

**President Obama's Proposal to Tax Capital Gains at Death:  
What Happens in Canada Stays in Canada?**

**I. Introduction**

The U.S. wealth transfer tax and related income tax regime has been hotly contested over the past few decades. After years of uncertainty regarding the fate of the transfer taxes, the American Taxpayer Relief Act of 2012 purported to usher in a permanent transfer tax regime. Yet, already in January of 2015, President Obama proposed to drastically reduce the transfer tax exemption amounts, increase the tax rate and, most importantly for purposes of this article, close the “stepped-up basis loophole”<sup>1</sup> by generally treating bequests and gifts, other than to charitable organizations, as tax realization events (which will be referred to throughout this article as the “recognition regime”). The latter proposal is the new and predominant element of President Obama’s proposed tax reform and 2016 budget. Though this proposal, as a whole, is highly unlikely to gain support in both the Republican-held U.S. House of Representatives and Senate, President Obama’s emphasis on closing the “stepped-up basis loophole” could bring the mainly academic debate on this topic to a head on Capitol Hill.<sup>2</sup>

Closing the stepped-up basis loophole is not such an outlandish proposal. The Kennedy Administration first made a recognition regime proposal in 1963.<sup>3</sup> Other organizations, like the American Bankers Association, and other political actors have also made proposals to end the step-up in basis at death rule. The step-up in basis regime was, in fact, temporarily replaced with a carryover regime in 1976, but was later retroactively repealed.<sup>4</sup> Other countries, including Canada, have adopted a recognition regime. And scholars have been debating the addition or substitution of a recognition regime in the U.S. tax system for decades.

The debate over a potential recognition regime boils down to whether imposing a recognition event on gifts and bequests is politically feasible in the context of the current transfer tax regime in the U.S. Some commentators say no. For instance, Professor Lily Batchelder did not advocate for treating gifts and bequests as recognition events in setting forth her proposed inheritance tax because “doing so might undercut political support of taxing inherited income.”<sup>5</sup> To support this point, she cited the Canadian example stating, “[i]ndeed, shortly after Canada began taxing all gains on wealth transfers at the time of the transfer, its estate tax was repealed.”<sup>6</sup> Professor Batchelder, instead, proposed a carryover basis regime. On the other hand, Professor Lawrence Zelenak, in a comprehensive article on capital gains tax at death, and Professors Laura and Noel Cunningham, in response to Professor Batchelder’s proposal, all support a recognition event at death and on gifts.<sup>7</sup>

As the 2016 budget debate escalates in the fall of 2015, it is timely to explore President Obama’s proposal in detail and how the capital gains tax treatment of gifts and bequests abroad, and specifically through the Canadian example, can inform the feasibility of his proposal in the context of the current transfer tax system.

Specifically, Part II of the paper will briefly review the types of wealth transfer tax systems and the related income tax regimes, including the step-up in basis regime, carryover basis regime and recognition regime. Part III of this paper will provide an overview of the current U.S. transfer tax regime and related income tax provisions, the history and purposes of this regime, and President Obama’s proposal (the “Proposal”). Then, Part IV will turn to international trends in the design of wealth transfer tax systems, and focus on countries, particularly Canada, that treat death or transfers by gift as a realization event. Part V will compare and contrast the proposed recognition regime with international examples.<sup>8</sup>

This paper concludes that the recognition regime –a possible hot topic for the 2016 budget – may be politically feasible under the current U.S. system. It finds that the Canadian example is largely inapposite. The double taxation argument, heavily relied on by opponents of the estate tax, is weakened by the fact that few individuals in the U.S. are actually subject to transfer taxes. The enactment of a recognition regime would also help alleviate the perennial U.S. budget deficits and may satisfy Republicans who are reluctant to raise tax rates (this, instead, would be a base broadening measure). On the other hand, however, many Republicans are still pushing for complete repeal of the estate tax. Therefore, it is important to revisit the overall feasibility of a recognition regime.

## **II. Forms of wealth transfer tax systems and approaches to related income tax issues**

To begin, there are several approaches to taxing the transfer of wealth. The three main forms of wealth transfer tax systems are the (i) estate and gift tax regime; (ii) inheritance tax regime; and (iii) inclusion tax regime.<sup>9</sup> Under the estate and gift tax regime, the donor or decedent's estate is responsible for the payment of tax on the amount gifted or bequeathed and the tax rate depends on the amount transferred. In contrast, under the inheritance tax regime, the recipient is taxed and the rate of the tax depends on the amount of the gift or bequest received by the recipient and, sometimes, on the relationship between the donor/decedent and the recipient. The inclusion tax does not impose a separate tax on transfers of wealth but requires the recipient to include gifts and bequests in his or her gross income. While Professor Batchelder supports implementing an inheritance tax over the estate tax, the Joint Commission on Taxation ("JCT") has noted that the inheritance tax may be vulnerable to abusive conduct, among other issues, and concluded that "the extent to which one form of transfer tax system in practice is more effective than another in achieving these goals is not clear."<sup>10</sup>

As to the income tax issues related to the gratuitous transfer of wealth, there are three alternative approaches. The first approach, which is the current U.S. approach for transfers at death, gives the transferee a step-up in basis in appreciated property upon the transferor's death or gift.<sup>11</sup> With regard to the second approach, which is the U.S. approach for transfers by gift and income in respect to the decedent (IRD), the transferee inherits the transferor's basis in the appreciated property upon the transferor's death or gift, meaning that the transferee receives carryover basis.<sup>12</sup> The third approach is a recognition regime, which President Obama has proposed, that subjects transfers on death or by gift to a capital gains tax on the built-in appreciation of the transferred assets.

The step-up in basis rule is extremely controversial for two reasons. First, it is very costly for the U.S. Treasury. Professor Lawrence Zelenak noted that the "permanent forgiveness of income tax on appreciation transferred at death" is "certainly one of the most expensive gaps in the tax base."<sup>13</sup> In fact, according to the Center on Budget and Policy Priorities, for estates in the U.S. with over \$100 million in assets, approximately 55% of such an estate consists of unrealized appreciation that has never been subject to capital gains tax.<sup>14</sup> Second, the step-up in basis rule causes market distortion because it encourages individuals to (i) hold on to appreciated assets until death, even if there is a more profitable use for such capital and (ii) to buy capital assets as opposed to assets that produce income if they expect to hold such assets until death.<sup>15</sup> Professor Zelenak refers to this distorted behavior as a "lock-in effect."<sup>16</sup> Professors Laura and Noel Cunningham also note that the step-up in basis rule violates (i) horizontal equity because it treats individuals who are similarly situated differently depending on whether they held appreciated assets at death or realized capital gains during life and (ii) vertical equity because a larger portion of a wealthy individual's income is more likely to consist of unrealized

appreciation at death as they do not need to dispose of appreciated assets to fund current consumption.<sup>17</sup> One justification provided for the step-up in basis regime is that the imposition of an estate tax on the decedent's estate serves as a proxy for the capital gains that escape taxation at death. However, the current estate tax only reaches the wealthiest .2% of estates in the U.S. so much of the appreciation transferred on death is never subject to any tax.<sup>18</sup>

