Muddling Along with the Federal Wealth Transfer Tax: A Survey of Practitioners and Law School Professors

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MUDDLING ALONG WITH THE FEDERAL WEALTH TRANSFER TAX: A SURVEY OF PRACTITIONERS AND LAW SCHOOL PROFESSORS

Wayne M. Gazur*

Editors' Synopsis: Recent efforts to repeal the wealth transfer tax system have prompted enormous discussion. In this Article, the author presents the results of his survey of members of the American Bar Association Real Property, Probate and Law Section about this issue and other reforms which have been enacted or suggested.

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II. BACKGROUND QUESTIONS
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* Associate Professor of Law and Business Administration, University of Colorado at Boulder, a joint position between the School of Law and the College of Business and Administration. Funding from the School of Law and private funds from the accounting division of the College of Business and Administration supported the preparation of this Article. I gratefully acknowledge the assistance provided by the American Bar Association, Pam H. Schneider, Esq., former chair of the American Bar Association Real Property, Probate and Trust Law Section, and Ms. Susan Marie Schaus of the American Bar Association Real Property, Probate and Trust Law Section. The American Bar Association did not review the survey content, and all observations and conclusions are strictly my own. I thank the practitioners and law professors who devoted time responding to the survey. I also gratefully acknowledge the research assistance of Constance Tromble, a law student at the University of Colorado School of Law. The questionnaire used for this article included additional questions for another article discussing the relevancy of law school instruction to the practice of law. That article is entitled “Do They Practice What We Teach? A Survey of Practitioners and Estate Planning Professors” and will be published by the Virginia Tax Review.
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I. INTRODUCTION

The federal wealth transfer tax system has undergone incremental legislative changes of varying degrees, but Congress recently enacted the Taxpayer Relief Act of 1997 (TRA 1997) amidst calls for a complete repeal of the federal levy. Belying the "death taxes" label and predicting

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1 The following three complementary taxes comprise the federal wealth transfer taxes: the gift tax, see I.R.C. §§ 2501-24 (1986), the estate tax, see I.R.C. §§ 2031-2209 (1986), and the tax on generation-skipping transfers, see I.R.C. §§ 2601-63 (1986).


Gingrich also called for legislative action to eliminate estate taxes, which he called the "death tax."

"There is no reason you should visit the IRS and the undertaker in the same week," he said. "You could eliminate the death tax just on what they're wasting on the earned income credit."

Id. Congressman Christopher Cox introduced a bill in the 105th Congress that would repeal the federal wealth transfer tax. See Family Heritage Preservation Act, H.R. 902, 105th Cong. (1997). A number of other Republican-sponsored bills sought the same result. See, e.g., S. Res. 29, 105th Cong. (1997); H.R. 525, 105th Cong. (1997); H.R. 736, 105th Cong. (1997); H.R. 249, 105th Cong. (1997); H.R. 802, 105th Cong. (1997); S. Res. 31, 105th Cong. (1997); Estate and Gift Phase-Out Act of 1997, S. Res. 31, 105th Cong. The pressure to repeal all federal wealth transfer taxes is constant. See, e.g., Sougata Mukherjee, Small Businesses Clamor for More Relief, DENV. BUS. J. Dec. 5-11, 1997, at 33A. The article noted that "Congressional leaders have been getting an earful in the waning days of the 105th Congress from the Washington-based Family Business Estate Tax Coalition, a group of more than 100 farm and business organizations. They have argued that the 1997 tax cuts fell far short of making any effect on most small businesses." Id. Another article stated:

Further estate tax changes remain the first priority for contractors, says Brian
the form and impact of potential changes to federal wealth transfer taxes are lively topics for professors and concerns for estate planning practitioners.  

Pallasch, chief lobbyist for the American Subcontractors Association. The estate tax section of the 1997 tax bill was "more like a down payment, but it doesn't do enough of what needs to be done to help small businesses get passed along to other family members," said Pallasch. Contractors support repeal of the estate tax, but would settle for additional relief.


Indeed, on September 15, 1999, the House of Representatives and the Senate sent the Taxpayer Refund and Relief Act of 1999, H.R. 2488, 106th Cong. 1st Sess. (1999) (1999 Act) to President Clinton for his signature. See 145 CONG. REC. 8383 (Sept. 17, 1999) (statement of Rep. Thomas from the Committee on House Administration reporting that the legislation was sent to the President). On September 23, 1999, President Clinton vetoed the legislation. See 145 CONG. REC. 8613 (Sept. 23, 1999) (setting forth the veto message from the President). In general, Title VI of the legislation repealed all wealth transfer taxes for years after December 31, 2008, substituting a new I.R.C. § 1023 instituting a carryover basis regime in lieu of I.R.C. § 1014. However, Congress did not "put to death" wealth transfer tax principles. For example, the carryover basis rules incorporated current estate tax principles under I.R.C. § 2056 to determine whether property was considered "acquired" by a surviving spouse for purposes of an exemption of up to $3,000,000 for property acquired from the decedent by the surviving spouse of the decedent. This proposal retains the rule of I.R.C. § 1014 for such property. The rules also incorporated other current estate tax principles under I.R.C. §§ 2033, 2038, 2040, 2041, and 2042(1) in determining whether the property would be "includible" in the estate of the decedent for purposes of another exemption preserving I.R.C. § 1014 treatment for property of "small" estates under $2,000,000.

Congressman Newt Gingrich adopted the phrase "death tax" in referring to the federal wealth transfer taxes in statements reported on September 9, 1997. Gingrich also referred to visiting the undertaker and the taxman during the same week. See Tax Policy, supra note 4. Curiously, Mr. Frank Luntz, a public opinion consultant, also used that phrasing in an earlier April 1997 memorandum "Explaining and Communicating the Death Tax."

There is virtually no tax reform proposal out there that is easier to explain than estate tax repeal—or what I like to call "Death Taxes." From "taxing the American Dream" to "you shouldn't have to visit the undertaker and the taxman on the same day," the language of Death Tax repeal is easy for working and retired Americans to understand and appreciate.

Explaining and Communicating the Death Tax, Memorandum from Frank Luntz of Luntz Research Companies to All Interested Parties 1 (Apr. 1997) (on file with author and The Center for the Study of Taxation). Mr. Luntz offers "Key Words to Use When Talking About the Death Tax" Id. at 8. Those words are "penalizes," "punishment," "confiscation," "devastating," "anti-success," "anti-child," and "anti-American dream." Id.

A. The Survey Subjects

In this Article, I discuss a survey of practicing estate planning attorneys and law professors about possible changes to the federal wealth transfer tax. I selected estate planning attorneys because they are first-hand witnesses to the circumstances and costs of the planning process, including the impact of wealth transfer taxes on family businesses. Predictably, many practitioners have conflicting views of the wealth transfer tax system. On the one hand, the estate planner's livelihood depends on the continuation of the system. Other self-interested parties include federal and state revenue yields from wealth transfer taxes are increasing and sparing other revenue sources. In 1996 federal estate and gift taxes raised almost $18 billion. See U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 1998, at 347 tbl.551 (118th ed. 1998). However, some commentators assert that abolition of the federal wealth transfer taxes will increase other federal tax revenues by more than the wealth transfer taxes lost. See infra note 60.

State treasuries collect their share of derivative “sponge” or “gap” state death tax credits. Congress provides a limited credit against the federal estate tax for state death taxes paid. See I.R.C. § 2011 (1994). The estimated 1998 federal credit for state death taxes is $4.12 billion. See ANALYTICAL PERSPECTIVES, BUDGET OF THE U.S. GOVERNMENT FOR FISCAL 1999 ch. 5 (1998), reprinted as Tax Expenditures Chapter From the President's Fiscal 1999 Budget, in 78 TAX NOTES 911, 938 tbl.5-6 (1998) [hereinafter Tax Expenditures Chapter]. While beneficiaries bear state inheritance taxes, the “sponge,” “gap,” or “pick-up” tax structure used by many states does not cost the beneficiaries additional taxes because the tax is equal to the credit available at the federal level for state death taxes. This system is a form of federal revenue sharing with the states. The overwhelming majority of states limit their estate taxes to the federal credit. See Joshua S. Rubenstein & Eileen Caulfield Schwab, Historic New York Estate and Gift Tax Reform, N.Y.L.J., Aug. 20, 1997, at 1 n.3, (describing the status of the state enactments as of August 20, 1997). If the federal tax were repealed, the arguments for the derivative state taxes would be eliminated. Several states
governments, charities,\textsuperscript{12} and life insurance providers.\textsuperscript{13} On the other hand, some practitioners may be generally opposed to the concept of wealth transfer taxes as a matter of principle.

Estate planning law professors are the other subjects of the survey. These professors may have strong views of the system, but their livelihoods have entertained proposals to repeal their state inheritance taxes. See, e.g., Delaware: Governor Carper Signs Budgets with Cuts in Business, Personal, Inheritance Taxes, \textit{DAILY REPORT FOR EXECUTIVES} (BNA), Jul. 6, 1998 available in 1998 WL 128 DER H-1; South Dakota: Legislator Pushes Petition to Repeal Inheritance Tax, \textit{DAILY REPORT FOR EXECUTIVES} (BNA), Jul. 30, 1997, available in 1997 WL 146 DER H-1; Iowa: Governor Signs Bill Cutting Inheritance Taxes, \textit{DAILY REPORT FOR EXECUTIVES} (BNA), Feb. 12, 1997, available in 1997 WL DER 29 d83 (quoting Iowa Governor Branstad as calling the inheritance tax “one of the biggest enemies of the family farm and family-owned businesses.”).

\textsuperscript{12} Tax benefits encourage donations to charities. In 1998, the estimated tax revenue loss for charitable contributions was $4.39 billion. See \textit{Tax Expenditures Chapter, supra} note 11, at 938 tbl.5-6. Experts generally predict that the unified credit increases in the Taxpayer Relief Act of 1997 will not affect charitable contributions. See Fred Stokeld, \textit{Estate Tax Reduction Unlikely To Hurt Charitable Bequests}, \textit{77 TAX NOTES} 275 (1997). One commentator has argued that the federal wealth transfer tax may actually reduce philanthropy when the demand for private bequests is inelastic and the remainder is to pass to charity. See Richard E. Wagner, \textit{Federal Transfer Taxation: A Study in Social Cost} 34-40 (Center for the Study of Taxation 1993). Under that theory, less wealth goes to charity because the estate must use part of it to pay the taxes on the gift to heirs. \textit{Id.} Compare Michael J. Boskin, \textit{Estate Taxation and Charitable Bequests}, \textit{5 J. PUB. ECON.} 27, 27 (1976) (concluding that (1) the “price elasticity of charitable bequests is considerably greater than one for all but the very largest estates” and (2) the estate tax charitable deduction stimulates “at least as much additional giving to charity as revenue lost by the Treasury”), with Thomas Barthold & Robert Plotnick, \textit{Estate Taxation and Other Determinants of Charitable Bequests}, \textit{37 NAT’L TAX J.} 225 (1984) (arguing that (1) higher tax rates appear to raise the likelihood of leaving a charitable bequest and (2) have no effect on the size of the bequest; the deductibility of charitable bequests does not appear to be an efficient method of increasing the flow of funds to charitable organizations).

