</sup> One of the Commission’s recommendations is for Florida to continue its favorable tax policies.<sup>260</sup> The original tax haven is back in business.

The popular media has fanned the flames of this renewed interstate competition. One need not read past the headlines to figure out the advice being dispensed. Readers of *Forbes* have been encouraged to say, “Florida or Bust.”<sup>261</sup> *Wall Street Journal* subscribers have been educated on “A Reason to Relocate.”<sup>262</sup> In states with death taxes, local newspapers warn of a pending exodus of wealth. A front-page article in *Crain’s New York Business* decried that retirees are simply “fleeing New York” in response to its state death tax.<sup>263</sup> The *Connecticut Law Tribune* titled its editorial about the new Connecticut death tax “A ‘Run Away’ Tax,” predicting state residents would run away to Florida in response.<sup>264</sup>

This media pressure has both molded public opinion and helped shape the agenda for the field of estate planning. Helping taxpayers choose their state of domicile has become a fundamental element of modern estate

259. DESTINATION FLORIDA COMMISSION, FINAL REPORT WITH RECOMMENDATIONS 1 (2003), available at <http://www.ccfj.net/DestFlaFinRep.html>. The Destination Florida Commission’s report also answers the question of why the State is so interested in attracting (wealthy) retirees:

This report reflects research that has shown that Florida cannot afford to lose the significant net gain income, services and contributions that retirees bring to the state. Direct spending by mature Floridians and the value of their federal health benefits is estimated at \$150 billion. From a fiscal perspective, Florida’s elder residents represented a net benefit of \$2.8 billion in taxes, to state and local governments, in the year 2000. These residents added even more through their participation in employment, volunteerism, charitable contributions and community involvement.

*Id.* (footnote omitted).

260. *Id.*

261. Ashlea Ebeling, *Florida or Bust*, FORBES, Mar. 15, 2004, at 171. Ms. Ebeling’s article features a chart segregating states into three groups based on their death tax laws: “retire here in peace,” “targeted tax,” and “shakedown.” *Id.*

262. Kaja Whitehouse, *A Reason to Relocate: Death Taxes: Burden for Heirs Depends On Where You Live or Die As States Rewrite Rules*, WALL ST. J., Nov. 5, 2003, at D2.

263. Tom Fredrickson, *Rich residents flee as state’s estate tax bites; More retirees change primary residences as gap between NYS, no-tax states widens*, CRAIN’S N. Y. BUS., Feb. 14, 2005, at 1 (“An increasing number of rich retirees are fleeing New York to escape the state’s estate tax, triggering a loss of millions in sales, charitable donations and income tax receipts.”).

264. Editorial, *A ‘Run Away’ Tax*, CONN. L. TRIB., June 13, 2005, at 20 (“Florida is such a pretty state. The bougainvillea burst with beautiful color. The golf is good just about all year round. No one ever dies there of a heart attack while shoveling snow . . . . Sure, one has to contend with an occasional hurricane. But what one doesn’t have to worry about is an estate tax . . .”).

planning practice.<sup>265</sup> Domicile considerations have become so paramount that at least one author has suggested that lawyers in states with death taxes may have an ethical duty to discuss with estate planning clients the virtues of moving out of state.<sup>266</sup>

Amid this backdrop, state leaders seem to be presented with a choice: lose your state death taxes or lose your wealthy residents. A past generation of state leaders faced a similar conflict and confronted a similar decision. Presented with the choice of losing state residents or abandoning state death taxes, they were prepared to choose the latter. The Congress of 1926 preempted that decision. The Congress of 2006 seems unlikely to take similar action.

As such, state leaders of 2006 may have no political choice but to finish what their predecessors started. Looking out across the new death tax landscape after EGTRRA, modern state leaders may consider it futile to compete with Florida and the other death tax havens. They may simply decide that state death tax revenues come at too high a political cost and turn elsewhere for needed tax dollars.

## VII. CONCLUSION

Throughout the twentieth century, interstate competition to attract and retain wealthy residents shaped the field of state death taxation. As the twenty-first century began, the passage of EGTRRA and repeal of the state death tax credit precipitated a fundamental change in state death tax regimes and significantly altered the competitive pressures facing states that impose these taxes.

The new landscape is one no current state leaders have experienced during their term in office. Yet, it strongly resembles a prior one. The death tax havens of 1924 have returned,<sup>267</sup> bringing old challenges to a new generation of state leaders. The considerations confronting modern politicians after the repeal of the state death tax credit resemble those which faced their predecessors some eighty years ago, before the credit's birth.

As such, history has much to teach about modern state death taxes. It is a history that has been all but lost in the current debate, which so often views EGTRRA as the starting point for analysis. By rediscovering that history, we can see how the events of the early twenty-first century fit in a far larger

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265. See Dean L. Surkin, *The Impact of the Decoupling of State Estate Taxes on a Taxpayer's Choice of Domicile*, 101 J. TAX'N 49 (2004); see also David Scott Sloan & Christopher Boyett, *Advising Clients Who Move to Florida*, N.Y.L.J., Feb. 14, 2005, at s5 (advising New York lawyers of the steps needed for clients to change domicile to Florida, but also warning that assisting clients in this manner could constitute unlicensed practice of Florida law).

266. Kaplan, *supra* note 25, at 28, 35.

267. Except, instead of numbering only a few, they now number about half of the states. See *supra* notes 8, 35.

continuum. By regaining historical perspective, we can appreciate the true magnitude of the challenges facing modern state death taxation.

Interstate competition is a powerful destructive force, harnessed over a period of eighty years but then released to reshape the death tax landscape. Confronting this force, modern state leaders may hold firm, touting decoupled twenty-first century estate taxes as a mere continuation of twentieth century death tax policy. Alternatively, and more likely, they may simply yield to competitive pressures, deciding that state death taxes are too controversial—and potentially too self-defeating—to warrant continuation.

If state leaders make this choice, and history suggests they will, then state death taxes will continue on what had once seemed their inevitable course. State leaders will abandon this traditional source of revenue in favor of others. Burdens will shift. Some taxpayers will lose while others will gain. Amid the clamor and complaints of those impacted by the resulting new tax, the long history of state death taxes will head towards a quiet end.