A carryover basis regime, on the other hand, would end the permanent avoidance of capital gains tax on assets transferred on death. Many scholars support the implementation of such a regime.<sup>19</sup> When the beneficiary of the estate sells appreciated assets received from the estate, the beneficiary would then recognize all of the built-in gain inherited from the transferor for capital gains tax purposes. This is sometime considered more palatable because, on sale, the beneficiary will have the cash required to pay the capital gains tax.<sup>20</sup> The primary disadvantages of carryover basis are the administrative challenges. Not only would the estate have to determine the decedent's basis in the property (which is equally an issue for a recognition regime) but the estate executor must also make a distribution of basis among the beneficiaries and would require beneficiaries to maintain records of basis across potentially limitless generations.<sup>21</sup> In addition, there must be a basis adjustment by increasing the carryover basis in the appreciated property by the estate taxes attributable to the appreciation so that the tax consequences are equivalent to a sale of the appreciated property before death, eliminating any horizontal inequity.<sup>22</sup> This basis adjustment would also need to be allocated among the various beneficiaries of appreciated property.<sup>23</sup> A carryover basis regime for a spouse, however, would not entail these administrative complications because no transfer taxes are assessed until the surviving spouse's death and basis records need only be kept for a limited amount of time.<sup>24</sup> In addition to these administrative difficulties, the U.S. treasury would be substantially less well off than it would be

under a recognition regime because a carryover rule still allows potentially unlimited, interest-free deferral of capital gains tax.<sup>25</sup> Likewise, there is still a noticeable lock-in effect for appreciated property. The carryover basis rule also has political baggage as it was implemented for a brief period in 1976, replacing the step-up in basis rule, but it was retroactively repealed because of complicated administration issues.<sup>26</sup>

A recognition regime would likely be simpler to administer and would end the lock-in effect for appreciated property while raising substantially more revenue than any of the alternatives. Professor Zelenak explained that a capital gains tax on death would be simpler to administer because estate executors would not need to allocate basis among beneficiaries (all beneficiaries would receive the assets with a basis equal to fair market value), records of the old basis would not have to be maintained going forward and there would be no need to allocate the estate tax basis adjustment.<sup>27</sup> In addition, a recognition regime would generate greater revenue than any of the alternatives.<sup>28</sup> The JCT estimated that, by imposing a recognition event for capital gains tax on death, the U.S. Treasury would realize approximately \$35 billion on average each year from 2014 to 2018. In addition, the JCT estimated that imposing a recognition event on appreciated gifts would result in \$7 billion of additional revenue on average per year over this same time period.<sup>29</sup>

### **III. The U.S. wealth transfer tax regime, purpose, history and President Obama's proposal**

#### **A. Current U.S. transfer tax regime and related income tax provisions**

As a brief overview, in general, the current U.S. wealth transfer tax regime imposes a tax on the donor or decedent for the gratuitous transfer of wealth to another. There are three components to the transfer tax regime: the estate tax, the gift tax, and the generation skipping

transfer (GST) tax. The estate tax imposes a tax on certain transfers at death while the gift tax imposes a tax on certain lifetime gifts. The GST tax imposes a tax on certain transfers to an individual who is two or more generations younger than the donor or decedent and often applies in addition to estate and gift taxes. The estate and gift taxes have a unified exemption amount of \$5.43 million per individual for 2015 (indexed for inflation annually). The surviving spouse can use his or her last deceased spouse's unused exemption amount in addition to the surviving spouse's own exemption amount under a doctrine known as portability so that a total of up to \$10.86 million per married couple is exempt from transfer taxes for 2015. A 40% flat tax effectively applies to gifts or estates over the exemption amount. Twenty-one U.S. states (and the District of Columbia) also impose an estate tax or inheritance tax or some combination of both.

In addition, there are several exceptions to the application of the estate and gift taxes. For instance, each year, the first \$14,000 (for 2015) that a donor gifts to a donee is not considered a taxable gift. There is also an unlimited deduction for gifts and bequests to spouses and charities. Because of the high exemption amount, only .2% of estates will pay any estate tax in 2015.<sup>30</sup> Of the estates that pay an estate tax, the effective tax rate is only 16.6%.<sup>31</sup>

But, most importantly for purposes of this paper, as to the income tax consequences of death, the beneficiary of an estate receives a step-up in basis for estate assets equal to the difference between the decedent's cost basis in the property and the property's fair market value on the date of the decedent's death. The step-up in basis rule does not apply universally. A carryover basis regime applies to income in respect to a decedent<sup>32</sup> as well as lifetime gifts.

**B. Purposes of the U.S. transfer tax regime and related income tax provisions**

One obvious goal of the U.S. transfer tax and related income tax regime is to raise revenue. In 2014, for instance, estate and gift tax revenues generated \$19.3 billion, which makes up only .6% of the federal revenue for 2014.<sup>33</sup> Between 2016 and 2025, the estate tax is estimated to generate \$246 billion in revenue under current law.<sup>34</sup> This is not an insignificant amount of revenue, considering that Congress has continually struggled with deficit limits. If the step-up in basis regime is eliminated, either of the two alternatives would provide even more federal revenue.

Perhaps the most important justification for this regime, however, is its redistributive function and its role as a symbol of redistribution. Currently, social mobility in the U.S. is lower than in comparable nations and the wealth gap is the widest in decades as reported by the *New York Times*.<sup>35</sup> It is “[i]ndisputable that there is growing income and wealth inequality in the U.S.”<sup>36</sup> Inherited wealth constitutes a significant portion of wealth in the U.S.<sup>37</sup> *The Economist* reported that, in 2013, the U.S.’s level of post-tax-and-transfer inequality was the highest of any developed country, including Britain and Canada, with a Gini coefficient of .42.<sup>38</sup> A large wealth disparity can lead to societal instability and can impair long-term economic growth.<sup>39</sup> Tax scholars argue that transfer taxes help reduce the wealth disparity and create more equal opportunity.<sup>40</sup> The transfer taxes also add progressivity to the income tax.<sup>41</sup> In regard to fairness, the wealthy also generally have a greater ability to pay. Transfer taxes may further help protect a healthy democracy by reducing concentrations of wealth and breaking-up dynastic families who have disproportionate political power.<sup>42</sup>

Opponents of the transfer taxes, however, argue that such taxes constitute double taxation<sup>43</sup> and assert that they are excessively burdensome for family farms and businesses.<sup>44</sup>



Some scholars disagree with the double taxation argument in the context of imposing a recognition event on death within our current transfer tax system because the transfer tax goals and the capital gains tax goals differ.<sup>45</sup> Professor David Kamin noted, in this regard, “The estate and gift tax is designed to tax transfers of wealth across generations. Realization upon bequest or gift is designed to tax previously accrued income that was deferred because of the realization rules.”<sup>46</sup> As noted above, any new capital gains tax rule on death will apply to property that is often not subject to the estate tax in the first place.<sup>47</sup>

### **C. History of the U.S. transfer tax regime and related income tax provisions**

A brief history of the transfer taxes and related income tax provisions follows to provide context for the current U.S. wealth transfer tax system and the proposed recognition regime for purposes of comparing the U.S. experience with the imposition of recognition regimes abroad.