\textsuperscript{13} From a federal taxation standpoint, life insurance companies sell one of the most beneficial products. Life insurance proceeds are generally excluded from the beneficiary’s taxable income. See \textit{I.R.C. § 101} (1994 & West Supp. 1998). Subject to various restrictions, the inside buildup in value of the life insurance contract is not taxable. See \textit{id}. The exclusion of interest on life insurance savings ranks as the twelfth largest tax expenditure, with an estimated 1999 revenue loss of $14.2 billion. See \textit{Tax Expenditures Chapter, supra} note 11, at 925 tbl.5-3. For estate tax purposes, individuals may avoid \textit{I.R.C. § 2042} by having a person other than the insured own the incidents of ownership of the policy. Of course, that “person other than the insured” often takes the form of an irrevocable life insurance trust that requires the assistance of an estate planning attorney.
Muddling Along With the Federal Wealth Transfer Tax

Professors are important participants in the debate over the future of the wealth transfer tax system because they initiate many reform proposals. Accordingly, one of my objectives in this survey was to gauge the reactions of professors and practitioners and possibly evoke further discussion of these ideas.

In Part I of this Article, I describe the survey procedure. In Part II, I describe the results of several background questions that possibly color the survey responses. I report the results of the substantive questions in Part III, and in Part IV I report the results of open-ended questions concerning the future of the wealth transfer tax system. Finally, I offer my conclusions in Part V.

I intended this survey as a tool to predict the impact of reform proposals, such as the Taxpayer Reform Act of 1997 (TRA 1997) or complete abolition of wealth transfer taxes. I also designed the survey to test the strength of opinions about various proposals to change or replace wealth transfer taxes. The survey reflects the participants' perceptions of the controversial tax treatment of family businesses.

B. The Survey Methodology

I created two survey instruments—one for practicing attorneys and one for law school professors. The surveys addressed some issues outside the scope of this Article, but the relevant portions of the survey instruments are reproduced in Appendices A and B.

1. Practitioner Sample

On September 26, 1997, I mailed a test sample to fifty-six Colorado lawyers who identified themselves in the Martindale-Hubbell Law

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14 In the long term, the repeal of the federal wealth transfer taxes without a replacement could decrease the demand for tax law professors. However, tenured professors could retain their positions and teach other subjects.
15 See sources cited supra note 6.
Directory as estate planners. 16 I sent the surveys by first-class mail, typed the addresses instead of printing labels, and included a cover letter addressed to each recipient. On October 6, 1997, I mailed a reminder letter to each recipient. 17 Of the fifty-six surveys mailed, the postal service returned six as undeliverable. Of the remaining fifty delivered surveys, twenty-four recipients (48%) completed and returned their surveys within the period from September 30, 1997, through December 2, 1997. I modified the questionnaire to respond to issues raised by the test sample and tried to determine the size of the final sample. 18

16 As of June 18, 1998, 453 Colorado lawyers listed estate planning as part of their practice. Search of Martindale-Hubbell Law Directory (June 1998). As of April 1998, 22,851 lawyers had registered to practice in Colorado, and 11,837 were in private practice. This information was gathered during a telephone conversation by the author with personnel of the Colorado Office of Registration for Lawyers in May 1998.

17 I modeled the structure of the survey instrument and the mailing procedures after the "total design method" suggested in a survey treatise. See DON A. DILLMAN, MAIL AND TELEPHONE SURVEYS—THE TOTAL DESIGN METHOD (1978). Strict adherence to the total design method would have been costly and somewhat intrusive. For example, the method requires additional written reminders and a replacement questionnaire with the second follow-up letter. See id. at 183. However, additional reminders reduce the percentage of non-responses and thus reduce the risk of bias. See id. at 52.

18 The sample size must be large enough to apply the probability assumptions underlying sampling theory, such as the central limit theorem. Opinions differ, but statisticians usually propose a minimum of thirty observations. DOUGLAS A. LIND & ROBERT D. MASON, BASIC STATISTICS FOR BUSINESS AND ECONOMICS 227 (2d ed. 1997). "There is no common agreement as to what constitutes a 'sufficiently large' sample size. Some statisticians say 30; others go as low as 12 ... As the sample size becomes larger and larger, the distribution of the sample means becomes closer and closer to the bell-shaped normal distribution." Id. Researchers also must select a desired confidence level and an acceptable standard error. Because most of the survey questions involve percentages of participants who would use certain techniques, much of the sampled information is in the nature of a proportion. Ideally, the researcher would use the sample proportions from the Colorado test sample to predict a sample proportion for the final sample. However, because of the multiple questions, no one proportion prevails. Accordingly, a proportion of 0.50 is appropriate. "So if no estimate of [the estimated proportion based on past experience or a pilot survey] is available, .50 should be used." Id. at 247. The formula for the sample size is \( n = \frac{p(1-p)}{(z/E)^2} \), where \( p \) is the estimated proportion, \( z \) is the statistical value associated with the degree of confidence selected, and \( E \) is the maximum error the researcher will tolerate. See id. at 246-47. I chose a 95% level of confidence and a maximum error of 5%. Solving for \( n \), \( n = 0.50(0.50)(1.960/0.05)^2 \), or 384. The Colorado pilot sample had a 48% response rate, but I cut that rate in half to 25% to estimate the final sample size because the mailing methodology changed. At a 25% response rate, at least 1,536 surveys are required. At an assumed 20% response rate, at least 1,920 surveys are required, which is close to the 1,966 ultimately mailed.
For the final survey I considered several sources that listed estate planning attorneys and settled on the membership of the American Bar Association Real Property, Probate and Trust Law Section. For the final survey, the Section created peel-off mailing labels for 1,966 members. The Section drew these members from two groups. First, the Section drew 864 members from the estate planning committees on the assumption that the committee members are more active estate planners. Second, the Section randomly drew the remaining 1,102 members from the general Real Property, Probate and Trust Law Section pool. However, the Section excluded law students, government lawyers, judges, legal services attorneys, public defenders, military lawyers, corporate law department attorneys, American Bar Association staff attorneys, law school faculty, part-time practitioners, and retirees. The goal was to include only attorneys engaged in the full-time private practice of law with some

19 The Martindale-Hubbell Law Directory is available on CD-ROM and permits a search by area of practice with other limits, including state and city. West’s Legal Directory is available on the Internet and on Westlaw and permits searches by major practice areas or keywords. See Westlaw, West Legal Directory (1999) <http://www.wld.com/Welcome.asp>; West Legal Directory available in 1999 WL. In addition, the National Association of Estate Planners and Councils maintains a Directory of Accredited Estate Planners, listing member attorneys, trust officers, insurance salespersons, and accountants. See National Association of Estate Planners and Councils <http://www.naepc.org/nc_directory.cfm>.

20 The American College of Trust and Estate Counsel was willing to consider my request to distribute the survey at their fall 1997 meeting, but I could not complete the surveys in time. I also was concerned that the membership of that organization consisted of specialists who might not be representative of a broad range of practicing estate planners.

21 The individuals were members of committees RP500000-603000. Approximately sixty-five committees make up the Real Property, Probate and Trust Law Section. See Probate and Trust Committees (Nov. 5, 1999) <http://www.abanet.org/rppt/ptcommittees.html>.

22 This approach did not create a pure randomly selected sample. The Section targeted all committee members to ensure that estate planning specialists were included because some members of the Real Property, Probate and Trust Law Section are real property lawyers instead of probate and trust lawyers. I will not try to justify the nonrandom inclusion of the committee members on the basis of stratified sampling technique, although authority exists to support it. “Stratified sampling is commonly used by social scientists because it can lend an extra ingredient of precision to a simple random or systematic sample. When selecting a stratified sample, the researcher divides the population in strata. The strata must be categories of a criterion.” ALAN BRYMAN & DUNCAN CRAMER, QUANTITATIVE DATA ANALYSIS FOR SOCIAL SCIENTISTS 101-02 (revised ed. 1994).

23 Based on responses from retired attorneys and trust officers, the exclusion filters were not foolproof.
emphasis on estate planning. 24

February 3, 1998, was the date of the survey package mailing. 25 A reminder postcard went out approximately ten days later. Both were first-class mailings. Of the 1,966 surveys mailed, 26 the postal service returned

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24 The membership of the Real Property, Probate and Trust Law Section included approximately 30,000 members when the Section drew the sample. At the same time, the total membership of the American Bar Association included approximately 328,000 members. See e-mail letter from Stacy Walter of the American Bar Association to Wayne M. Gazur (Oct. 15, 1997) (on file with author). As of 1996, the estimated number of individuals employed as lawyers in the United States was 880,000. See DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 1997, at 410 tbl.645 (117th ed. 1997).

Defining the population or universe being sampled is a difficult problem. The least problematic approach would be to define the population simply as members of the Real Property, Probate and Trust Law Section. A researcher would need to make further assumptions to conclude that the Real Property, Probate and Trust Law Section is sufficiently representative of membership of the American Bar Association, practicing estate planners in general, or practicing lawyers in general. The optimistic conclusion is that the members of the Real Property, Probate and Trust Law Section are roughly representative of attorneys in the United States who are in private practice and engaged in estate planning.

Interestingly, the size of the population is largely irrelevant to determine the appropriate size of a random sample.

Contrary to expectations, the size of the same relative to the size of the population (in other words n/N) is rarely relevant to the issue of a sample's accuracy. This means that sampling error—differences between the sample and the population which are due to sampling—can be reduced by increasing sampling size. However, after a certain level, increases in accuracy tend to tail off as sample size increases, so that greater accuracy becomes economically unacceptable.

