Justice and Truth in Political Discourse

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INTRODUCTION

Since the Watergate scandal, campaign finance reform has been the focus of a great deal of national attention.[1] Legislation has attempted to limit the amount that individuals or various entities may contribute to candidates or spend on political advertising or campaigns.[2] Although the public generally supports campaign finance reform,[3] reforms implemented thus far have not been effective in appreciably reducing campaign costs and the role of large contributions.[4]

Reform of campaign finance presents difficult political and legal problems. Regulation of campaign contributions has proved to be difficult. Contributions may facilitate lobbying of public officials that can be positive. Lobbying may inform as well as persuade. It is clearly an activity protected by the First Amendment; however, campaign contributions may promote individual or special interests that may conflict with the common good. Because of the need to finance costly campaigns, elected officials tend to give more attention to major contributors.[5] This provides these well-financed interests

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1. *See* William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 NW. U. L. REV. 335 (2000) (discussing problems with current campaign finance regulations and proposing a decentralized solution).

2. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C., 12 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C. (2000 & Supp. 2003)).

3. Keating Holland, *Poll: Americans Favor Campaign Finance Reform Efforts*, CNN.com, *at* http://www.cnn.com/2001/ALLPOLITICS/03/16/cnn.poll/ (Mar. 16, 2001) (stating that 54 percent of Americans support the passage of new campaign finance reform).

4. *See* Michael Saxl & Maeghan Maloney, *The Bipartisan Campaign Reform Act: Unintended Consequences and the Maine Solution*, 41 HARV. J. ON LEGIS. 465 (2004) (discussing a loophole in the Bipartisan Campaign Finance Reform Act of 2002 that allows large contributions to play a role in campaigns via non-party organizations).

5. John McCain, *Reclaiming Our Democracy: The Way Forward*, 3 ELECTION L.J. 115, 116 (2004) (discussing office holders' and candidates' constant need for money and the human tendency to reward large donors with favorable public policies).

disproportionate access to public officials.[6] Such disproportionate access makes it probable that these interests will have greater influence in the making of laws and the process of government.[7] Consequently, the interests of the rich and otherwise more powerful tend to be promoted, perhaps at the expense of the less powerful and the common good.[8]

Campaign expenditures have proved to be even more difficult to regulate than contributions.[9] The First Amendment has been among the most serious obstacles to campaign finance reform.[10] In *Buckley v. Valeo*,[11] the United States Supreme Court invalidated portions of the Federal Election Campaign Act Amendments of 1974.[12] The Court held that the Act's expenditure limitations negatively impacted political speech and could not be upheld unless supported by a compelling state interest.[13] Since no compelling state interest was found, the expenditure limits were found invalid.[14] However, the contribution limits were valid since they involved only "marginal restriction" upon speech and could be justified by the state's interest in eliminating corruption or the appearance of corruption.[15]

The Problem May be Greater than Just Campaign Finance

Campaign finance in other developed democracies indicates that campaign finance reform may be accomplished despite the formidable legal and political obstacles.[16] However, campaign finance reform is

6. *See* Steve France, *Campaign Cash Cops: Reformers Fight Precedent and 'Evil Special Interest Man'*, A.B.A. J., Feb. 1999, at 24 (reporting that proponents of campaign finance reform feel that the views of large contributors drown out the voices of average citizens).

7. *See* McCain, *supra* note 5, at 117 (discussing the affidavits of politicians, corporate officials, and political scientists affirming that contributions purchased influence over public policy).

8. *See id.* at 120 (arguing that candidates' attention to large donors creates a sense of disempowerment in the average American and erodes a citizen's incentive to participate in civic life).

9. *See* Buckley v. Valeo, 424 U.S. 1, 58–59 (1976) (invalidating the limitation of a candidate's expenditures from his own personal funds and on overall campaign expenditures as violations of the First Amendment).

10. There have been others. *See* Marshall, *supra* note 1, at 346–54 (discussing the Supreme Court's reliance upon the First Amendment in its *Buckley* decision).

11. *Buckley*, 424 U.S. 1.

12. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of 2 U.S.C. and 18 U.S.C. (2000)) (imposing, inter alia, overall limitations on campaign expenditures and political contributions).

13. *Buckley*, 424 U.S. at 44–58.

14. *Id.*

15. *Id.* at 20–21.