The U.S. transfer tax regime has had a tumultuous history. Congress experimented with an inheritance tax in the 1800s then finally decided on an estate tax in 1916, added the gift tax in 1932 and added the GST tax in 1976, which was replaced with the current version of the GST tax in 1986.<sup>48</sup> In 1976, the estate and gift tax exemption amounts and rates were also unified. Yet, despite the long history of the transfer tax, due to political attacks on the estate tax, sunset provisions and fluctuating exemptions and rates, the transfer tax regime has been ripe with uncertainty.

In 1999 and 2000, Congress voted to repeal the estate tax, but President Clinton vetoed such bills.<sup>49</sup> In 2001, the Republican Congress, supported by newly elected President Bush, enacted legislation that gradually phased out the estate and GST tax over ten years.<sup>50</sup> This law culminated in the complete repeal of the estate and GST tax for just one year in 2010 and then the law would sunset, reverting back to a prior estate tax regime with a \$1 million exemption and

55% rate.<sup>51</sup> In the interim, in 2008, President Obama was elected U.S. president and the U.S. economy imploded. Before the 2010 repeal, the then democratic Congress failed to act and the estate and GST taxes were repealed for one year.<sup>52</sup>

Late in 2010, in lieu of the sunset regime described above, Congress temporarily enacted an estate and GST tax for two years, under which there was a \$5 million exemption (adjusted for inflation), a maximum rate of 35% and portability so that a surviving spouse could use her last deceased spouse's unused exemption amount.<sup>53</sup> The exemptions and rates were set to sunset at the end of 2012 again, however, in January 2013, Congress enacted the American Taxpayer Relief Act of 2012<sup>54</sup>, which created an indefinite transfer tax regime – a transfer tax exemption set at \$5 million (adjusted for inflation), a maximum rate of 40%, and permanent portability. The volatility and politically-charged nature of the U.S. wealth transfer tax system, however, casts doubt on the notion that the changes are truly permanent.

The related income tax provisions have not provoked so much political jockeying or reflection. In fact, the step-up in basis regime at death did not result from a reasoned decision of Congress. Professor Zelenak described, “[I]t occurred almost accidentally” and was not “a conscious policy decision.”<sup>55</sup> Rather, the relevant code provisions (predecessors to IRC 1015 and 1014) were not enacted until 1921 and simply codified prior IRS practice. In 1976, as part of the tax reform, Congress enacted IRC 1023, which replaced the step-up in basis rule at death with a carryover basis regime.<sup>56</sup> This provision was severely criticized for its poor technical drafting and failure to address difficult administration issues, like computing the estate tax basis adjustment, and was retroactively repealed in 1980.<sup>57</sup>

**D. President Obama's proposed recognition regime**

President Obama, in his 2015 State of the Union address, called on Congress to substantially change the transfer tax regime to crackdown on loopholes and tax advantages for the wealthy.<sup>58</sup> The centerpiece of President Obama's proposal is the elimination of the "step-up in basis loophole" by generally treating bequests and gifts, other than to charitable organizations, as recognition events for capital gains tax purposes. Specifically, bequests and gifts of appreciated property would be deemed a sale of such property and would be subject to capital gains tax at the time of such transfer.<sup>59</sup> The donor or decedent's estate would pay capital gains tax in the year of the transfer in an amount equal to the difference between the donor's or decedent's cost basis in the property and the property's fair market value on the date of the transfer by gift or death.<sup>60</sup> The decedent's estate would be allowed unlimited use of carry-forwards and capital losses on the decedent's final income tax return and would be permitted to deduct the amount of capital gains tax paid at death on the decedent's estate tax return.<sup>61</sup> The Obama Administration noted that this proposal would raise more revenue and ensure that "the wealthiest Americans pay their fair share on inherited assets."<sup>62</sup>

The Proposal further outlines several exceptions to the recognition regime.<sup>63</sup> Spouses and charities that receive gifts or bequests would receive carryover basis. In addition, the recognition regime would allow a \$100,000 per-person exclusion for capital gains recognized by reason of death that would be indexed for inflation and portable between spouses (effectively, a \$200,000 exclusion per couple). The \$250,000 per-person exclusion under current law for capital gain on a principal residence would apply to all residences and would be portable to the decedent's surviving spouse (effectively, a \$500,000 exclusion per couple). The recognition regime would continue the exclusion for capital gain taxation on certain small business stock and

would defer payment of tax on appreciation of certain small family owned and operated businesses until the business is sold or ceases to be family owned and operated. A deferred payment election could also be made for illiquid appreciated assets. The recognition regime would also allow a deduction for the cost of appraisals for appreciated assets and other rules to facilitate the legislative change. President Obama would also increase the maximum capital gains tax rate to 28% (inclusive of the 3.8% net investment income tax).

Notably, Republican representatives have recently introduced two separate house bills to eliminate the estate tax.<sup>64</sup> One bill, known as the Death Tax Repeal Act of 2015, passed the House of Representatives on April 16, 2015 and is currently pending in the Senate. Additionally, in May of 2015, the Republicans passed a non-binding budget resolution through Congress that did not discuss President Obama's proposal regarding the imposition of capital gains tax at death and on gifts but, instead, set forth a deficit reserve fund to accommodate the permanent elimination of the Federal estate tax.<sup>65</sup> The final budget and specific provisions will be debated in the fall of 2015 and President Obama's signature as well as Democratic support in the Senate will be required in order for a budget to pass.

#### **IV. International trends**

International practices differ dramatically regarding wealth transfer taxes.<sup>66</sup> Such transfer tax laws are often highly complex, have substantial tax avoidance issues and high administrative costs.<sup>67</sup> The current international trend appears to be that several mostly developed countries are abandoning their transfer taxes.<sup>68</sup> Countries that have abolished such regimes include Singapore in 2008<sup>69</sup>, Austria in 2008<sup>70</sup>, Sweden in 2004<sup>71</sup>, New Zealand in 1992<sup>72</sup>, Canada in 1972<sup>73</sup>, Australia in the late 1970s<sup>74</sup>, and Mexico in 1962.<sup>75</sup> A recent European Commission report noted that "compared to the number of abolitions, the number of introductions of inheritance and

gift taxes is few.”<sup>76</sup> This trend toward abolition is significant as it “make[s] the retention of such taxes in other countries more problematic . . . given the increasing mobility of those who might otherwise find themselves subject to such taxes.”<sup>77</sup> Interestingly, one scholar observed that “the decline in wealth transfer taxes in O.E.C.D. countries has been much greater among countries with estate-type taxes that fall on the estates of persons dying domiciled in the jurisdiction than countries with inheritance type taxes that apply to amounts received by beneficiaries living in a particular jurisdiction.”<sup>78</sup> This may be due to the fact that the public perceives inheritance taxes to be more fairly imposed on the beneficiary rather than the donor or decedent.<sup>79</sup> Currently, the only O.E.C.D. countries that have estate and gift tax systems are the U.S. and the U.K.<sup>80</sup>

Several countries’ tax regimes create an income tax realization event on death or on the transfer of a gift.<sup>81</sup> Countries with such a regime include Canada, Australia, Ireland and the U.K.<sup>82</sup> This paper will focus on the Canadian case study.