BRYMAN & CRAMER, supra note 22, at 104. “The precision of a sample statistic does not depend on the size of the population, as long as the population is much larger than the sample.” DAVID S. MOORE, STATISTICS CONCEPTS AND CONTROVERSIES 17 (1979). However, population size does play a role in an adjustment for samples that are a substantial percentage, generally five or more percent, of the population being tested. This adjustment is the “finite-population correction factor.” LIND & MASON, supra note 18, at 240-41. The factor might apply to the law professor sample because the complete population of law professors teaching federal estate and gift taxation or estate planning is so small.

25 The package consisted of a cover letter, the survey questionnaire, and a business return envelope.

26 Practitioner Malcolm A. Moore and Professor Jeffrey N. Pennell of Emory University School of Law conducted two surveys of registrants of the University of Miami Philip E. Heckerling Institute on Estate Planning. See Malcolm A. Moore & Jeffrey N. Pennell, Practicing What We Preach: Esoteric or Essential?, 27 INST. ON EST. PLAN. ¶ 1200 (1993) [hereinafter Miami Survey I]; Malcolm A. Moore & Jeffrey N. Pennell, Survey of the Profession II, 30 INST. ON EST. PLAN. ¶ 1500 (1996) [hereinafter Miami Survey II]. In the second survey, the response rate was 11.9%.
twenty-three as undeliverable, and 250 recipients (14.50%) completed and returned the survey. The reasons for failure to respond varied. Seven recipients declined because they did not practice in the estate planning area, and five responded that they were retired. One recipient had passed away, while another did not complete the survey due to poor eyesight. One had already submitted the earlier Colorado test survey, and one objected to the survey.

The response rate on the final sample was lower than the rate for the test sample probably because the mailing procedure was different. We compromised on certain survey techniques to address cost concerns and the sheer size of the final sample. The following changes removed the specificity and individuality from the mailing:

1. The envelopes had typed addresses in the test sample, but peel-off labels in the final sample.

2. In the test sample, I individually addressed and manually signed each cover letter, but the final sample contained a "Dear Counselor" salutation and a photocopy of my signature.

3. The test sample's reminder was a personally addressed letter, but the final sample's reminder was a form postcard with a peel-off address label.

4. The test sample was limited to Colorado where I am a professor at a local public university, but I sent the final sample to a national audience.

5. The final sample contained names drawn randomly from the general membership of the Real Property, Probate and Trust Law Section, which includes a number of attorneys practicing in real

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27 A 20% response rate was assumed in selecting the size of the sample. See supra note 18. Applying the formula discussed in that footnote (see LIND & MASON, supra note 18, at 246-47) to the actual 250 subject sample in solving for the maximum allowable error yields an error of 6.2%. The formula would appear as follows: 250 = .50 (.50) (1.96/x)^2.
property and not estate law.28

Because of the potential bias from those who did not respond to the survey questionnaire, I will sometimes compare the national sample to the results of the Colorado test, which had a high response. However, the possibility of a regional bias may affect the comparison.29

2. Law Professor Sample

I modified the practitioner survey for law professor recipients. I purchased mailing lists from the Association of American Law Schools (AALS) of all professors of estate and gift taxation or estate planning. The survey package went out on February 3, 1998, to all 275 professors on the list, and I mailed a reminder postcard approximately ten days later.

The postal service returned one survey as undeliverable. Of the 274 surveys delivered, thirty-seven professors (13.50%) completed and returned the package. Two professors declined to respond because they did not teach in the field, and one professor had passed away. One professor received two surveys but completed only one.30

C. Compilation

I entered the survey data into a personal computer using the Statistical Package for Social Sciences 8.0 for Windows. I entered and identified the surveys in the order I received them. The questionnaire instructed the

28 If I were to redesign the survey, I would select a sample from the Martindale-Hubbell Law Directory and West's Legal Directory estate planning specialty designations. See supra note 19. I also would mail fewer surveys, but conduct a more intense follow-up with the participants, in the manner of the Colorado pilot survey.
29 For example, if the sample were drawn from a state with significant agricultural activity, that would probably skew responses about tax valuation of farmland under section 2032A. Professor Cooper's survey of various estate planning techniques, which ranged from basic tools to more exotic holding company structures, uncovered some regional differences. See George Cooper, A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance, 77 COLUM. L. REV. 161, 168 (1977).
30 The lists were supposed to eliminate double inclusion, but the procedure was not fool proof.
participants not to disclose their identity anywhere on the survey.

II. BACKGROUND QUESTIONS

The survey included several general background questions. For example, the questionnaire asked about years of experience and the percentage of practice devoted to estate planning. I designed these questions to measure the level of experience and expertise of the survey subjects. Information on the participant’s gender, political views, and level of personal wealth reflected relationships between those variables and other views expressed in the survey. Accordingly, a positive correlation might exist between a very conservative political outlook and support to abolish the federal wealth transfer tax. Likewise, an individual with personal wealth who is potentially subject to the estate tax may foreseeably support the abolition of those taxes to serve personal interests. Moreover, age may play a part in the responses. For example, senior estate planning attorneys with a lifetime invested in learning the system may resist change.

A. Years of Estate Planning Experience

Practitioners responded to the following question: "How many years of estate planning experience do you have?" Similarly, professors answered the following question: "How many years of estate planning experience in private practice do you have?"

<table>
<thead>
<tr>
<th>Years of Practice</th>
<th>Practitioners</th>
<th>Professors</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-2</td>
<td>0.8%</td>
<td>10.8%</td>
</tr>
<tr>
<td>3-5</td>
<td>6.1</td>
<td>27.0</td>
</tr>
<tr>
<td>6-10</td>
<td>12.2</td>
<td>16.2</td>
</tr>
<tr>
<td>11-20</td>
<td>26.0</td>
<td>18.9</td>
</tr>
<tr>
<td>More than 20</td>
<td>54.9</td>
<td>27.1</td>
</tr>
</tbody>
</table>

The practitioners predictably had more years of experience because the practice of law is their principal occupation. However, 62% of the
professors had six or more years of practical estate planning experience. Therefore, both the practitioners and professors had adequate estate planning experience to answer the survey questions knowledgeably and bolster the validity of the survey conclusions.

B. Percentage of Practice Devoted to Estate Planning

The questionnaire asked practitioners to report the "percentage of your practice . . . devoted to estate planning."\(^\text{31}\)

![Table]

**Figure 2**

<table>
<thead>
<tr>
<th>Reported Percentage of Practice Time</th>
<th>Practitioners</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 10%</td>
<td>3.7%</td>
</tr>
<tr>
<td>10-20</td>
<td>6.9</td>
</tr>
<tr>
<td>21-30</td>
<td>13.0</td>
</tr>
<tr>
<td>31-50</td>
<td>21.5</td>
</tr>
<tr>
<td>51-60</td>
<td>16.7</td>
</tr>
<tr>
<td>61-80</td>
<td>21.1</td>
</tr>
<tr>
<td>81-100</td>
<td>17.1</td>
</tr>
<tr>
<td>Mean Percentage of Practice</td>
<td>52.86%</td>
</tr>
</tbody>
</table>

More than half (54.9%) of the practitioners indicated that they spent more than half of their time in estate planning.\(^\text{32}\) On average, they

---

\(^{31}\) I might have used other indicators of expertise, such as state specialty certifications, or membership in specialist organizations. However, I did not want to limit responses to specialists. The Colorado test respondents tended to have a higher level of expertise; 8.3% reported that estate planning was 21-30% of their practice, 25.1% reported 31-50%, 20.8% reported 51-60%, 20.8% reported 61-80%, and 25.1% reported 81-100%.

\(^{32}\) In the second survey conducted by Moore and Pennell, 88% of the respondents indicated that they spent greater than half of their time or billables in estate planning. *See Miami Survey II, supra* note 26, at ¶ 1501.
devoted 52.86% of their practice to estate planning. Accordingly, I concluded that the practitioners represented a desirable concentration of the middle range of the estate planning practice.

C. Age

<table>
<thead>
<tr>
<th>Age</th>
<th>Practitioners</th>
<th>Professors</th>
</tr>
</thead>
<tbody>
<tr>
<td>25-29</td>
<td>1.6%</td>
<td>0.0%</td>
</tr>
<tr>
<td>30-39</td>
<td>14.2</td>
<td>5.4</td>
</tr>
<tr>
<td>40-49</td>
<td>28.9</td>
<td>29.7</td>
</tr>
<tr>
<td>50-59</td>
<td>29.3</td>
<td>37.9</td>
</tr>
<tr>
<td>60-70</td>
<td>17.9</td>
<td>21.6</td>
</tr>
<tr>
<td>71-80</td>
<td>6.1</td>
<td>5.4</td>
</tr>
<tr>
<td>81-90</td>
<td>1.6</td>
<td>0.0</td>
</tr>
<tr>
<td>91-100</td>
<td>0.4</td>
<td>0.0</td>
</tr>
</tbody>
</table>

Mean Age 52.15 years 53.85 years

D. Gender

<table>
<thead>
<tr>
<th>Gender</th>
<th>Practitioner Percentages</th>
<th>Professor Percentages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>88.6%</td>
<td>86.5%</td>
</tr>
<tr>
<td>Female</td>
<td>11.4</td>
<td>13.5</td>
</tr>
</tbody>
</table>

E. Political Views

The questionnaires asked all participants the following question: "How

33 In the Colorado test sample, 87.5% of the respondents were male and 12.5% were female.

34 In the Colorado test sample, 4.2% described themselves as very liberal, 20.8% as somewhat liberal, 41.7% as moderate, 25% as somewhat conservative, and 8.3% as very conservative.
would you generally characterize your political views and convictions?” The questionnaire listed the range of possible answers from 1 to 5.

<table>
<thead>
<tr>
<th>Description</th>
<th>Practitioners</th>
<th>Professors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very Liberal (1)</td>
<td>1.6%</td>
<td>17.1%</td>
</tr>
<tr>
<td>Somewhat Liberal (2)</td>
<td>21.6%</td>
<td>37.2%</td>
</tr>
<tr>
<td>Moderate (3)</td>
<td>30.2%</td>
<td>31.4%</td>
</tr>
<tr>
<td>Somewhat Conservative (4)</td>
<td>35.6%</td>
<td>5.7%</td>
</tr>
<tr>
<td>Very Conservative (5)</td>
<td>11.0%</td>
<td>8.6%</td>
</tr>
<tr>
<td><strong>Average 1-5 Ranking</strong></td>
<td><strong>3.33</strong></td>
<td><strong>2.51</strong></td>
</tr>
</tbody>
</table>

F. Personal Wealth

Both practitioners and professors responded to the following question: “With the current exemptions, if you were to pass away, would your estate pay an estate tax?”