16. *See, e.g.*, Keith D. Ewing, *Promoting Political Equality: Spending Limits in British*

only part of the solution to the problem of big money speaking too loudly in policy formulation. Money can also buy modern methods of molding public opinion: through television, radio, the internet, other media, and the modern art and science of public relations.[17] The Framers of our Constitution could hardly have imagined the power of these modern methods of mass persuasion, and their greater availability to those able to pay for them. This power may pose a challenge to the democratic process even more formidable than campaign finance. The force of these techniques can be especially effective where complex or difficult to grasp issues are involved. In today's complex society, ordinary citizens are often ill-equipped to understand the issues involved in technical areas such as taxation.

Campaign finance reform focuses on the problem of special interests buying access to, and influencing, public officials. Even if an effective system of campaign finance reform were to be implemented, however, influence buyers can still do an "end run" by going directly to the public via the mediums describe above. Public officials are then influenced by what their constituents believe or what the officials think they believe. There is nothing inherently wrong with this, because in the democratic process, an informed citizenry may properly influence the government that represents them. However, if citizens are misled and ill-informed by well-funded special interests, the process becomes dysfunctional.

Lies and misrepresentations have always been involved in American political discourse. But under the marketplace of ideas concept, if the marketplace is working, free and open discussion is supposed to separate lies from the truth, good ideas from bad. First Amendment freedom of speech values are a basic foundation for this concept. Freedom to attempt to persuade others is a fundamental right, and it would be very dangerous to tamper with this right. There may be, however, grounds for fine-tuning First Amendment rights to prevent the consistent drowning of the truth in a torrent of professionally fashioned

Electoral Law, 2 ELECTION L.J. 499 (2003) (discussing spending controls in British election law); Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism, and Fiss-ian Freedoms*, 58 U. MIAMI L. REV. 265, 284–95 (2003) (exploring the benefits of looking to the constitutional case law of other Western democracies in order to illuminate First Amendment jurisprudence in the United States); Andrew C. Geddis, *Democratic Visions and Third-Party Independent Expenditures: A Comparative View*, 9 TUL. J. INT'L & COMP. L. 5 (2001) (examining the methods used in the United States, United Kingdom, and Canada to regulate money and elections).

17. *See* Stephen E. Gottlieb, *Election Reform and Democratic Objectives—Match or Mismatch?*, 9 YALE L. & POL'Y REV. 205, 224 (1991) (noting that "restrictions on the expenditure of money within campaigns [only led to] increased expenditures on lobbying and other public relations efforts").

and disseminated lies. Functional democracy assumes input from an informed public, not a public distracted or misled by falsehoods.

Federal Estate Tax and the Manipulation of Public Thought

The current attempt to repeal the Federal Estate Tax is an apt example of how modern methods of mass persuasion can be employed to mold public opinion about a political issue. In the course of selling the elimination of the tax, repeal proponents persuaded many people that it was a tax that impacted a large percentage of decedents' estates upon death. Among other arguments furthering this misperception, the tax was presented as a threat to small business, family farms, and the economy itself. These arguments ranged from utter untruth to distortion of fact. The behavior of the purveyors of this misinformation was particularly egregious because the Federal Estate Tax is a subject that is hard for many people to understand, and thus easy to misconstrue. Indeed, the tax is an arcane subject little understood except mainly by lawyers and accountants who specialize in estate planning. Perhaps, more importantly, these untruths and distortions also distracted interested citizens from adequately considering real issues about the tax. A national debate about the tax is appropriate, however, provided that the debate focuses on the actual tax and its real impact.

In order to fully grasp the nature of this manipulation of public opinion, this essay will review the mechanics of the Federal Estate Tax. In discussing the tax with some of its critics, the author learned that those critics did not really appreciate some important aspects of how the tax really works.[18] Understanding the basics of the tax is necessary to evaluate, correctly, most arguments for or against its repeal. The author has summarized the basic features of the tax in the next section. The author will then review the highlights of the centuries-old debate about death taxes and the right of governments to impose them. The author will then turn to the most recent campaign for the repeal of the Federal Estate Tax, discussing the role played by hired professionals in persuading the public. The author will conclude by making some suggestions for reform.

18. For example, some critics of the tax said it should be repealed because of its impact on small business. They apparently did not realize that there was an alternative to repeal—raising the exemption so the estates of small business owners would not be taxed—that could adequately address this concern. Some critics also complained that "the government" should not decide which charities or charitable activities should get a decedent's money without realizing that the charitable deduction gave decedents the right to pass wealth tax free to numerous qualified charities.