#### **A. Canadian implementation of a recognition regime**

The Canadian history leading to the implementation of a recognition regime and the elimination of its transfer taxes follows below. Canada had substantial provincial succession duties from 1913 to 1942. This changed, however, when a federal inheritance tax regime was implemented in 1942 to raise revenue to fight WWII.<sup>83</sup> Canada imposed a gift tax beginning in 1935<sup>84</sup> and replaced its inheritance tax with a progressive estate tax in 1958, which contributed no more than 1.7% to Canadian federal revenue.<sup>85</sup> But Canada abruptly ended its federal estate and gift tax regime in 1972.<sup>86</sup> Likewise, the provinces abolished their wealth transfer taxes in the 1970s and 1980s.<sup>87</sup> In its place, a capital gains tax was implemented in 1972 with a “deemed disposition” event on death and on transfers by gift.

Quite surprisingly, it was the Canadian Liberal Party, a central political party and not the

conservative party, that repealed the gift and estate taxes, despite Prime Minister Pierre Trudeau's campaign promise in the 1968 election for a "Just Society."<sup>88</sup> The path toward abolition of the transfer taxes began when the Canadian government formed a commission in 1962 to review its federal tax laws, known as the "Carter Commission." It was composed of tax professionals and business leaders. The Commission studies found that there was no evidence that the estate tax prompted the sale of small businesses, some studies questioned the escape of capital gains tax at death, and other studies determined that the tax system was regressive for certain poor families.<sup>89</sup> The Commission released a 1967 report that recommended the following: (i) gains and losses should be recognized on a realization basis and on transfers by gift or on death (ii) gifts and inheritances should be included by the recipient in income (iii) since gifts and inheritances would be included in income, they recommended repeal of the wealth transfer taxes.<sup>90</sup> One tax scholar, Richard Bird, noted that academic supporters of the capital gains tax at death underestimated the strong political pressure that emerged to exchange the capital gains tax for the transfer taxes.<sup>91</sup>

Wealthy individuals, businesses and professionals responded negatively to the report.<sup>92</sup> In addition, shortly after the 1967 Report and after the election cycle, the new Liberal Government substantially changed the federal transfer tax system in 1968 by exempting interspousal transfers, increasing tax rates on estates valued at less than C\$5 million, and integrating estate and gift taxes into a cumulative progressive tax.<sup>93</sup> This caused public outrage, especially because of the substantial impact on small and medium-sized estates.<sup>94</sup> In response to the family farms impacted by the 1968 legislation, Alberta began to rebate its portion of the estate tax (75%) to its citizen's estates.<sup>95</sup> Shortly after, Saskatchewan took a similar action.<sup>96</sup>

Against this backdrop, the new Canadian government also responded to the

Commission's report through a 1969 White Paper.<sup>97</sup> The White Paper rejected the Commission's comprehensive tax base but agreed that capital gains should be fully taxable at ordinary rates (as Canada did not yet have a capital gains tax). But, to prevent simultaneous application of capital gains tax and estate tax, the government rejected that capital gains should be realized on death but agreed that there should be a recognition event on a transfer by gift. The White Paper also made a quite unpopular proposal that shareholders of certain corporations should recognize half of their accrued gains and losses every 5 years. The government's White Paper engendered much debate. Parliamentary Committees were responsible for public response to the White Paper and they received "524 briefs, 1,093 letters and 211 oral presentations from 820 individuals", the majority from corporations and businesses.<sup>98</sup> Yet, the Committees had "limited staff and minimal technical knowledge", "were completely unprepared for this task" and acted mostly as "sounding board[s] for those segments of public opinion that were most vocal."<sup>99</sup>

In response to the White Paper and public comments, the Parliamentary Committees issued reports in 1970. The Commons Committee suggested a one-half inclusion rate for all capital gains, abandoning the five-year realization rule, taxing capital gains at death, and reducing the federal estate tax by either lowering rates or expanding the brackets.<sup>100</sup> The Senate Committee report recommended distinguishing between short-term and long-term capital gains, allowing carryover basis for gifts and bequests, and to "consider abandoning the estate tax field to the provinces."<sup>101</sup> In accord with the Commons Committee report, the government created draft legislation which introduced a general capital gains tax with a one-half inclusion rate for all capital gains and losses, rejected the proposal to tax accrued gains on certain shares every five years, and "accepted the Carter Commission's original proposal to tax accrued gains when

property is transferred on death as well as by gift.”<sup>102</sup> Following the Senate Committee report, the draft legislation eliminated the federal estate and gift tax and left the field to the provinces.<sup>103</sup> The draft legislation was shortly after made into law.<sup>104</sup>

Professor David Duff noted that “[b]y sacrificing the federal gift and estate tax, the Government finally obtained the acquiescence of organized interest groups to the *introduction* of capital gains tax and the recognition of accrued gains at death.”<sup>105</sup> He further mentioned that this exchange of tax regimes made sense from the government’s revenue perspective, since the federal government would receive more in revenue from a capital gains tax than through the transfer taxes.<sup>106</sup> Further, the fact that the ill-suited and inept Parliamentary Committees reflected the views of those who opposed the White Paper also assisted with the undoing of the Canadian transfer taxes.<sup>107</sup> Except for some academic commentators, the public was mainly silent in its response to the repeal of the federal transfer taxes, making it even easier for the government to allow such a drastic action.<sup>108</sup>

Regarding the effects of the elimination of the federal transfer taxes, Professor Bird concluded, “clearly that Canada has gained few, if any, benefits from its move away from death taxes and has paid a significant price in terms of reduced equality of opportunity, probably increased inequality of wealth, and certainly increased fossilization of the structure of wealth.”<sup>109</sup> Under current law, Canada continues to have no wealth transfer taxes but imposes a tax on capital gains on transfers by death or gift under a deemed disposition approach as noted above. There are several exceptions to this recognition rule, including gifts or bequests to spouses and for certain transfers of farm and fishing property to children.<sup>110</sup> The applicable capital gains rate depends on the province. The combined federal and provincial marginal capital gains tax rates in 2014 ranged from 19.5% to 25%.<sup>111</sup>



**B. Other recognition regimes abroad**

Australia, Ireland, and the U.K. all treat transfers of property by gift, but not death, as recognition events.<sup>112</sup> Like Canada, Australia has no federal transfer taxes.<sup>113</sup> Australia's transfer tax abolition movement in the 1970s grew out of a petition and popular protest because (i) small and medium size estates were not exempt from the estate tax since the exemption amount for the estate tax was not adjusted for inflation, (ii) the commonwealth and state duties were not integrated so the system was complicated, and (iii) more sophisticated taxpayers could avoid the tax through planning. Under current law, the transfer of capital assets by gift is generally subject to Australia's capital gains tax but transfers of capital assets on death are not subject to capital gains tax.<sup>114</sup>