<table>
<thead>
<tr>
<th>Response</th>
<th>Practitioners</th>
<th>Professors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>47.2%</td>
<td>43.2%</td>
</tr>
<tr>
<td>No</td>
<td>47.6%</td>
<td>46.0%</td>
</tr>
<tr>
<td>Don’t Know</td>
<td>2.0%</td>
<td>5.4%</td>
</tr>
<tr>
<td>No Response</td>
<td>3.2%</td>
<td>5.4%</td>
</tr>
</tbody>
</table>

**III. SUBSTANTIVE QUESTIONS**

A. The Impact of Change on Fees

Legal fees for estate planning play a significant role in the wealth transfer tax debate. From the client’s perspective, the price they pay for wealth transfer tax planning is a nonproductive cost that should be

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35 In the Colorado sample, 50% had taxable estates, and 50% did not. This question was poorly conceived because it fails to address the marital deduction. However, marital status raises the additional issue of spousal assets. Accordingly, the question could have asked: “With the current exemptions, upon your death (or if you are married, upon the death of the survivor), would your estate or the estate of your surviving spouse pay an estate tax?”
minimized or eliminated. However, isolating the portion of estate planning that is devoted to tax concerns is enlightening. Some clients may not realize that eliminating the federal wealth transfer taxes still would not eliminate the need for general estate planning. Furthermore, assuming that tax planning costs should be minimized, assessing the impact of the TRA 1997 on fees may shed light on the debate. Finally, estimating the impact of a complete abolition of the federal wealth transfer tax on legal revenues may reveal the nature of the interests at stake. I designed the survey to address these reform issues.

1. Breaking Down the Fees

The questionnaire asked practitioners to provide “the net worth of your typical estate planning client.” The wealth level of the typical client indicates the role of the federal wealth transfer tax in estate planning activities.

<table>
<thead>
<tr>
<th>Typical Client's Net Worth</th>
<th>Practitioners</th>
</tr>
</thead>
<tbody>
<tr>
<td>$50-300,000</td>
<td>2.9%</td>
</tr>
<tr>
<td>301-600,000</td>
<td>7.1</td>
</tr>
<tr>
<td>601-900,000</td>
<td>12.4</td>
</tr>
<tr>
<td>901-1,200,000</td>
<td>11.2</td>
</tr>
<tr>
<td>1,201-1,500,000</td>
<td>12.9</td>
</tr>
<tr>
<td>1,501-2,000,000</td>
<td>18.3</td>
</tr>
<tr>
<td>2,001-2,500,000</td>
<td>11.2</td>
</tr>
<tr>
<td>2,501-3,000,000</td>
<td>6.6</td>
</tr>
<tr>
<td>3,001-5,000,000</td>
<td>12.4</td>
</tr>
<tr>
<td>5,001-7,000,000</td>
<td>2.5</td>
</tr>
<tr>
<td>9,001-11,000,000</td>
<td>0.8</td>
</tr>
<tr>
<td>15,001-17,000,000</td>
<td>0.4</td>
</tr>
<tr>
<td>21,000,000+</td>
<td>1.2</td>
</tr>
</tbody>
</table>

Mean Net Worth\(^{36}\) $2,234,192

\(^{36}\) To determine the mean of the net worths, I made several computational compromises. First, since I entered the information as a range, the mean computation was the midpoint of the range. Second, for the three respondents who claimed typical client net worths in excess of $21 million, the mean computation used $21 million, rather than the larger amounts. Third, several participants reported very broad ranges that would span several categories. Consequently, I applied simplifying assumptions.
The estate and gift tax unified credit amount in 1998 was $625,000.37 Accordingly, clients with a net worth in excess of $2,000,000 require tax-driven planning, and federal wealth transfer taxes are a primary concern to the practitioners’ typical clients.

The second step was estimating the estate planning fee paid by the typical client. The practitioners responded to the following question: “Although it is very difficult to generalize, what would be your estimate of the fee paid to you for estate planning services by a typical estate planning client?”

The typical fee covers more than services for wealth transfer tax planning. Therefore, the survey asked practitioners: “Again, although this is very difficult to quantify in most situations, what percentage of the fee would be strictly succession and disposition related, without any federal wealth transfer tax consequences?”

The survey also asked professors about estate planning fees, although professors necessarily base their estimates of the non-tax charges on a combination of dated private practice experience, written or oral accounts from practicing lawyers, and sheer speculation. Consequently, the question to professors contained an additional phase and asked: “What percentage of the fee paid to practitioners for estate planning services by a typical estate planning client would be strictly succession and disposition related, without any federal wealth transfer tax consequences?” Figure 9 shows the comparison of the results to these questions.

<table>
<thead>
<tr>
<th>Percentage of non-tax services</th>
<th>Practitioners</th>
<th>Professors</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-20%</td>
<td>16.1%</td>
<td>12.5%</td>
</tr>
<tr>
<td>21-40</td>
<td>30.4</td>
<td>40.6</td>
</tr>
<tr>
<td>41-60</td>
<td>31.7</td>
<td>31.3</td>
</tr>
<tr>
<td>61-80</td>
<td>16.1</td>
<td>15.6</td>
</tr>
<tr>
<td>81-100</td>
<td>5.7</td>
<td>0.0</td>
</tr>
</tbody>
</table>

| Mean percentage of non-tax services | 43.38% | 40.44% |

Although a subsequent question addresses the theoretical impact of a wealth transfer tax repeal, these results also may be a rough measure of that impact on fees. However, these percentages may not reveal the full impact of a wealth transfer tax repeal because the question did not address the possibility that clients may neglect to seek other estate planning if they do not have tax savings as an incentive. In this regard, Professor Willard Pedrick argued that the wealth transfer tax was an incentive to overall estate planning. "But surely our experience tells us that it is concern over taxes that brings great numbers of estate planning clients to the office. Taxes, especially federal levies, get the property owner's attention . . . ."

Nevertheless, although some practitioners believe that a wealth transfer tax repeal would significantly reduce revenue from non-tax services, the results of the survey do not support this forecast. The practitioners estimated, on average, a 41.62% overall decline in revenues. That amount is less than the tax-driven portion of estate planning services suggested by subtracting from 100% the "non-tax services" responses to the previous question, which produces 56.62% for practitioners and 59.56% for professors.

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39 See infra Figure 15 and text accompanying note 48.
2. Predicting the Impact of TRA 1997

One potential benefit of the increase in the unified credit under the TRA 1997 is the decrease in the need for wealth transfer tax planning. Accordingly, the survey asked practitioners: "By how much, if any, will the Taxpayer Relief Act of 1997 changes increase or decrease the typical estate planning fee amount?" Figure 10 shows the results.

<table>
<thead>
<tr>
<th>Change</th>
<th>Practitioners</th>
<th>Estimated Mean Fee Change</th>
<th>Standard Deviation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decrease in fee</td>
<td>4.4%</td>
<td>-$670</td>
<td>$709</td>
</tr>
<tr>
<td>Increase in fee</td>
<td>8.4</td>
<td>+$517</td>
<td>$596</td>
</tr>
<tr>
<td>No change</td>
<td>77.2</td>
<td>-0-</td>
<td></td>
</tr>
<tr>
<td>Do not know</td>
<td>10.0</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Practitioners overwhelmingly predicted no change in the amount of the typical estate planning fee. The practitioners who predicted a decrease estimated an average decrease of $670, with a standard deviation of $709.

The standard deviation is a measure of the dispersion of a distribution of values. For example, if all the values in a population were each equal to four the mean would be four, and the standard deviation would be zero because no dispersion of values occurs. However, if one value was six and the other was two, the mean would still be 4, but the standard deviation would be 2.82. The mean alone is potentially misleading because the two values of the population, six and two, are dispersed or distant from that mean number of four. The standard deviation is computed to measure the degree of dispersion. A large standard deviation reflects a greater dispersion.

The standard deviation is an absolute number of the same scale of the population values and can be directly compared with those values. The standard deviation is computed by taking the square root of the variance. The variance in turn is computed by: (1) calculating the mean of the values in the population or sample; (2) calculating the difference between the mean and each value in the population or sample, seriatim; (3) squaring each difference; (4) summing the values computed in (3); and (5) dividing that sum by the number of values in the population or sample. For example, with a population consisting of two values as above, where one value is six and the other is two, the mean (step 1) would be 4 (i.e., 6+2/2=4. The sum of the squares of the differences from the mean (steps 2-4) would be (6-4)^2 + (2-4)^2, or 4+4=16. Dividing 16 by the number of values in the population or sample, 2, yields 8 as the variance (step 5). The standard deviation is then computed as the square root of the variance, 8, and that number is 2.8284.

If the population was a normal distribution, a standard deviation of 2.82 would
and a range of $99-$2,500. The practitioners who predicted an increase in the fee estimated an average increase of $517 with a standard deviation of $596 and a range of $50-$2,500.

Because most of the practitioners thought the TRA 1997 would not significantly change the average fee, the mix of services (i.e., tax and non-tax) also should remain static. To test that conclusion, I asked practitioners and professors: "After taking into account the Taxpayer Relief Act of 1997 changes, what would be the percentage [of strictly succession and disposition related fees]?" Figure 11 shows the results.

<table>
<thead>
<tr>
<th>Post-TRA 1997 percentage of non-tax services</th>
<th>Practitioners</th>
<th>Professors</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-20%</td>
<td>21.1%</td>
<td>17.2%</td>
</tr>
<tr>
<td>21-40</td>
<td>25.4%</td>
<td>38.0%</td>
</tr>
<tr>
<td>41-60</td>
<td>30.0%</td>
<td>24.1%</td>
</tr>
<tr>
<td>61-80</td>
<td>15.8%</td>
<td>13.8%</td>
</tr>
<tr>
<td>81-100</td>
<td>7.7%</td>
<td>6.9%</td>
</tr>
<tr>
<td>Mean percentage of non-tax services</td>
<td>40.59%</td>
<td>37.66%</td>
</tr>
</tbody>
</table>

A comparison of these figures to the estimates of non-tax services prior to the 1997 legislation (43.38% for practitioners and 40.44% for professors\(^4\)) reveals that the percentages fell for both practitioners and professors. That result contradicts predictions that the TRA 1997 "changes will alter estate planning practice, experts say. Lawyers will spend less time on tax strategies and more time on succession and business planning."\(^42\)

\(^41\) See supra Figure 9 and text accompanying note 38.
Another survey question asked: “With respect to the Taxpayer Relief Act of 1997, what do you expect to be the impact of the amendments on your estate planning practice revenues?” The question for professors was similar, but I substituted the word “private” for “your.”