A Brief Primer on the Federal Estate Tax

Very few estates have to pay federal estate taxes, and an estate tax return does not even have to be filed for most estates. In 1976, 139,115 estates incurred tax, or 7.65% of all adult decedents' estates.[19] However, between 1982 and 1993, the percentage of taxable estates in any given year has been no higher than 1.82 percent.[20]

A return does not even have to be filed, generally, unless the value of the estate exceeds the exemption. When the estate tax was enacted in 1916, the exemption was $50,000.[21] Over the years, the exemption was changed until it was raised to $600,000 and remained at that figure until 1997. In 1998, it was raised to $625,000, $650,000 in 1999, and $675,000 in 2000–01.[22] The estate tax repeal Act provides for a series of increases in the exemption to a maximum of $3,500,000 in 2009 with repeal in 2010 followed by reinstatement of the tax in 2011 unless Congress acts to permanently repeal it.[23]

The federal tax code also provides for a "stepped-up basis" for assets in the estate.[24] If the owner of property sells it, a capital gains tax may be imposed on the difference between what the owner paid for the property and what the buyer paid the owner for it.[25] If the heirs or other takers sell property they received from a decedent's estate, capital gains tax will be computed, basically, by subtracting from the price received from the buyer the value of the property when the decedent owner died or at a time within six months of when the decedent died.[26] The stepped-up basis usually gives the heirs or other takers a very substantial income tax break because the property is usually worth much more at the time of the decedent's death than it

19. Barry W. Johnson & Martha Britton Eller, Internal Revenue Service, Federal Taxation of Inheritance and Wealth Transfers 18, 19, *at* http://www.irs.gov/pub/irs-soi/inhwlttr.pdf (last visited Jan. 6, 2005). During the 1990's, the tax generated a little more than one percent of federal revenues in any given year. *Id.* However, this amounts to roughly $30 billion annually, about nine percent of all discretionary federal spending. William H. Gates Sr. & Chuck Collins, Wealth and Our Commonwealth: Why America Should Tax Accumulated Fortunes 91–92 (2002).

20. Johnson & Eller, *supra* note 19, at 19.

21. *Id.* at 13.

22. Jay D. Waxenberg, *Preparation and Audit of the United States Estates Tax Return*, *in* Practising Law Institute, Understanding Estate, Gift, and Fiduciary Income Tax Returns, 2003: Strategies for Maximum Advantage with the "706," "709," & "1041" (2003).

23. *Id*.

24. 26 U.S.C. § 1014 (2000 & Supp. I 2001), *amended by* P.L. 108-357, § 413(c)(18), 118 Stat. 1508.

25. 26 U.S.C. § 1001 (2000); 26 U.S.C. § 1221 (2000, Supp. I 2001, & West Supp. 2004).

26. Waxenberg, *supra* note 22, at 106–07.

was when the decedent paid for it. If the basis for capital gains tax was the decedent's cost, much more capital gain tax would normally be payable. For example, suppose a decedent bought IBM stock in 1962 and died in 2002, willing it to his daughter. The capital gain would be computed on what the stock was worth in 2002, not 1962. Since the value of IBM stock has increased many times since 1962, if the daughter sells he stock, she would pay substantially more capital gains tax if the 1962 value were used. Under the estate tax repeal as it currently stands, the stepped-up basis will be eliminated.

The estate tax presently provides for an unlimited marital deduction.[27] This generally means that a surviving spouse may take any or all of the decedent's property with no limit on amount without paying any tax at all.[28] Property given to charitable institutions is also generally not subject to tax.[29] This provision, commonly referred to as the "charitable deduction," allows the decedent to give property to charitable institutions and thereby prevents the government from taxing it.[30] It is widely believed that the charitable deduction serves to encourage charitable giving.

The estate tax law also provides for various deductions besides the marital and charitable deductions. Examples include debts and claims against the estate, costs of administration, funeral expenses and the like, which are all deductible.[31]

After all deductions, the tax rate is applied to any balance remaining.[32] The top rate has varied from a high of seventy-seven percent during 1954 to 1976 to fifty-five percent from 1984 to 2001, with the top rate to be lowered to forty-five percent by 2009.[33] The federal estate tax also provides for credits that may be deducted from the amount of tax that the estate has to pay after the rate is applied to the net estate (i.e., the amount left after subtracting the deductions).[34] One of the more important credits was for state death taxes that were

27. 26 U.S.C. § 2056 (2000).