Ireland, on the other hand, has both an inheritance tax<sup>115</sup> and gift tax, known as the capital acquisitions tax ("CAT"), as well as a recognition event upon the transfer of capital gains assets by gift.<sup>116</sup> The donee is liable for the payment of CAT and the exemption that may apply depends on the relationship of the donee to the donor.<sup>117</sup> There are three categories of exemption amounts are generally as follows: (i) if the beneficiary is a child of the donor or decedent, the lifetime exemption for all gifts and inheritances is €225,000, (ii) if the beneficiary is a brother or sister of the donor or decedent, the exemption is €30,150, and (iii) for any other beneficiary the exemption is €15,075. These exemptions are not indexed for inflation. There is a total exemption for spouses and civil partners and an annual gift exemption amount. The amount in excess of the exemption is subject to a 33% tax rate. Since a gift is a disposition event for capital gains tax purposes, gifts may also trigger capital gains tax liability (as well as a stamp duty).<sup>118</sup> The capital gains tax rate is 33% and the donor is liable for the tax due.<sup>119</sup> Where capital gains

tax and the CAT arise at the same time, generally the capital gains tax paid can be credited against the CAT liability, provided that the property is not disposed of within two years.”<sup>120</sup>

The U.K. has a unified estate and gift tax called an inheritance tax (IHT) and also treats lifetime gifts (other than to a spouse) as recognition events for capital gains tax purposes.<sup>121</sup> The IHT applies to a decedent’s estate and to certain gifts made within seven years of a decedent’s death in excess of an exclusion amount.<sup>122</sup> Transfers on death are generally subject to a 40% tax rate and transfers by gift within seven years of death are subject to a lower tax rate.<sup>123</sup> In the U.K., therefore, it is possible for both a gift tax (*i.e.*, an IHT charge) and a capital gains tax to apply to a lifetime gift.<sup>124</sup> Several tax scholars criticize the frequent absence of a gift tax for lifetime gifts under the IHT even where a capital gains tax is imposed.<sup>125</sup> The scholars point out that the two forms of taxes serve different purposes: “[capital gains tax] is a tax on returns to savings, not on wealth transfers.”<sup>126</sup> The scholars argue that the U.K. system is flawed for granting a step-up in basis at death, like the U.S. system, and that a capital gains tax exemption should not offset the impact of the estate tax.<sup>127</sup>

## **V. Analysis and Conclusion**

Although the general international trend appears to suggest that estate and gift tax regimes (as opposed to inheritance tax regimes) are particularly vulnerable to abolition worldwide and that, since individual wealth is particularly mobile, it is crucial to cultivate a fair transfer tax and income tax system, the international case studies, themselves, do not strongly cut against President Obama’s proposal to create a recognition regime on death and on transfers by gift.

To begin, the Canadian example is not instructive as to whether the U.S. should pursue a recognition regime for transfers on death or by gift because of the feared consequence that such a

regime would lead to the undoing of the transfer taxes. Importantly, the Canadian model does show that treating transfers on death or by gift as recognition events is administratively feasible.

The Canadian example is distinct from the U.S. situation for three principal reasons:

First, despite the fact that the U.S. and Canada are culturally similar in many ways, the historical and factual circumstances surrounding the beginning of the Canadian deemed disposition approach are quite unique. Shortly before the repeal of its transfer taxes, the Canadian government substantially changed the transfer tax landscape, increasing tax rates on estates valued at less than C\$5 million, among other changes.<sup>128</sup> The public outcry in Canada was amplified because of the substantial impact on small and medium-sized estates, which led to counteractions by the provinces.<sup>129</sup> Unlike the situation in Canada prior to the repeal of the estate tax, all small and medium-sized estates in the U.S. currently escape any estate tax. The high exemption amount applies for gift tax and GST tax as well. Therefore, the majority of Americans are not touched at all by the U.S. transfer tax regime and the double taxation argument, if a capital gains tax is added, is substantially weaker here than it was in Canada.

Additionally, the Canadian Parliamentary Committees tasked with responding to the public debate on the White Paper were inexperienced and allowed opposition groups to override any objective, technical analysis that the Committees could provide to the parliament.<sup>130</sup> The U.S. Joint Committee on Taxation, conversely, has a substantial amount of technical expertise and can provide objective analysis to Congress.<sup>131</sup> Furthermore, in contrast to the Canadian government's proposal through draft legislation that the capital gains tax was in exchange for the transfer taxes, the U.S. executive branch has not proposed to end the transfer taxes in exchange for adding a capital gains tax – instead it proposed to *add* a new aspect to the capital gains tax and to the transfer tax regime. Moreover, the U.S. Congress has deficit spending limits that

would likely preclude Congress from eliminating the transfer tax unless the capital gains tax would produce a similar amount of revenue – the debt ceiling is continually a problem.<sup>132</sup>

Therefore, Congress's options are more limited than was true of Canada's Parliament in 1971.

Lastly, we currently have two different parties controlling the legislature and the executive branch, unlike the Canadian situation where only one party controlled both the executive branch and parliament in 1971, which made it easier for the Canadian government to take its desired action without compromise.

Second, and perhaps most importantly, Canada's deemed disposition system on death and on transfers by gift was a part of the introduction of the general capital gains tax.<sup>133</sup> In place of the transfer taxes, Canada's government did not just receive the deemed disposition approach but the whole capital gains tax regime. In contrast, the U.S. already has a robust capital gains tax in place and, therefore, the deemed realization approach, by itself, gives opponents of the transfer taxes much less leverage than the Canadian opponents had at the time.

Third, President Obama's proposal has more targeted exemptions and exceptions to relieve the capital gains tax burden at death or on transfers by gift compared to the Canadian law. One tax scholar noted in the context of Canada's deemed disposition approach that "[t]he special solicitude for deathtime transfers in the Canadian law is quite limited."<sup>134</sup> Currently, Canada's exceptions and accommodations relating to its deemed disposition approach include: (i) deferral of gain recognition for spousal transfers or transfers to a qualified spouse trust (carryover basis), (ii) deferred recognition of transfers of farm and/or fishing property to children or grandchildren (iii) a lifetime capital gains exemption of C\$800,000 that can be claimed on the decedent's last return and used where the decedent owned shares of a qualifying small business corporation or qualified farm and/or fishing property (iv) net capital losses incurred on a deemed disposition at

death can be applied to reduce income from any source in the year of death or the preceding year, and (v) the option of paying the capital gains tax on death in installments.<sup>135</sup>

The Obama Proposal, on the other hand, includes the following: (i) deferral of gain recognition for spousal and charitable transfers (i.e., the spouse or charity receives carryover basis);<sup>136</sup> (ii) continuation of exclusion for capital gain on certain small business stock;<sup>137</sup> (iii) only requires payment of tax on appreciation of certain small family-owned and operated businesses if the business is sold or is no longer family owned and operated; (iv) allows a 15-year fixed-rate payment plan (v) allows a deduction for the cost of appraisals for appreciated assets, waiver of penalty for underpayment of estimated tax if it is attributable to unrealized gains at death and other rules to facilitate the legislative change; (vi) allows the unlimited use of capital losses and carry-forwards on the decedent's final income tax return; (vii) allows a deduction for the capital gains tax due at death on the decedent's estate tax return; (viii) allows a \$100,000 per-person exclusion for capital gains recognized by reason of death, which is indexed for inflation and portable between spouses and a \$250,000 per-person exclusion under current law for capital gain on a principal residence that is portable to the decedent's surviving spouse; and (ix) the recognition regime would apply prospectively after December 31, 2015.<sup>138</sup> Notably, though, the Obama proposal recommends a 28% federal capital gains tax rate in addition to any capital gains tax rate imposed by the states. Canada, on the other hand, has a lower combined federal and provincial marginal capital gains tax rate, ranging from 19.5% in Alberta to 25% in Nova Scotia in 2014.