<table>
<thead>
<tr>
<th>Impact of TRA 1997 on revenue</th>
<th>Practitioners</th>
<th>Mean Change</th>
<th>Professors</th>
<th>Mean Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decrease in revenues</td>
<td>4.0%</td>
<td>-17.82%</td>
<td>16.2%</td>
<td>-19.0%</td>
</tr>
<tr>
<td>Increase in revenues</td>
<td>20.8</td>
<td>+16.73</td>
<td>35.1</td>
<td>+11.0</td>
</tr>
<tr>
<td>Roughly no change</td>
<td>70.0</td>
<td>0</td>
<td>43.3</td>
<td>0</td>
</tr>
<tr>
<td>Do not know</td>
<td>5.2</td>
<td>-</td>
<td>5.4</td>
<td>-</td>
</tr>
</tbody>
</table>

Practitioners who predicted a decline in revenues estimated an average decline of 17.82%, with a standard deviation of 24.10. For professors, it was 19%, with standard deviation of 7.42. Practitioners who predicted an increase in revenues estimated an average percentage increase of 16.73%, with a standard deviation of 13.56. For professors, it was 11%, with a standard deviation of 3.95.

The increase in the unified credit under TRA 1997 will gradually move more estates into the nontaxable category.\textsuperscript{43} Although some individuals will no longer require tax-driven estate planning, the question remains whether the increase is dramatic enough to change the perceptions of clients and discourage them from seeking legal advice from estate planners. The survey reflected this uncertainty because the overwhelming majority of

practitioners predicted no change in revenues, while a larger percentage of professors predicted either an increase or decrease.

Overall, average fees per client and the number of clients determine changes in practice revenues. In Figure 12, 70% of practitioners believed that the TRA 1997 would not affect overall revenues and 20.8% believed that overall revenues would increase. Figure 10 showed that only 8.4% of the practitioners expect an increase in the typical estate planning fee. A comparison reveals that the estimated increase in total revenues must be attributable to an increased number of clients. If the prediction holds true, TRA 1997 will not reduce taxpayer transaction costs.

The survey participants reported an average client net worth of $2,234,192. The TRA 1997 changes may not affect the participants’ clients because the average net worth amount exceeds the unified credit increases. On the other hand, the TRA 1997 may affect less wealthy clients who will not need tax-related planning work. Consequently, I separated the data according to the wealth of the typical client. Figure 13 shows a cross-tabulation of the percentage of non-tax estate planning services reported by practitioners against typical client net worth. Practitioners predicted that clients who are currently on the cusp of taxable status, at net worths of $601,000 to $900,000, will receive a greater percentage of non-tax services because of the scheduled increases in the unified credit. Still, the data does not show a clear pattern or support a predicted result that the TRA 1997 will increase the proportion of non-tax services for most clients.

The question did not specify a time frame. Perhaps practitioners believe that the increases in the exemption will not keep pace with the rate of asset appreciation. See supra Figure 7 and text accompanying note 36.

When fully phased in by the year 2006, the unified credit exclusion will be $1,000,000. See I.R.C § 2010(c) (West Supp. 1999).
In Figure 10, the overwhelming majority of the practitioners (77.1%) predicted no change in the typical estate planning fee after the TRA 1997 changes. In Figure 14, I measured this response against the typical client’s net worth.

<table>
<thead>
<tr>
<th>Client Net Worth</th>
<th>Non-Tax Services Prior to TRA 1997</th>
<th>Non-Tax Services After TRA 1997</th>
</tr>
</thead>
<tbody>
<tr>
<td>$ 50 - 300,000</td>
<td>62.40%</td>
<td>50.25%</td>
</tr>
<tr>
<td>301 - 600,000</td>
<td>56.11</td>
<td>52.00</td>
</tr>
<tr>
<td>601 - 900,000</td>
<td>47.46</td>
<td>56.04</td>
</tr>
<tr>
<td>901 - 1,200,000</td>
<td>47.30</td>
<td>46.98</td>
</tr>
<tr>
<td>1,201 - 1,500,000</td>
<td>45.77</td>
<td>47.46</td>
</tr>
<tr>
<td>1,501 - 2,000,000</td>
<td>38.80</td>
<td>35.26</td>
</tr>
<tr>
<td>2,001 - 2,500,000</td>
<td>40.02</td>
<td>31.80</td>
</tr>
<tr>
<td>2,501 - 3,000,000</td>
<td>44.22</td>
<td>43.73</td>
</tr>
<tr>
<td>3,001 - 5,000,000</td>
<td>36.57</td>
<td>34.62</td>
</tr>
<tr>
<td>5,001 - 7,000,000</td>
<td>26.20</td>
<td>30.20</td>
</tr>
<tr>
<td>9,001 - 11,000,000</td>
<td>32.75</td>
<td>30.25</td>
</tr>
<tr>
<td>15,001 - 17,000,000</td>
<td>30.50</td>
<td>30.50</td>
</tr>
<tr>
<td>21,000,000+,+</td>
<td>30.25</td>
<td>30.25</td>
</tr>
</tbody>
</table>
### Figure 14

Percentages of Practitioners predicting changes in typical planning fee amounts according to their clients' net worth

<table>
<thead>
<tr>
<th>Client Net Worth</th>
<th>Decrease In Fee</th>
<th>Increase In Fee</th>
<th>No Change</th>
<th>Do Not Know</th>
</tr>
</thead>
<tbody>
<tr>
<td>$ 50 - 300,000</td>
<td>0.00%</td>
<td>0.00%</td>
<td>57.14%</td>
<td>42.86%</td>
</tr>
<tr>
<td>301 - 600,000</td>
<td>0.00</td>
<td>0.00</td>
<td>82.35%</td>
<td>17.65%</td>
</tr>
<tr>
<td>601 - 900,000</td>
<td>0.00</td>
<td>13.79</td>
<td>75.87%</td>
<td>10.34%</td>
</tr>
<tr>
<td>901 - 1,200,000</td>
<td>11.11</td>
<td>7.41</td>
<td>70.37%</td>
<td>11.11%</td>
</tr>
<tr>
<td>1,201 - 1,500,000</td>
<td>3.23</td>
<td>12.90</td>
<td>80.64%</td>
<td>3.23%</td>
</tr>
<tr>
<td>1,501 - 2,000,000</td>
<td>13.64</td>
<td>9.09</td>
<td>75.00%</td>
<td>2.27%</td>
</tr>
<tr>
<td>2,001 - 2,500,000</td>
<td>3.70</td>
<td>7.41</td>
<td>77.78%</td>
<td>11.11%</td>
</tr>
<tr>
<td>2,501 - 3,000,000</td>
<td>0.00</td>
<td>12.50</td>
<td>68.75%</td>
<td>18.75%</td>
</tr>
<tr>
<td>3,001 - 5,000,000</td>
<td>0.00</td>
<td>0.00</td>
<td>90.00%</td>
<td>10.00%</td>
</tr>
<tr>
<td>5,001 - 7,000,000</td>
<td>0.00</td>
<td>16.67</td>
<td>83.33%</td>
<td>0.00%</td>
</tr>
<tr>
<td>9,001 - 11,000,000</td>
<td>0.00</td>
<td>0.00</td>
<td>100.00%</td>
<td>0.00%</td>
</tr>
<tr>
<td>15,001 - 17,000,000</td>
<td>0.00</td>
<td>0.00</td>
<td>100.00%</td>
<td>0.00%</td>
</tr>
<tr>
<td>21,000,000 +</td>
<td>0.00</td>
<td>0.00</td>
<td>100.00%</td>
<td>0.00%</td>
</tr>
</tbody>
</table>

Even at the more modest net worth levels, the practitioners did not predict a decrease in the typical estate planning fee. This comparison reveals that dramatic changes may be necessary to meaningfully address concerns about the transaction costs represented by estate planning fees. Critics may be correct to argue for the elimination of the entire system.

3. The Impact of Repeal

The questionnaire asked practitioners: "If the federal estate, gift, and generation skipping transfer tax were abolished entirely (without a direct replacement), what would you expect to be the impact on your estate planning practice revenues?"

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47 This prediction is difficult to accept, considering estimates that the increase in the unified credit will cut federal wealth transfer tax revenues. See H.R. CONF. REP. NO. 105-220, supra note 43, at 781. The survey results may reflect the practitioners' expectations of asset inflation, higher transaction costs produced by the uncertainty accompanying reforms of any nature, or flatly wrong speculations.
Professors answered a similar question, but I substituted the word “private” for “your.”

<table>
<thead>
<tr>
<th>Change in Revenues</th>
<th>Practitioners</th>
<th>Mean % Change in Revenues</th>
<th>Professors</th>
<th>Mean % Change in Revenues</th>
</tr>
</thead>
<tbody>
<tr>
<td>Decline in revenues</td>
<td>78.8%</td>
<td>-41.62%</td>
<td>91.9%</td>
<td>-47.66%</td>
</tr>
<tr>
<td>Increase in revenues</td>
<td>3.2</td>
<td>+39.12</td>
<td>0.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Roughly no change</td>
<td>12.8</td>
<td>0.00</td>
<td>2.7</td>
<td>0.0</td>
</tr>
<tr>
<td>Do not know</td>
<td>5.2</td>
<td>0.00</td>
<td>5.4</td>
<td>0.0</td>
</tr>
</tbody>
</table>

The impact of a total repeal of the wealth transfer tax on estate planning professionals was a concern of many practitioners in the months leading up to the enactment of TRA 1997.48 Practitioners who predicted a decline in revenues estimated an average decline of 41.62%, with a 20.37 standard deviation. Professors predicted an average decline of 47.66%, with a standard deviation of 20.59. Practitioners who predicted an increase in revenues, estimated an average increase of 39.12%, with a standard deviation 27.73. This estimated 41% decline predicted by an overwhelming 78.8% of the responding practitioners gives practitioners a real stake in perpetuating the current state of affairs, and it may influence their behavior in debates over potential amendments to the wealth transfer tax laws. As we turn to proposals for change, support may grow for incremental approaches such as increased exemptions, which would retain the current system rather than totally repeal it.