28. Waxenberg, *supra* note 22, at 125.

29. 26 U.S.C. § 2055 (2000); Waxenberg, *supra* note 22, at 127–28.

30. 26 U.S.C. § 2055 (2000).

31. 26 U.S.C. § 2053 (2000 & Supp. I 2001).

32. 26 U.S.C. § 2001 (2000 & Supp. I 2001).

33. Johnson & Eller, *supra* note 19, at 13; James F. Gulecas & Alan S. Gassman, The Economic Growth and Tax Relief Reconciliation Act of 2001: Practical Estate Planning, The Prac. Tax Law., Summer 2001, at 35, 38; Mayling Birney & Ian Shapiro, Death and Taxes: The Estate Tax Repeal and American Democracy, Yale University, at 6, *at* http://www.princeton.edu/~cdsp/events/pdfs/ BirneyShapiro.pdf (Oct. 5, 2003).

34. 26 U.S.C. §§ 2010–15 (2000 & Supp. I 2001); 26 U.S.C. § 2016 (2000), *amended by* Pub. L. No. 107-47, § 411(h), (x), 116 Stat. 46, 53.

payable. A majority of the states imposed taxes that were equal to the maximum federal credit.[35] Thus, the estates paid no more total tax. The effect of the credit was to "pickup" some of the estate tax that would otherwise go to the federal government and give it to the state instead. In effect, it was a form of federal revenue sharing with the states. The estate tax repeal law provides for the gradual elimination of the state death tax credit.[36] To make up for the loss of revenue caused by the elimination of this credit, at least nineteen states have enacted new state death taxes.[37]

The Centuries-Old Debate About Death Taxes

Whether property transfers at death should be taxed has been debated for centuries. In a recent textbook on trusts and estates, the authors refer to the federal estate tax as "highly contentious."[38] That description is accurate. In the 17th century, English philosopher John Locke argued that parents had a natural law right to pass their property to their children.[39] "[N]ature appoints the descent of their Property to their Children, who thus come to have a Title, and natural Right of Inheritance to their Fathers [sic] Goods, which the rest of Mankind cannot pretend to."[40] There are people today in the United States who adhere to Locke's view. Some have a deeply held moral belief that the right to pass on wealth to survivors is fundamental.[41] Others believe that the estate tax is a means of transferring the property of the deserving to the unworthy.[42] It should not be surprising that the subject of estate and inheritance taxes can arouse strong emotions.

35. Michael G. Kaplan, Will the Disappearing State Death Tax Credit Deliver a Knock-Out Punch to the Tennessee Inheritance Tax?, Tenn. B.J., May 2003, at 28, 29.

36. *Id.* It has been estimated that the elimination of the credit will result in a loss of revenue to the states of $100 billion over ten years. *Id.* at 28.

37. Susan T. Bart, *This is Me Leaving You: Illinois Departs From the Federal Estate Tax Scheme*, Ill. B.J., Jan. 2004, at 20, 22.

38. William M. McGovern, Jr. & Sheldon F. Kurtz, Wills, Trusts and Estates 665 (3d ed. 2004).

39. John Locke, Two Treatises of Government 206–07, 210 (Peter Laslett ed., student ed., Cambridge Univ. Press 1994) (1690).

40. *Id.* at 207.

41. In *Hodel v. Irving*, 481 U.S. 704 (1987), the Supreme Court held that the complete abolition of the transfer of property to heirs or devisees could be an unconstitutional taking of property. Conversely, there is no question that estate and inheritance taxes, even at very high rates, are constitutional.

42. *See, e.g.,* Art Linkletter, *Paying From the Grave*, Scripps Howard News Service, Aug. 30, 2000 (arguing that the estate tax is unfair because it targets successful people), *available at* LEXIS, News & Business, Scripps Howard News Service, http://www.lexisnexis.com. Art Linkletter is a veteran television personality, author, and national spokesman for United Seniors Association. *Id.*

William Blackstone disputed Locke's view. According to Blackstone, there was no natural right to transfer property at death to successive generations.[43] Government had the right to control transfers of property from the dead to the living. English Utilitarian philosopher Jeremy Bentham advocated regulation of inheritances "in order to prevent too great an accumulation of wealth in the hands of an individual. . . ."[44] Andrew Carnegie favored a confiscatory inheritance tax so that the wealthy would use their fortunes during their lifetimes for the public good.[45]

By the twentieth century, some supported estate taxes because they believed that concentrations of wealth passed from generation to generation retarded social mobility. Andrew Carnegie was a prominent proponent of this view.[46] If advancement in business, education and other endeavors was substantially aided by inherited wealth, those with the most ability did not rise to leadership and accomplishment as frequently and as much as they should. A meritocracy tends to promote and reward the best and most able; a system heavily influenced by inherited advantages does not. An ideal meritocracy would insure that those with the most ability would be able to use it to the fullest extent, without being retarded by the circumstance of having poor ancestors or a cultural background non-conducive to the development of talent. In 2001, Warren Buffett used this basic rationale to support his opposition to the repeal of the estate tax.