Ireland's model, which imposes a capital gains tax on gifts in addition to a gift tax (where no exemption applies), also shows that a combination of taxes may be politically feasible. The gift tax and capital gains tax rates in Ireland are both 33%, which is lower than the current U.S.

rate on gifts and estates (40%) but higher than the proposed U.S. capital gains rate (28%).

Ireland's tax system uses a credit mechanism to reduce the burden caused by the simultaneous impact of both taxes in most cases, which effectively means that no capital gains tax is imposed if a gift tax is due that exceeds the capital gains tax paid. Notably, though, Ireland's exemption amounts for recipients are significantly lower than the current U.S. exemption amount for gifts so that it is less likely for a gift tax to be imposed in the U.S. on gifts in the first instance. The proposed U.S. recognition regime does not presently include a credit or deduction for capital gains tax paid on gifts where the gift tax is also imposed, unlike the system in Ireland.<sup>139</sup>

However, for estate tax purposes, the Proposal would reduce the decedent's estate tax base by the amount of capital gains tax paid – it is not a dollar for dollar credit; rather it would save the estate an amount equal to 40% of the capital gains tax paid. The deduction approach, however, makes sense when looking at horizontal fairness from the perspective of a taxpayer disposing of a capital asset during life – the taxpayer pays a capital gains tax on the sale of the asset during life and the amount of the tax depletes his taxable estate.<sup>140</sup>

Australia's repeal of its transfer taxes resulted from public mobilization opposing the tax, which hit small and medium size estates hard because the exemption amounts were not adjusted for inflation. Our current transfer tax system is unlike Australia's system before it was dismantled because we have high exemption amounts for transfer taxes that are adjusted for inflation annually. Therefore, Australia's repeal of its transfer taxes and implementation of a capital gains tax on gifts is substantially distinct from the current U.S. situation.

The U.K. transfer tax system and capital gains tax is structured differently than the U.S. model. The U.K. imposes a capital gains tax on gifts and sometimes imposes a gift tax on gifts. Notably, there appears to be no provision granting a credit or deduction for capital gains tax paid

where a gift tax is imposed. U.K. tax scholars do not see the application of the capital gains tax as sufficient where no gift tax is imposed on a gift and have not appeared to comment on the lack of relief where both taxes apply. The U.K. example is not particularly helpful in this debate except to show that a recognition regime alone on gifts does not supplant the function of a gift tax.

In sum, the Canadian example appears to be overblown as a prophecy for the demise of the U.S. transfer taxes if a recognition regime is implemented. The Canadian example clearly highlights, though, that the recognition regime is administratively feasible. Unlike in Canada, the double taxation argument against imposing a capital gains tax is currently weak in the U.S. because of the high transfer tax exemption amounts, where few individuals actually pay any transfer taxes. In addition, President Obama has specifically emphasized ending the step-up in basis regime in the context of the current transfer tax system (not as an alternative). Also, the more targeted exemptions and exceptions to the proposed recognition regime make it more politically palatable, including, most importantly, the \$100,000 exclusion for capital gains recognized at death, the deduction of all capital gains tax due at death from the estate tax base, the special rules for small businesses and the exception to the recognition regime for charities and spouses. The recognition regime would also add significant federal revenue without raising tax rates. Although many Republicans are still proposing to end the estate tax, the widening economic inequality in the U.S., the need for revenue, and the weakened double taxation argument (along with the fact that President Obama will veto any such bill) make this goal highly unlikely for 2016. Based on the above, it may be feasible for the recognition regime to succeed in the context of the current transfer tax system and the 2016 budget debate may bring the deliberation on this issue to a head.

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<sup>1</sup> THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, FACT SHEET: A SIMPLER, FAIRER TAX CODE THAT RESPONSIBLY INVESTS IN MIDDLE CLASS FAMILIES (Jan. 17, 2015) [hereinafter *Obama Fact Sheet*]. See also DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2016 REVENUE PROPOSALS (Feb. 2015) 125 [hereinafter *2016 Budget Proposal*].

<sup>2</sup> Obama's proposal to make death and transfers by gift a realization event could be adopted in the context of the current transfer tax system, it could be used as a bargaining chip to preserve the transfer tax regime under attack by the current Republican Congress or it could be rejected now but a later Congress could embrace the proposal, in whole or in part.

<sup>3</sup> Dan Subotnik, *On Constructively Realizing Constructive Realization: Building the Case for Death and Taxes*, 38 UNIV. KANSAS L. REV. 1, 6 (1989).

<sup>4</sup> Lawrence Zelenak, *Taxing Gains at Death*, 46 VAND. L. REV. 361, 365 (1993).

<sup>5</sup> Lily L. Batchelder, *Taxing Privilege More Effectively: Replacing the Estate Tax with an Inheritance Tax*, at 20 (NYU LAW AND ECONOMICS WORKING PAPER NO. 07-25, 2007) [hereinafter *Taxing Privilege*]; see also Prof. Batchelder's later paper taking the same view: Lily Batchelder, *What should Society Expect from Heirs? The Case for a Comprehensive Inheritance Tax*, 63 TAX L. REV. 1 (2009); David G. Duff, *The Abolition of Wealth Transfer Taxes, Lessons from Canada, Australia, and New Zealand*, 3 PITTSBURGH TAX REV. 71, 118 (2005).

<sup>6</sup> *Id.*

<sup>7</sup> Zelenak, *supra* note 4; Laura E. Cunningham & Noel B. Cunningham, *Commentary: Realization of Gains Under the Comprehensive Inheritance Tax*, 63 NYU TAX L. REV. 271 (2009).

<sup>8</sup> Reuven Avi-Yonah *et. al.*, *Global Perspectives on Income Taxation Law*, OXFORD UNIV. PRESS, 1-17 (2011) was particularly helpful in framing my comparative analysis.

<sup>9</sup> STAFF OF JOINT COMM. ON TAX'N, 110TH CONG., DESCRIPTION AND ANALYSIS OF ALTERNATIVE WEALTH TRANSFER TAX SYSTEMS, JCX-22-08, at 2 (Mar. 10, 2008) [hereinafter *JCT Alternative Wealth Transfer Tax*].

<sup>10</sup> *Id.* at 4.

<sup>11</sup> Internal Revenue Code of 1986 ("IRC") 1014(a); Zelenak, *supra* note 4 at 363.

<sup>12</sup> IRC 1015; Zelenak, *supra* note 4 at 363.

<sup>13</sup> *Id.*

<sup>14</sup> Chye-Ching Huang & Brandon DeBot, *Ten Facts You Should Know About the Federal Estate Tax*, CENTER ON BUDGET AND POLICY PRIORITIES (Mar. 23, 2015) <http://www.cbpp.org/cms/?fa=view&id=2655>.

<sup>15</sup> Adam J. Mirrlees *et. al.*, *Tax by design: the Mirrlees Review, Institute for Fiscal Studies, Chapter 15: Taxes on Wealth Transfers*, OXFORD UNIV. PRESS, 365 (2011); See also, *Taxing Privilege* at 20.