48 Talk of such reform has even extended to a complete repeal of the estate tax! In times past, many industry soothsayers have greeted such talk by sounding the death knell; theorizing that no justifiable reason would remain to employ probate specialists, trust officers and others who practice in our profession. Of course, these predictions couldn’t have been more inaccurate and there is no reason to believe that this year’s proposals will in any way adversely affect our professional lives.

B. Opinions About Reforming the System

The wealth transfer tax system generates a great number of proposals for change. I designed this survey to measure the degree of agreement among practitioners and law professors on some of the common proposals.

The survey asked practitioners and professors to indicate their agreement or disagreement with fourteen statements concerning the federal wealth transfer tax, ranking their opinions on a scale of one through five.\(^4\)

I. Proposals for Abolition of the Federal Wealth Transfer Tax

Several of the survey's statements addressed reasons why the current system should be abolished, without suggesting an alternative to replace it.

Statement 1 "The federal wealth transfer tax should be abolished because it significantly discourages entrepreneurial activity."

---

\(^4\) The questionnaire section contained the following preface: "Please indicate your agreement or disagreement with the following statements. If a question refers to a 'family business,' assume a business in which family members are directly involved in managing or final decisions or in which family members have substantial ownership of the business."

\(^5\) This common style of ranking is referred to as Likert scaling. See BRYMAN & CRAMER, supra note 22, at 64. Generally, the common statistical procedure is to perform a test of statistical significance on data. The tester must predict an expected result and then compare it to the observed result. If the observed result does not differ from the expected result to a statistically significant degree, the result is deemed to be the result of a random distribution. The Pearson chi-square is one of these tests. See generally, DUNCAN CRAMER, FUNDAMENTAL STATISTICS FOR SOCIAL RESEARCH: STEP-BY-STEP CALCULATIONS AND COMPUTER TECHNIQUES USING SPSS FOR WINDOWS 287-94 (1998) (describing the Pearson Chi-Square test). To be statistically significant, the test must produce a degree of probability of a random result of less than 0.05. See id. In applying the Pearson test to each of the Likert scaled data, I arbitrarily assumed that each value of 1 through 5 had an expected probability of \(1/5\) (20%). All of the practitioner questions were statistically significant. All of the professor questions were statistically significant, in the 0.00 through 0.05 range, except for Figure 17 (0.874), Figure 29 (0.096), Figure 26 (0.726), Figure 22 (0.675), Figure 33 (0.332), Figure 25 (0.250), Figure 20 (0.276), Figure 19 (0.625), and Figure 23 (0.305). Compared to the practitioners, the smaller number of professors in the final sample increased the likelihood of producing a result that was not statistically significant.
Figure 16

<table>
<thead>
<tr>
<th></th>
<th>Practitioners</th>
<th>Professors</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Strongly Disagree</td>
<td>18.7%</td>
<td>39.0%</td>
</tr>
<tr>
<td>2. Disagree</td>
<td>33.6</td>
<td>33.3</td>
</tr>
<tr>
<td>3. Neither Agree nor Disagree</td>
<td>18.7</td>
<td>8.3</td>
</tr>
<tr>
<td>4. Agree</td>
<td>17.4</td>
<td>11.1</td>
</tr>
<tr>
<td>5. Strongly Agree</td>
<td>11.6</td>
<td>8.3</td>
</tr>
<tr>
<td>Average 1-5 ranking</td>
<td>2.70</td>
<td>2.17</td>
</tr>
</tbody>
</table>

This argument is a popular criticism. A majority of practitioners and professors disagreed with the statement, although the professors expressed stronger disagreement than the practitioners. Whether the professors based their opinions primarily on objective evidence, such as personal experience with family businesses, is difficult to discern. On the one hand, practitioners showed a weak positive correlation between approval of this statement and conservative political views. On the other hand, professors showed a weak positive correlation between approval of this statement and conservative political views. On the other hand, professors

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51 Another possible response to the tax is to devote less energy to entrepreneurial efforts for wealth creation and accumulation in the first place. To the extent those efforts are motivated by a desire to leave bequests, the tax will lead to a substitution of activities such as the pursuit of hobbies for the pursuit of business activity, even without any change in retirement plans. WAGNER, supra note 12, at 10.

Thus, the desire to leave a large estate is one of the primary motivations for working and saving later in life. To the extent that the estate tax reduces a parent's ability to leave an estate to his children, it will have a negative effect on his willingness to accumulate wealth through work, saving, and investing. Bruce Bartlett, The End of the Estate Tax, 76 Tax Notes 105, 107 (1997) (citing a number of commentators expressing this view).

52 A cross-tabulation of the practitioner responses against their political position disclosed that 43.75% of the practitioners who identified themselves as conservative (somewhat or very) agreed with the statement while 10.91% of those who identified themselves as liberal (somewhat or very) agreed with the statement. Although the responses appear to bear a relationship to the participants' general political outlooks, a statistical test of correlation should be applied. The variable for political outlook was given the following values: very liberal=1, somewhat liberal=2, moderate=3, somewhat conservative=4, and very conservative=5. Similarly, the respondents ranked their approval of the statement on a 1 through 5 scale. Respondents ranked their age on a scale of 1 through 8 and taxability
showed a moderately strong positive correlation between disapproval of this statement and liberal political views.\textsuperscript{53}
Statement 2 "The federal wealth transfer tax should be abolished because the revenue yield is probably less than the costs of its administration and taxpayer compliance and planning." Figure 17 shows the results.

<table>
<thead>
<tr>
<th>Figure 17</th>
<th>Practitioners</th>
<th>Professors</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Strongly Disagree</td>
<td>13.0%</td>
<td>13.9%</td>
</tr>
<tr>
<td>2. Disagree</td>
<td>24.2</td>
<td>25.1</td>
</tr>
<tr>
<td>3. Neither Agree nor Disagree</td>
<td>23.8</td>
<td>19.4</td>
</tr>
<tr>
<td>4. Agree</td>
<td>21.8</td>
<td>19.4</td>
</tr>
<tr>
<td>5. Strongly Agree</td>
<td>17.2</td>
<td>22.2</td>
</tr>
<tr>
<td>Average 1-5 ranking</td>
<td>3.06</td>
<td>3.11</td>
</tr>
</tbody>
</table>

Estimates of administration costs have become part of the lore of the federal wealth transfer tax. In 1981 Professor Gerald P. Moran estimated that the total cost of compliance "probably exceeds the yield that Uncle Sam receives." More recently, the Center for the Study of Taxation, an opponent of the wealth transfer tax, asserted that the cost of compliance is less than previous estimates. The Center said that "it has been estimated that the government and taxpayers collectively spend some 65 cents for each dollar of estate and gift tax collected . . . for enforcement and compliance activities." Sixty-five cents is breathtaking but misleading because it largely represents lost productivity from disincentives caused by the levy of taxes.

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56 Payne's article does not single out wealth transfer taxes, but criticizes the federal tax system as a whole. Payne places government costs for net tax revenue at 0.61% and business and individual compliance costs at 24.43%. Payne additionally estimates "economic disincentive costs" (i.e., productivity discouraged by taxes) at 33.20% and "other private-sector burdens" (i.e., the cost of engaging in tax avoidance activity) at 6.78%.
The practitioners have a vested interest in this issue because their professional services constitute a significant portion of the transaction costs. Nevertheless, the practitioners’ responses averaged close to that of the professors. Conservative practitioners showed a weak positive correlation for agreement with the claim as compared to liberal practitioners. The professors’ responses demonstrated no clear patterns.

**Statement 3** “The federal wealth transfer tax should be abolished because it reduces the income tax and employment tax yields by more than the wealth transfer tax revenues it collects.”

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57 I also considered the response to this statement in light of the percentage of practice devoted to estate planning. See *supra* Figure 2 and text accompanying note 31. Surprisingly, practitioners who responded that they devote a large percentage of their practice to estate planning did not agree less with proposals to abolish the wealth transfer taxes. No statistically significant correlations emerged between the responses to the fourteen statements proposing abolition and percentage of estate planning practice.

58 Although 39% of practitioners overall agreed with the second statement, 49.55% of practitioners identifying themselves as conservative (somewhat or very) agreed with the statement and 23.64% of the practitioners identifying themselves as liberal (somewhat or very) agreed with the statement. Overall results showed a moderately weak relationship between political identification and approval of this statement (Spearman’s correlation coefficient of 0.268 at a statistical significance of 0.000). A cross-tabulation of the responses against the age of the participant disclosed slightly more agreement with the statement by younger practitioners. Of the practitioners aged 25 to 49, 32.71% disagreed with the statement, as compared with 37.30% of the practitioners overall. In the same age group, 44.86% agreed with the statement, as compared with 39% of the practitioners overall. Comparing responses to this statement against whether the respondent’s own estate would bear the estate tax, 40.52% of participants with a taxable estate agreed with the statement, 35.96% of the participants with a non-taxable estate agreed with the statement, and 39% of practitioners overall agreed with the statement.

59 Of the professors identifying themselves as politically liberal (somewhat or very), 47.37% disagreed with statement 2, compared with 38.9% of the professors overall. A Spearman’s correlation coefficient for all professors demonstrated a weak to moderately weak relationship between political identification and approval of this statement (0.195 at a not statistically significant level of 0.270). Of the professors, 38.46% of those aged 30 to 49 disagreed with the statement, compared with 38.9% of the professors overall. Although 38.9% of professors overall disagreed with the statement, 68.75% with taxable estates disagreed with the statement, but only 6% with non-taxable estates disagreed with the statement.
Arguments supporting this statement tend to be grounded in supply side economics\(^60\) or tend to focus on charitable giving patterns.\(^61\)

A majority of the professors disagreed with Statement 3. Conservative practitioners more strongly agreed with the statement.\(^62\) Conversely, liberal practitioners had a stronger disagreement (Table IX).

\(^60\) Richard E. Wagner simulated the effect of abolishing wealth transfer taxes on total federal tax revenues from 1971 to 1991, assuming abolition in 1971. See Wagner, supra note 12, at 24-26. Wagner concluded that the resulting increase in labor and capital inputs would cause greater production, and increase other tax revenues, such as Social Security taxes, corporate income taxes, and personal income taxes. The result would be $20.7 billion in additional net federal tax revenues and $96.3 billion more state and local tax revenues. See id. However, he concluded that if Congress had abolished the transfer tax in 1993, the net tax change would be a deficit of $38.7 billion by the year 2000, although “[t]hereafter, net federal revenue gains might well emerge.” \textit{Id.} at 26. “A final argument is that the tax causes losses in output and jobs that far outweigh the $19 billion it will pump into the Treasury this year. Part of the damage results from the sale and breakup of thriving farms and businesses.” George J. Church, \textit{Death and Lower Taxes}, \textit{Time}, May 5, 1997, at 50.