In an interview with *The New York Times*,[47] Buffett said that the estate tax "promot[ed] economic growth, by helping create a society in which success is based on merit rather than inheritance."[48] He stated that:

> [R]epealing the estate tax would be a terrible mistake, the equivalent of choosing the 2020 Olympic team by picking the eldest sons of the gold-medal winners in the 2000 Olympics. We would regard that as absolute folly in terms of athletic competition . . . We have come

43. JOHNSON & ELLER, *supra* note 19, at 3.

44. RONALD CHESTER, INHERITANCE, WEALTH, AND SOCIETY 18 (1982).

45. Andrew Carnegie, *Administration of Wealth, in* THE GOSPEL OF WEALTH AND OTHER TIMELY ESSAYS 22 (Edward C. Kirkland ed., 1965). Carnegie also believed that a "thoughtful man" would rather leave his children a curse than the "almighty dollar." *Id.* at 21.

46. Peter Dobkin Hall, *Andrew Carnegie and the "Gospel of Wealth"*, *in* DOCUMENTARY HISTORY OF PHILANTHROPY AND VOLUNTARISM IN THE UNITED STATES, 1600–1900 11 (Peter Dobkin Hall ed.), *at* http://ksghome.harvard.edu/~phall/dochistcontents.html (last visited Jan. 4, 2005).

47. David Cay Johnston, *Dozens of Rich Americans Join In Fight to Retain the Estate Tax*, N.Y. TIMES, Feb. 14, 2001, at A1.

48. *Id*.

> closer to a true meritocracy than anywhere else around the world. You have mobility so people with talents can be put to the best use. Without the estate tax, you in effect will have an aristocracy of wealth, which means you pass down the ability to command the resources of the nation based on heredity rather than merit.[49]

The Campaign for Repeal

The current effort to repeal the estate tax probably began in earnest in 1992 when Representative Richard Gephardt proposed an increase in the estate tax.[50] Gephardt's proposal created a "strong and . . . unexpected backlash."[51] At about this time, Patricia Soldano, an estate planner from Orange County, California, began to organize a coalition in support of repeal.[52] Eventually, the Washington, D.C. lobbying industry was effectively employed.[53] Some rich families contributed substantial funds to finance "lobbying, strategizing, and coordinating indirect outside pressure for estate tax repeal."[54] From this funding, "[m]any millions in lobbying expenditures—and uncountable hours in coordinating member contacts with elected officials—were made by lobbying groups. . . ."[55] By the late 1990s, estate tax repeal acquired a populist flair.[56] Polling from the late 1990s onward has consistently shown that sixty to seventy percent of people support repeal.[57] Repeal appeared to have a broad base of support.[58] While there is little doubt that the heart of the support was from the Republican party—especially its right wing—liberal Democrats in the House, such as Neil Abercrombie of Hawaii and the Congressional Black Caucus, also supported repeal.[59]

As discussed above, the estate tax is a fairly technical subject that is not well understood by the general population. The public also has an inaccurate notion of the breadth and impact of the tax. A number of surveys have shown that the public believed that the tax applied to a far

49. *Id*.
50. Birney & Shapiro, *supra* note 33, at 4.
51. *Id*.
52. *Id*.
53. *See* Gates & Collins, *supra* note 19, at 56 (describing the efforts of Washington lobbying organizations, think tanks, public opinion research, and communications experts to disseminate anti-tax arguments to public forums such as radio programs and newspapers).
54. Birney & Shapiro, *supra* note 33, at 16.
55. *Id*.
56. *Id.* at 2.
57. *Id.* at 7.
58. *Id.* at 4.
59. *Id.* at 2.

greater percentage of the population than was the case. For example, in a 2003 opinion survey sponsored by National Public Radio, the Kaiser Foundation and Harvard's Kennedy School of Government, half of the respondents thought that it was true that most families have to pay a federal estate tax when someone dies.[60] Eighteen percent responded that they did not know.[61]