<sup>16</sup> Zelenak, *supra* note 4 at 363.

<sup>17</sup> Cunningham & Cunningham, *supra* note 7 at 272 (citing Zelenak *supra*).

<sup>18</sup> Subotnik, *supra* note 3 at 8.

<sup>19</sup> *Taxing Privilege* at 20-21; Duff, *supra* note 5 at 119; Mirrlees *et. al.*, *supra* note 14 at 365 n.27.

<sup>20</sup> Zelenak, *supra* note 4 at 367.

<sup>21</sup> *Id.* at 368.

<sup>22</sup> *Id.*



<sup>23</sup> *Id.* at 369-370.

<sup>24</sup> *Id.* at 370.

<sup>25</sup> See Cunningham & Cunningham, *supra* note 7 at 279.

<sup>26</sup> Zelenak, *supra* note 4 at 371.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 370.

<sup>29</sup> STAFF OF JOINT COMM. ON TAX'N, 110TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2014-2018, JCX-97-014, at 26-27 (Aug. 8, 2014). See also David Kamin, *How to Tax the Rich*, Tax Notes, Jan. 5, 2015, 125 and fn. 39 (commenting on accuracy of figures).

<sup>30</sup> Huang & DeBot, *supra* note 13.

<sup>31</sup> *Id.* This is due to the high exemption amount and the use of deductions. One tax scholar contends “the estate can be easily eviscerated with a modicum of planning.” Paul L. Caron & James R. Repetti, *Occupy the Tax Code: Using the Estate Tax to Reduce Inequality and Spur Economic Growth*, 40 PEPPERDINE L. REV. 1255, 1278, n. 121 (2013) (citing Edward J. McCaffery).

<sup>32</sup> This rule raises why IRD items (income) should be treated differently than non-IRD items (appreciation) in the first instance. See IRS Publication 559 (2014); IRC 691(c)(1).

<sup>33</sup> STAFF OF JOINT COMM. ON TAX'N, 114TH CONG., HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM, JCX-52-15, at 1 (Mar. 16, 2015) [hereinafter *JCT History of Wealth Transfer Tax*].

<sup>34</sup> Huang & DeBot, *supra* note 13.

<sup>35</sup> Jason DeParle, *Harder for Americans to Rise from Lower Rungs*, N.Y. TIMES (Jan. 4, 2012) [http://www.nytimes.com/2012/01/05/us/harder-for-americans-to-rise-from-lower-rungs.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/01/05/us/harder-for-americans-to-rise-from-lower-rungs.html?pagewanted=all&_r=0); Patricia Cohen, *Fueled by Recession, U.S. Wealth Gap is Widest in Decades, Study Finds*, N.Y. TIMES (Dec. 17, 2014) <http://www.nytimes.com/2014/12/18/business/economy/us-wealth-gap-widest-in-at-least-30-years-pew-study-says.html>.

<sup>36</sup> Caron & Repetti, *supra* note 36, at 1257.

<sup>37</sup> Of the 2013 Forbes 400 ranking of the richest Americans, 71 inherited their wealth and 56 inherited at least a portion of their wealth. FORBES, *Forbes Announces Its 32nd Annual Forbes 400 Ranking of The Richest Americans* (Sept. 16, 2013).

<sup>38</sup> THE ECONOMIST, *Inequality in America, Gini in the bottle*, (Nov. 26, 2013). Under the Gini coefficient, zero represents perfect equality and one represents total inequality.

<sup>39</sup> Caron & Repetti, *supra* note 36, at 1264, 1266.

<sup>40</sup> Mirrlees *et. al.*, *supra* note 14, at 357 (noting that transfer taxes complement welfare programs, social services, and early education to improve equality of opportunity).

<sup>41</sup> *JCT Alternative Transfer Taxes* at 2; Zelenak, *supra* note 34, at n. 60; Caron & Repetti, *supra* note 29, at 1275 (noting that “while federal taxes help to reduce inequality in the US, the impact of federal taxes on inequality has been declining.”)

<sup>42</sup> Rudnick & Gordon, *supra* note 44, at n.21 (quoting President Roosevelt that “[s]uch inherited economic power is an inconsistent with the ideals of this generation as inherited political power was inconsistent with the ideals of the generation which established our government”). The political power of the wealthy has been amplified by current U.S. campaign finance laws and Supreme Court rulings.

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<sup>43</sup> However, top income earners are often subject to lower capital gains tax rates or are not taxed at all, making the need for transfer taxes even greater. Michael J. Graetz, *It's Fair, and We Need the Revenue*, WALL STREET JOURNAL, (Sep. 20, 2010). Also, items of wealth are often subject to two or more layers of taxation. For instance, wage income is subject to income tax and, upon spending such income, it is subject to sales tax.

<sup>44</sup> Only 20 small businesses and family farms paid any estate tax in 2013. Huang & DeBot, *supra* note 13.

<sup>45</sup> Zelenak, *supra* note 4 at 364.

<sup>46</sup> David Kamin, *supra* note 28 at 126.

<sup>47</sup> Zelenak, *supra* note 4 at 364.

<sup>48</sup> *JCT History of Transfer Tax*, 4-9.

<sup>49</sup> Paul L. Caron, *The Costs of Estate Tax Dithering*, 43 CREIGHTON L. REV. 638, 642 (2010).

<sup>50</sup> Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, Title V (June 7, 2001).

<sup>51</sup> The law included a sunset provision so that Congress could avoid deficit limits imposed by a prior Congress. Caron, *supra* note 54, at 643. See the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act ("TRUIRJCA") of 2010, Pub. L. No. 111-312 (Dec. 17, 2010).

<sup>52</sup> Caron, *supra* note 54 at 644.

<sup>53</sup> See TRUIRJCA of 2010.

<sup>54</sup> Pub. L. No. 112-240 (Jan. 2, 2013).

<sup>55</sup> Zelenak, *supra* note 4 at 363-364; Subotnik, *supra* note 3 at 3-4.

<sup>56</sup> *Id.*; Cunningham & Cunningham, *supra* note 7 at 276.

<sup>57</sup> *Id.*

<sup>58</sup> The Proposal would also make the transfer tax regime more potent by lowering the exemption amounts and raising the rates back to 2009 standards. The Proposal would lower the exemption amount for estate and GST taxes to \$3,500,000 and lower the exemption amount for gift taxes to \$1,000,000, ending any inflation adjustments, and increase the rate for all three taxes to 45%. In addition, to curb perceived abuses, the Proposal would (i) require a ten year minimum term for a grantor retained annuity trust and a minimum remainder interest, (ii) limit the duration of the GST tax exemption so that on the 90th anniversary of the creation of a trust, the GST exclusion allocated to the trust would terminate, and (iii) subject the \$14,000 annual exclusion per donee for 2014 to \$50,000 overall limit. *Id.* at 194, 198, 200, and 205.

<sup>59</sup> 2016 Budget Proposal at 156.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 157.

<sup>62</sup> Obama Fact Sheet.

<sup>63</sup> 2016 Budget Proposal at 156-157.

<sup>64</sup> *JCT History of Transfer Taxes* at 47 (citing "Death Tax Repeal Act of 2015" H.R. 1105 (114th Cong., 1st Sess.) and H.R. 177 (113th Cong., 2d Sess.)).