\(^61\) “Many give to charity to avoid the estate tax—and also pay lower income taxes as a result. Stanford economist B. Douglas Bernheim says the lost income taxes may be equal to the total estate tax revenues.” \textit{The Dumbest Tax of All}, \textit{Investor’s Bus. Daily}, March 6, 1997, at A30. “[A]vailable evidence suggests that, historically, true revenues associated with estate taxation may well have been near zero, or even negative.” B. Douglas Bernheim, \textit{Does the Estate Tax Raise Revenue?} \textit{TAX POL’Y \\& THE ECON.}, 113, 115 (1987). “[I]n the absence of far-reaching reform, it seems unlikely that the estate tax will do much more than benefit charitable causes.” \textit{Id.} at 135.

\(^62\) Of those practitioners identifying themselves as conservative (somewhat or very), 23.15% agreed with statement 3, as compared with 7.41% of the practitioners identifying themselves as liberal. Overall, the results revealed a moderately weak correlation of political identification with approval of the statement (Spearman’s correlation coefficient
professors more strongly disagreed with the statement.\textsuperscript{63}

Statement 4 "The federal wealth transfer tax has failed in its goal to significantly moderate the distribution of wealth and should therefore be abolished."

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
 & Practitioners & Professors \\
\hline
1. Strongly Disagree & 13.9\% & 19.4\% \\
2. Disagree & 22.7 & 19.4 \\
3. Neither Agree nor Disagree & 33.1 & 27.9 \\
4. Agree & 18.5 & 22.2 \\
5. Strongly Agree & 11.8 & 11.1 \\
\hline
Average 1-5 ranking & 2.92 & 2.86 \\
\hline
\end{tabular}
\caption{Figure 19}
\end{table}

The responses of practitioners and professors are widely divided. The
disagreement of practitioners and professors is statistically significant (Spearman's correlation coefficient of 0.203 at a statistically significant level of 0.002). Comparing the responses of only the conservative practitioners produced a weak Spearman's correlation coefficient of 0.115 at a non-statistically significant level of 0.236. A cross-tabulation of the practitioners' responses against their ages did not disclose a pattern. Of the practitioners aged 25 to 49, 40.95\% disagreed with the statement as compared with 41.70\% of the practitioners overall. In that same age group, 14.29\% agreed with the statement as compared with 16.20\% of the practitioners overall. A cross-tabulation of the responses against whether the practitioner's estate would bear an estate tax disclosed that 16.07\% of practitioners with a taxable estate and 15.93\% with a non-taxable estate agreed with the statement, compared with 16.20\% of practitioners overall.

Of the professors identifying themselves as liberal (somewhat or very), 63.16\% disagreed with the statement. In comparison, 40\% of the professors identifying themselves as conservative (somewhat or very) disagreed with the statement. Overall results indicate a moderately weak correlation between political identification and approval of the statement (Spearman's correlation coefficient of 0.212 at a not statistically significant level of 0.228). Comparing the opposing responses of liberal professors produced a moderately weak Spearman's correlation coefficient of 0.381 at a non-statistically significant level of 0.108. Of the professors aged 30 to 49, 53.85\% disagreed with the statement, compared with 58.40\% overall. Of the professors reporting a taxable estate, 87.5\% disagreed with the statement. Of those with a non-taxable estate, 25\% disagreed with the statement. The overall rate of disagreement by professors was 58.4\%.
average of the responses reflects that both practitioners and professors are largely neutral on this statement. However, conservative practitioners more strongly agreed with the statement. Conversely, liberal professors strongly disagreed with the statement.

In reviewing the responses to Statements 1 through 4, one finds that the results reveal that practitioners and professors supported most strongly the arguments that reflected practical considerations. For example, the second statement was that the taxes should be abolished because the revenue yield is probably less than the costs of administration and taxpayer compliance. Both practitioners and professors gave it their highest approval. The

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64 This issue has caused more commentary than it deserves. Bruce Bartlett has summed up a number of the arguments:

Indeed, existing high estate tax rates appear to do virtually nothing to equalize the distribution of wealth. Recent studies, in fact, have argued that wealth has never been more unequal than it is today. One reason why estate taxes have less impact on wealth distribution than people imagine is that inheritances constitute less of the wealthy’s assets than is usually thought. . . . Indeed, even among the super-rich, inheritance counts for less than commonly believed. . . .

Bartlett, supra note 51, at 109.

65 Of the conservative practitioners, 35.45% agreed with the statement, while 25.45% of liberal practitioners agreed with the statement. Overall, a very weak correlation resulted between responses to the statement and political identity (Spearman’s correlation coefficient of 0.165 at a 0.011 level of statistical significance). The Spearman’s correlation for conservative practitioners’ responses was also a weak 0.181, barely falling on the side of being non-statistically significant at 0.059. A cross-tabulation of the practitioners’ responses with their ages did not disclose an age-linked pattern. Of the practitioners aged 25 to 49, 34.29% disagreed with the statement as compared with 36.6% of the practitioners overall. In that same age group 31.43% agreed with the statement as compared with 30.3% overall. A cross-tabulation of the responses against whether the practitioner’s estate would bear an estate tax disclosed that 33.33% of the practitioners with a taxable estate agree with the statement, while 26.32% with a non-taxable estate agreed with the statement. The overall rate was 30.3%.

66 None of the conservative professors disagreed with the statement, but 63.16% of the liberal professors disagreed. Overall, a moderately strong correlation existed between political identification and approval of this statement (Spearman’s correlation coefficient of 0.511 at a statistically significant level of 0.002). The liberal professors’ responses had a moderately weak relationship to their political identification, producing a Spearman’s correlation coefficient of 0.205 at a non-statistically significant level of 0.4000. Of the professors aged 30 to 49, 46.15% disagreed with the statement, as compared to 38.8% overall. Of the professors with taxable estates, 43.75% disagreed with the statement. Of the professors, with a non-taxable estate, 25% disagreed with the statement.

67 See supra Figure 17 and text accompanying notes 54-59.
average 1-5 rankings for practitioners and professors were 3.06 and 3.11, respectively. Yet, the TRA 1997 apparently did little to address the issue of transaction costs.

A less practical statement was that the wealth transfer tax should be abolished because it discourages entrepreneurial activity.\textsuperscript{68} Although the survey revealed a relative gap between practitioners and professors, this statement was the least popular. The average 1-5 rankings for practitioners was 2.70, while it was 2.17 for professors.

2. Proposals for Modification

Several statements in the survey deal with modifications to the current system.

Statement 5 "The federal wealth transfer tax should be retained, but the general exemption should be increased significantly for all decedents."

<table>
<thead>
<tr>
<th>Statement</th>
<th>Practitioners</th>
<th>Professors</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Strongly Disagree</td>
<td>8.0%</td>
<td>8.3%</td>
</tr>
<tr>
<td>2. Disagree</td>
<td>15.2</td>
<td>30.6</td>
</tr>
<tr>
<td>3. Neither Agree nor Disagree</td>
<td>19.8</td>
<td>19.4</td>
</tr>
<tr>
<td>4. Agree</td>
<td>37.2</td>
<td>25.0</td>
</tr>
<tr>
<td>5. Strongly Agree</td>
<td>19.8</td>
<td>16.7</td>
</tr>
<tr>
<td>Average 1-5 ranking</td>
<td>3.46</td>
<td>3.11</td>
</tr>
</tbody>
</table>

At first blush, this statement would contradict the economic self-interest of the practitioners because a dramatically increased exemption would reduce the number of clients requiring tax planning. However, the survey revealed that the practitioners more strongly supported limiting transaction costs in this manner than the professors. Both liberal and conservative

\textsuperscript{68} See supra Figure 16 and text accompanying notes 51-53.
practitioners shared this conviction.\textsuperscript{69} Liberal professors were more likely to disagree with the statement.\textsuperscript{70}

Interestingly, in earlier questions on the TRA 1997 exemption increases, most practitioners predicted no decline in their professional services income.\textsuperscript{71} However, the difference may reflect a question of degree, and an increase in the exemption beyond the magnitude of TRA 1997 could have a greater impact. Accordingly, the questionnaire asked participants a follow-up question about the appropriate level of an exemption: "In your view, what should be the amount of the general exemption for the federal wealth transfer tax? \$\text{__________}\text{ }(Use \ a \ dollar \ exemption \ equivalent \ rather \ than \ a \ credit \ amount.)."

\textsuperscript{69} Of conservative practitioners, 55.86\% agreed with the statement. Of liberal practitioners, 58.18\% agreed with the statement. The overall rate was 56.90\%. A cross-tabulation of the practitioners' responses against their ages did not disclose a pattern. Of the practitioners aged 25 to 49, 54.72\% agreed with the statement compared with 56.90\% of the practitioners overall. Of those aged 50 to 90, 58.91\% agreed with the statement. A cross-tabulation disclosed that 54.39\% of those with a taxable estate and 60.18\% of those with a non-taxable estate agreed with the statement, compared with 56.90\% of the practitioners overall.

\textsuperscript{70} Of the liberal professors, 57.89\% disagreed with the statement while none of the conservative professors disagreed with the statement. Overall, political identification by the professors bears a moderately strong relationship to the responses (Spearman's correlation coefficient of 0.474 at a statistically significant level of 0.005). The responses of liberal professors produced a moderately weak degree of correlation at a non-statistically significant level (Spearman's correlation coefficient of 0.272 at 0.260 level of statistical significance). The responses of conservative professors produced a Spearman's correlation coefficient of 0.913 at a statistically significant 0.030. Of the professors aged 30 to 49, 46.15\% disagreed with the statement, compared with 38.9\% of the professors overall. Of the professors reporting a taxable estate, 43.75\% disagreed with the statement, while 25\% of those with a non-taxable estate disagreed with the statement.

\textsuperscript{71} See supra Figure 12 and text accompanying notes 43-44.
The average exemption proposed by the professors is slightly more than the $1 million that will take effect in the year 2006 under the TRA 1997 amendments. The practitioners proposed an exemption that is roughly 25% greater.