MISCONCEPTIONS AND MISREPRESENTATIONS

During the course of the campaign for repeal, misrepresentations of fact surfaced. Most serious was "spin" presenting the estate tax as a death tax that destroyed small businesses and forced family farmers off the land.[62] In fact, the majority of beneficiaries of tax repeal will be the family members or other beneficiaries of the rich.[63] In their media placements, repeal proponents failed to mention this fact. The reason for the failure is obvious. "Imagine a series of advertisements with profiles of the true beneficiaries of estate tax repeal. Picture a group of third-generation millionaires, teenagers draped in Armani clothes and jewelry, standing in front of their mansions and fancy cars. One of them earnestly pleads, 'I've never worked a day in my life and I'm hoping I never to have to. Please repeal the estate tax.'"[64] Instead, the "poster child" of the repeal movement was the family farmer.

Repeal proponents argued that the estate tax was driving family farmers off the land. When challenged to produce documented cases, the proponents initially could produce none.[65] In fact, farms and other

60. Larry M. Bartels, *Unenlightened Self-Interest; the Strange Appeal of Estate-Tax Repeal*, THE AM. PROSPECT, June 2004, at A17, A18.

61. *Id.*

62. *See* William W. Beach, *Time to Repeal Federal Death Taxes: The Nightmare of the American Dream*, The Heritage Foundation, *at* http://www.heritage.org/Research/Taxes/BG1428ES.cfm (Apr. 4, 2001) (asserting that "[s]mall-business owners, particularly minority owners, suffer anxious moments wondering whether the business they hope to hand down to their children will be destroyed by the death tax bill"); J.D. Foster, *Is the Estate Tax a (Revenue) Loser?*, Tax Foundation, *at* http://www.taxfoundation.org/estatetaxrevenue.html (Dec. 1999) (identifying one reason for repealing the estate is that it prevents small businesses and farmers from passing their businesses on to the next generation).

63. For example, in 1998, 47,483 estates owed estate tax. These estates represented only 2.1% of adult deaths. Of the estates subject to tax, fifty-one percent of the taxes were paid by estates in excess of $5 million—only five percent of all taxable estates. William G. Gale & Joel Slemrod, *Rhetoric and Economics in the Estate Tax Debate*, at 4, *at* http://www.brookings.edu/views/papers/gale/20010522.htm (May 22, 2001).

64. GATES & COLLINS, *supra* note 19, at 65–66.

65. As of April 2001, the American Farm Bureau Federation – a major supporter of repeal – could not cite a single instance of a family farm that was forced out of business because of the estate tax. Gale & Slemrod, *supra* note 63, at 10. A few cases of sales due to estate taxes have been documented. *See, e.g.*, Elizabeth Allen, *Saving the Homestead: Reviled Estate Tax Actually*

small businesses account for no more than eleven percent of assets in taxable estates: a "vast majority of estate taxes are paid by people who own neither farms nor small businesses."[66] Furthermore, any impact on family farms or small businesses could easily be eliminated by an increase of the exemption to an appropriate level, say $10 million.[67] When the repeal bill was nearing passage in 2001, Democrats did offer a compromise that would have substantially raised the exemption while retaining the stepped up basis.[68] Or, alternatively, Democrats offered to fully exempt small businesses and farmers.[69] The offer was rejected and the coalition of repeal proponents held firm in their demand for total repeal.[70] It is remarkable that the family farmer and small business interests in the repeal coalition rejected this proposal that was clearly in their best interests in order to pursue a goal that would almost exclusively be in the interests of the wealthiest members of the coalition.

In reality, the estate tax does not present a threat to the existence of the family farmer. As explained by Leon Geyer, past President of the American Agricultural Law Association: "For most farmers and ranchers estate taxes are not the real problem."[71] If some fairly basic and inexpensive estate planning techniques are employed, the family farmer should be able to "pass the total estate without estate taxes now and in the future."[72] From 1989 to 1996, only an average of 6.4 percent of taxable estates included farm assets.[73] Because only 1.3% of all estates were taxable over this same period of time, only 0.08% of all

Has Some Supporters, San Antonio Express-News, Sept. 3, 2003, at 1E (reporting on a Texas man who was forced to sell the ranch he inherited from his mother because he was unable to pay the estate tax bill), *available at* LEXIS, News & Business, San Antonio Express News, http://www.lexisnexis.com.