<sup>65</sup> S.Con.Res.11 (114th Cong., 1st Sess.) (May 5, 2015)

<sup>66</sup> *JCT Alternative Transfer Tax* at 2; Mirrlees *et. al.*, *supra* note 14, at 347.

<sup>67</sup> EY, *Cross-country Review of Taxes on Wealth and Transfers of Wealth*, EUROPEAN COMMISSION, (Oct. 2014) 27 [hereinafter *EU Report*].

<sup>68</sup> *Id.* *JCT Alternative Transfer Tax* at 3; Duff, *supra* note 5, at 1.

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<sup>69</sup> EY, *Worldwide Estate and Inheritance Tax Guide 2014* at 264 [hereinafter *EY Report*].

<sup>70</sup> *Id.* at 8; *EU Report* at 18.

<sup>71</sup> *EY Report* at 288. *EU Report* at 384.

<sup>72</sup> *EY Report* at 194. Duff, *supra* note 5, at 113, 116; *JCT Alternative Transfer Tax* at 3.

<sup>73</sup> *EY Report* at 40.

<sup>74</sup> Duff, *supra* note 5, at 72, 107-108.

<sup>75</sup> Richard M. Bird, *Canada's Vanishing Death Taxes*, 16 OSGOODE HALL L. J. 133, at 134 n.5 (1978); *JCT Alternative Transfer Tax* at 11, n.37.

<sup>76</sup> *EU Report* at 28.

<sup>77</sup> *Mirrlees et. al.*, *supra* note 14, at 366. Exit regimes, like IRC 877A and other tax laws, may impact the mobility of such private wealth.

<sup>78</sup> Duff, *supra* note 5, at 120.

<sup>79</sup> *Id.*; *Taxing Privilege* at 6 and 51-52.

<sup>80</sup> *JCT Alternative Transfer Tax* at 3.

<sup>81</sup> *JCT Alternative Transfer Tax* at 11.

<sup>82</sup> *Id.* at 11-13.

<sup>83</sup> Duff, *supra* note 5, at 86.

<sup>84</sup> *Id.* at 87, n.87.

<sup>85</sup> *Id.* In 1967, the federal government paid 25% of the estate tax to all provinces except British Columbia and an additional 50% to all other provinces except Ontario and Quebec. Bird, *supra* note 85, at 135.

<sup>86</sup> Duff, *supra* note 5, at 72.

<sup>87</sup> *Id.* at 88. The provinces abolished their transfer taxes because of horizontal tax competition, which grew without a federal transfer tax with a credit for provincial transfer taxes. *Id.* at 117.

<sup>88</sup> *Id.* at 73, n.11.

<sup>89</sup> *Id.* at 92.

<sup>90</sup> *Id.*

<sup>91</sup> Bird, *supra* note 85, at 138.

<sup>92</sup> Duff, *supra* note 5, at 93.

<sup>93</sup> Bird, *supra* note 85, at 136; Duff, *supra* note 5, at 95.

<sup>94</sup> Bird, *supra* note 85, at 137

<sup>95</sup> Bird, *supra* note 85, at 136; Duff, *supra* note 5, at 95-96.

<sup>96</sup> Duff, *supra* note 5, at 95-96.

<sup>97</sup> *Id.* at 96.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 97, 115.

<sup>100</sup> *Id.* at 98.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 99.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 102.

<sup>105</sup> *Id.* at 100 (emphasis added); See also *JCT Alternative Transfer Tax* at 13, n.42.

<sup>106</sup> *Id.* at 115.

<sup>107</sup> *Id.* at 115, 119.

<sup>108</sup> *Id.* at 100; Bird, *supra* note 85, at 133.

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<sup>109</sup> Bird, *supra* note 85, at 144. Although I was unable to locate a study on whether the repeal of the Canadian transfer taxes has affected inequality in Canada, a 2013 summary about Canadian inequality concluded that: (i) Canada gets a C grade and ranks 12<sup>th</sup> out of 17 peer countries (the U.S. is ranked worse than Canada) (ii) income inequality has increased over the past 20 years, hitting a low in 1989 then rising in the 1990s and maintaining around a .32 in the 2000s; and (iii) Canada's Gini coefficient fell 27% after application of its taxes (while the U.S. Gini coefficient only fell by 22%). The Conference Board of Canada, *How Canada Performs, Income Inequality* (Jan. 2013) <http://www.conferenceboard.ca/hcp/details/society/income-inequality.aspx>.

<sup>110</sup> *EY Report* at 48.

<sup>111</sup> *EY Report* at 52; *JCT Alternative Transfer Tax* at 13.

<sup>112</sup> *EU Report* at 26, 58.

<sup>113</sup> Duff, *supra* note 5, at 73, n. 10.

<sup>114</sup> *JCT Alternative Transfer Tax* at 11-12.

<sup>115</sup> Note that Ireland replaced its estate tax with an inheritance tax. URBAN-BROOKINGS TAX POLICY CENTER, *Wealth Transfer Taxes*, 16 last updated 2011, [http://www.taxpolicycenter.org/upload/Elements/II9KEYELEMENTS\\_WealthTransferTaxes.final.pdf](http://www.taxpolicycenter.org/upload/Elements/II9KEYELEMENTS_WealthTransferTaxes.final.pdf)

<sup>116</sup> *EY Report* at 144.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 145.

<sup>119</sup> *Id.*

<sup>120</sup> *EY Report* at 148; *EU Report* at 153.

<sup>121</sup> *EY Report* at 339; *EU Report* at 390-395.

<sup>122</sup> *Id.*

<sup>123</sup> *EY Report* at 340; *EU Report* 390-395.

<sup>124</sup> Mirrlees *et. al.*, *supra* note 35, at 362.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 364.

<sup>127</sup> *Id.*

<sup>128</sup> Bird, *supra* note 85, at 136; Duff, *supra* note 5, at 95.

<sup>129</sup> Bird, *supra* note 85, at 136-137; Duff, *supra* note 5, at 95-96.

<sup>130</sup> See Duff, *supra* note 5, at 119.

<sup>131</sup> JOINT COMM. ON TAX'N, *How the Joint Committee Fulfills its Statutory Mandate*, <https://www.jct.gov/about-us/mandate.html>

<sup>132</sup> See *e.g.*, Everett Rosenfeld, *Lew to Congress: U.S. hits debt limit on March 16, needs to be raised ASAP*, CNBC (Mar. 7, 2015) <http://www.cnbc.com/id/102459024>.

<sup>133</sup> Lawrence A. Zelenak, *Exhibit A. Background Paper on the Canadian Taxation of Gains at Death* in Report on Reform of Federal Wealth Transfer Taxes, ABA, 207 (2004).

<sup>134</sup> *Id.* at 208.

<sup>135</sup> *EY Report* at 48-59.

<sup>136</sup> 2016 Budget Proposal at 157.

<sup>137</sup> *Id.*; see IRC 1202.

<sup>138</sup> 2016 Budget Proposal, at 157.

<sup>139</sup> 2016 Budget Proposal at 157.

<sup>140</sup> Zelenak, *supra* note 4, at 403-404.