66. Gale & Slemrod, *supra* note 63, at 13.

67. Understandably, some repeal proponents are unwilling or reluctant to accept a substantial increase in the basic exemption as a solution for small business owners. They do not trust Congress to adjust the exemption upward to compensate for its erosion by inflation. This mistrust is well founded. In the past, the exemption was not adjusted upward for inflation causing the tax to spread to more and more estates. To allay these concerns, the exemption could be tied to some index of inflation so that it is adjusted automatically. Of course, any future Congress would not be bound.

68. *See* Birney & Shapiro, *supra* note 33, at 5 (discussing the Democrat's proposal to raise the estate tax exemption permanently).

69. *Id*.

70. *Id.* at 20–23.

71. L. Leon Geyer, *AALA Presidential Address: Contentious Issues in Agricultural Law*, 8 Drake J. Agric. L. 1, 12 (2003).

72. *Id*.

73. *Id.* at 15.

decedents were farmers having estates required to pay estate taxes.[74] According to Geyer, the real problem for family farmers is the lack of farm and ranch profitability, not estate taxes.[75] It should not be surprising, therefore, that repeal proponents had difficulty coming up with actual cases of family farms being lost because of estate taxes.

There is also scant evidence that the estate tax has forced sales of small family businesses.[76] The vast majority of small family businesses do not face extinction because of the estate tax.[77] Furthermore, an increase of the basic exemption to $5 or $10 million would remove any possible estate tax impact on small businesses.[78]

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74. *Id.* at 15–16.

75. *Id.* at 12–13.

76. Some of the strongest supporters of repeal have been large family businesses: Gallo wines ($875 million), Blethen newspapers (over $400 million), Mars Candy ($27 billion, owned by three family members), and Campbell's Soup ($6.5 billion shared by six grandchildren of the founder). GATES & COLLINS, *supra* note 19, at 75.

77. *See* Gale & Slemrod, *supra* note 63, at 11 (citing a study that found that 77% of business owners in their fifties would not have to liquidate any portion of the business to satisfy any estate tax liabilities, and further arguing that this figure is far too low due to flaws in the study's methodology).

78. Another argument for repeal that found broad acceptance was that the estate tax is unfair "double taxation." This argument was also one of the most persuasive made by repeal proponents. Talk show hostess Oprah Winfrey has well stated the concept: "I think it's irritating that once I die, 55 percent of my money goes to the U.S. government. You know why that's irritating? Because you would have already paid nearly 50 percent." Bill Archer, *Bury the Death Tax*, USA TODAY, June 9, 2000, at 17A. It is a fact that wealth taxed in a decedent's estate may have been taxed before. For example, income or capital gains taxes may have been applied. But multiple taxation of wealth is not limited to situations involving death taxes. For example, an income earner, after paying income taxes, may have invested the remainder in corporate stock with the corporation paying corporate income tax. She might have then received dividends on the stock, possibly subject to income tax, or capital gains taxes on the sale of the stock. For another example, income taxed money may be used to pay for gasoline, liquor or tobacco and the accompanying excise taxes. Multiple taxation of wealth is a fact of life. From an economic standpoint, "counting the levels of tax is an exercise in *rhetoric*, and has no economic significance." Gale & Slemrod, *supra* note 63, at 22. More importantly, much of the wealth in taxable estates has never been taxed previously. Under the capital gains tax law, an appreciated capital asset generally has to be sold for a tax to apply on the appreciation. 26 U.S.C. § 1001 (2000). In tax law language, the gain has to be "realized." Many estates contain substantial amounts of unrealized (i.e. never taxed) capital gain. For example, it was estimated "that in 1998 about thirty-six percent of all wealth held by those who died consisted of unrealized capital gains. For estates in excess of $10 million, that figure rises to 56.4 percent." *Id*. at 22. The recipients of the property from the decedent, under the stepped up basis provision discussed above, received the property with a new basis, the value at or near the date of the decedent's death. 26 U.S.C. § 1014 (2000 & Supp. I 2001), *amended by* P.L. 108-357, § 413(c)(18), 118 Stat. 1508. This provision ensured that the gain would never be subject to capital gains tax. So the estate tax, if any, would be the only tax on the gain. The temporary estate tax repeal will also eliminate the stepped up basis. Some estate tax repeal supporters may not have understood that the death tax was being extinguished at the cost of a broader capital gains tax.

CONCLUSION

Our understanding of the First Amendment is in need of some adaptation to modern realities that the Framers of the Constitution could hardly have envisioned. The basic assumption of the First Amendment is "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[79] This assumption remains as true in the twenty-first century as it was in the eighteenth. The right of the people "to petition the Government for a redress of grievances" must remain inviolate.[80] But in the past two hundred years, social organization and communication technology has changed in ways that were unforeseeable in the eighteenth century. There is a large advertising and public relations industry available for hire that is skilled at selling any product, individual, or idea to the public. In the Washington, D.C. area and elsewhere, there is an industry devoted to influencing government policy.

The art and science of mass persuasion has also reached very high levels of expertise in the latter half of the twentieth century. The society that *New York Times Co. v. Sullivan*[81] refers to no longer exists.[82] Today, it is not a simple case of intrepid journalists with printing presses and other individuals criticizing powerful government. Now there are powerful interests with the means to influence and even intimidate government officials. These means include sophisticated methods of influencing public opinion that may be directed at government policy makers. These means are available for hire to those willing and able to pay for them.

One of the fundamental ideals in the American democratic system is equality of citizens in the political process. Perfect equality has never been achieved nor is it likely to be attained, but such equality should always be a goal. Freedom of speech is another fundamental aspect of American democracy. As Americans, we believe that free discussion by an informed citizenry is one of the foundations of good government. The right of free expression is generally broad enough to encompass dissemination of untruths and lies, but is that right so broad as to completely insulate the advertising and public relations professionals responsible for this misinformation?

79. Associated Press v. United States, 326 U.S. 1, 20 (1945).

80. U.S. CONST., amend I.

81. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

82. *Id.* at 270 (asserting that a newspaper's right to criticize government and public officials, even when it is "sometimes unpleasantly sharp" criticism, is protected by "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

Two of the worst dictatorships in the twentieth century were Nazi Germany and the Stalinist Soviet Union. Both used control of communication media to impose social control of their populace. Governmentally manufactured lies were an essential component of these control mechanisms. Because freedom of speech did not exist in these regimes, there was no marketplace of ideas that could work to expose the lies of the government. Lies may also be used by private persons or entities to control or at least influence the population by harnessing methods of mass persuasion. Social control or influence based on lies is not rendered harmless just because it comes from sources other than government.

Thus, the recent effort to repeal the Federal Estate Tax presents a dilemma. If proponents of a political position can buy access to mass media and public relations professionals, those proponents may use those means to promote their objectives with untruths as well as truths. First Amendment freedom of speech values allow them to do so. However, this may be counter to other important values: equality of citizens in the political process and political discourse based on the best available information.

The underlying problem is that the founders of American democracy were familiar with their fellow citizens discussing political issues at meetings, face to face. The mass media that has been ushered in by the information age did not exist, and the one true medium was print, which was often posted in public places. Additionally, illiteracy was more common, and thus many citizens had to rely on the spoken word for formulations on the political issues of the day.

As detailed above, the media dynamic has changed drastically from the days of the founding fathers. In some instances, this has benefited society, such as brief advertisements aimed at persuading the public that drunken driving is dangerous and unacceptable behavior. However, brief television and radio commercials and placed "news" items by public relations firms are not similarly helpful in informing the public on complex political issues, such as the estate tax repeal.

Presently, there is no effective regulation of the paid professional use of mass media to sell political positions and candidates. These professionals are generally free to sell positions or candidates, or attack their opponents, through distortions or even outright lies. The existing unfair campaign laws are weak and *New York Times Co. v. Sullivan*[83]

83. *New York Times Co.*, 376 U.S. at 280 (holding that a public official (later extended to a "public figure") may not recover damages for a defamatory falsehood unless he proves that the statement was made with "actual malice").

gives a very free hand to libel political opponents.

The author does not have any comprehensive suggestion for a solution to these problems. Perhaps the marketplace of ideas will somehow adjust to restore the balance so that only an acceptable number of citizens will be fooled all or most of the time by private propaganda. Maybe there is nothing, legally, that can be done. Perhaps no appreciable added harm will be done by allowing money to speak more loudly in the political process. However, the author suggests that it may be appropriate to consider whether advertising and public relations specialists should be regulated when they are employed to promote political candidates or views. Lawyers are restricted by codes of professional ethics from lying to courts and third parties in the course of representing clients.[84] A good start to fixing the problem would be considering somewhat similar restrictions on mass persuasion professionals when they are hired to work in political arenas.

84. Model Rules of Prof'l Conduct R. 3.3, 4.1 (2003).