Estate tax returns filed in 1997 reveal that 96.22% of returns

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\[ \text{Mean Exemption} = \frac{1,508,125}{1,213,235} \]

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\[ \text{Mean Exemption} = \frac{1,508,125}{1,213,235} \]
represented gross estates under $5 million, and 88.8% of returns represented gross estates under $2.5 million. Of the nontaxable returns 97.74% revealed gross estates under $5 million, and 91.94% reflected gross estates under $2.5 million. Dramatically increasing the exemption would remove a number of estates from the system. Based on the returns filed in 1997, the net estate tax and generation-skipping transfer tax lost on taxable estates reporting a gross estate under $5 million would be more than $8.55 billion. That would leave $8.17 billion from taxable estates reporting a gross estate over $5,000,000. If the exemption were placed at $2.5 million, the net estate and generation-skipping transfer taxes lost would be $5.13 billion.

Perhaps the responding practitioners suggested exemption levels slightly below the wealth level of their typical client with the idea that exemption increases would then have little effect on their professional services income. The survey appears to support that explanation. Practitioners reported that the average net worth of typical clients was $2,234,192. The average practitioners’ proposed exemption is $1,508,125. I also cross-tabulated the responses for the net worth of a typical client with the size of the proposed exemption. This cross-tabulation revealed that 115 (49%) of the 234 practitioners responding to this question proposed an exemption below the net worth level of their typical client.

Statement 6 “The federal wealth transfer tax should be strengthened further, eliminating loopholes and increasing its coverage.”

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75 See id.
76 See id.
77 See Johnson & Mikow, supra note 74, at 108.
78 See supra Figure 8 and text accompanying note 36.
Table

<table>
<thead>
<tr>
<th></th>
<th>Practitioners</th>
<th>Professors</th>
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<tbody>
<tr>
<td>1. Strongly Disagree</td>
<td>33.3%</td>
<td>25%</td>
</tr>
<tr>
<td>2. Disagree</td>
<td>38.3</td>
<td>19.4</td>
</tr>
<tr>
<td>3. Neither Agree nor Disagree</td>
<td>12.9</td>
<td>11.1</td>
</tr>
<tr>
<td>4. Agree</td>
<td>14.2</td>
<td>25.1</td>
</tr>
<tr>
<td>5. Strongly Agree</td>
<td>1.3</td>
<td>19.4</td>
</tr>
<tr>
<td>Average 1-5 ranking</td>
<td>2.12</td>
<td>2.94</td>
</tr>
</tbody>
</table>

More than 70% of practitioners disagreed with this statement, while 44% of the professors disagreed. Some scholarly writing provides support for this statement.79 Liberal practitioners more strongly agreed with the statement.80 Likewise, liberal professors more strongly agreed with the statement.81

79 "Perhaps, the discussion of estate taxation might be focused more suitably on how to clamp down on tax evaders and tax avoidance and on how to restore some sense of fairness to the U.S. tax system." Edward N. Wolff, Commentary, Colloquium on Wealth Transfer Taxation, 51 TAX L. REV. 517, 521 (1996). See also Mark L. Ascher, Curtailing Inherited Wealth, 89 MICH. L. REV. 69, 73-74 (1990) (proposing the confiscation of all but a modest inheritance).

80 In cross-tabulating with political identification, 11.61% of conservative practitioners agreed with the statement, while 21.82% of the liberal practitioners agreed with the statement. A Spearman’s correlation of political identification and responses to the question produced a moderately weak -0.223 correlation coefficient at a statistically significant 0.001. The responses of liberal practitioners produced a Spearman’s correlation coefficient of 0.268 at a statistically significant level 0.047. A cross-tabulation of the practitioners’ responses against their ages did not disclose a pattern. Of the practitioners aged 25 to 49, 70.75% disagreed with the statement compared with 71.6% of the practitioners overall. In the same age group, 16.04% agreed with the statement compared with 15.5% overall. Of the practitioners reporting a taxable estate, 13.04% agreed with the statement. Of those with a non-taxable estate, 15.65% agreed with the statement compared with 15.5% overall.

81 Of liberal professors, 52.63% agreed with the statement while none of the conservative professors agreed with the statement. Overall, this produced a moderately strong Spearman’s correlation coefficient of -0.509 at a statistically significant level of 0.002. Focusing on liberal professors produced a Spearman’s correlation coefficient of -0.298, but it also disclosed a non-statistically significant level of 0.215. In both of these cases the correlation is negative, because political identification is ranked on a 1-5 scale, from liberal to conservative. Agreement is ranked on a 1-5 scale, from disagreement to agreement. So a very liberal professor with a strong agreement would juxtapose a “1”
Statement 7 "The QTIP election in application often promotes gender bias against females."\textsuperscript{82}

<table>
<thead>
<tr>
<th>Figure 23</th>
<th>Practitioners</th>
<th>Professors</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Strongly Disagree</td>
<td>24.9%</td>
<td>27.8%</td>
</tr>
<tr>
<td>2. Disagree</td>
<td>34.8</td>
<td>25.0</td>
</tr>
<tr>
<td>3. Neither Agree nor Disagree</td>
<td>24.9</td>
<td>25.0</td>
</tr>
<tr>
<td>4. Agree</td>
<td>13.7</td>
<td>11.1</td>
</tr>
<tr>
<td>5. Strongly Agree</td>
<td>1.7</td>
<td>11.1</td>
</tr>
<tr>
<td>Average 1-5 ranking</td>
<td>2.32</td>
<td>2.53</td>
</tr>
</tbody>
</table>

Practitioners did not strongly concur with this statement. The lack of agreement may reflect the preponderance of male respondents. Only 11.4% of the practitioners and 13.5% of the professors were females.\textsuperscript{83}

In a cross-tabulation of gender against responses to this statement, 14.08% of male practitioners agreed with the proposition, and 11.11% of female practitioners agreed with it. Only 1.41% of male practitioners strongly agreed with the statement, and 3.70% of female practitioner against a "5," creating a negative correlation. Cases that fall between such extremes can create apparently spurious or inconclusive results due to the imprecision of the simple scaling. \textit{See supra} note 52. Of the professors aged 30 to 49, 23% agreed with the statement, while 56.52% of the professors aged 50 to 80 agreed with the statement. Comparing age with political identification disclosed that 66.67% of the professors aged 30 to 49 identified themselves as politically liberal, while 47.83% of those aged 50 to 80 identified themselves as liberal. Therefore, the difference in the age groups' reactions to the statement apparently is not because the older professors are more liberal. Of the professors with taxable estates, 62.5% agreed with the statement, while only 25% of those with non-taxable estates agreed with the statement.

\textsuperscript{82} This statement is a detour from the principal theme of this Article. I included it because of recent commentary on this issue. \textit{See}, e.g., Joseph M. Dodge, \textit{A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction}, 76 N.C. L. REV. 1729 (1998); Wendy C. Gerzog, \textit{The Illogical and Sexist QTIP Provisions: I Just Can't Say It Ain't So}, 76 N.C. L. REV. 1597 (1998); Wendy C. Gerzog, \textit{The Marital Deduction QTIP Provisions: Illogical and Degrading to Women}, 5 UCLA WOMEN'S L.J. 301 (1995).

\textsuperscript{83} \textit{See supra} Figure 4 and text accompanying note 33.
strongly agreed with the statement. Among professors, 9.68% of male professors agreed with the statement, and 20% of female professors agreed with the statement. Of male professors, 6.45% strongly agreed with the statement, and 40% of female professors strongly agreed.

A cross-tabulation of responses against political identification disclosed that 15.18% of conservative practitioners agreed with Statement 7, compared with the overall 15.40% agreement, although 20% of liberal practitioners agreed with the statement. Among liberal professors, 31.58% agreed with Statement 7 compared with 22.2% overall. None of the conservative professors agreed with the statement.

Of the seven statements, practitioners and professors expressed the most support for retaining the system, but increasing the amount of the exemption. The average 1-5 ranking of practitioners was 3.46. For professors, it was 3.11. Practitioners were highly enthusiastic about this proposal. The Economic Recovery Tax Act of 1981 increased exemptions, which some predicted would reduce the percentage of decedents with taxable estates from 2.8% to 0.3%. The TRA 1997 also increased exemptions. For practitioners, increasing exemptions permits the wealth transfer taxation system, and their livelihood, to continue relatively unaffected. From a political standpoint, exemption increases

84 See supra Figure 20 and text accompanying notes 69-71.

85 The Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (codified as amended in scattered sections of 26 U.S.C.) amended I.R.C. § 2001 to reduce the top marginal transfer tax rate from 70% to 50%. The legislation also amended I.R.C. § 2010 to increase the unified credit from $47,000 (an exclusion amount of $175,625) in steps ultimately to $192,800 (an exclusion amount of $600,000), amended I.R.C. § 2056 (and the companion gift tax provision, I.R.C. § 2523) to provide for an unlimited marital deduction between spouses, and amended I.R.C. § 2503 to increase the annual gift exclusion from $3,000 to $10,000. For an explanation of the legislation see Gutman, supra note 2.

86 See Gutman, supra note 2, at 1207-08.

87 TRA 1997 amended I.R.C. § 2010 to include a phased-in increase in the “applicable credit amount” such that the exclusion for the estate of a decedent dying, and gifts made, during 2006 or thereafter will reach $1,000,000. In addition, for years after 2007 the $1,000,000 amount is subject to increase by a cost-of-living adjustment. See I.R.C. § 2010(c). TRA 1997 also amended I.R.C. §§ 2032A (valuation of farm and other property), 2503(b) (the $10,000 annual gift exclusion), and 2631 (the $1,000,000 generation skipping transfer tax exemption) to include continuing adjustments to reflect cost-of-living increases occurring after 1997.
would probably relieve some of the pressure to repeal the system.\(^8\) On the other hand, practitioners suggested an average proposed exemption of $1.5 million, which is only 25% greater than the $1.2 million mark set by the professors who do not have the same financial stake in perpetuating wealth transfer taxes.

3. Alternatives to the Current System

The first seven statements dealt with changing the existing system, thus preserving the system's fundamental approach. However, critics have proposed several forms of replacement. Accordingly, several statements in the survey addressed alternatives.

**Statement 8** “The federal wealth transfer tax should be abolished, even if any revenue loss were replaced by an increase in the upper marginal income tax rates.”

<table>
<thead>
<tr>
<th>Figure 24</th>
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<tr>
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<tr>
<td><strong>Practitioners</strong></td>
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<tr>
<td>---------------------</td>
</tr>
<tr>
<td>1. Strongly Disagree</td>
</tr>
<tr>
<td>2. Disagree</td>
</tr>
<tr>
<td>3. Neither Agree nor Disagree</td>
</tr>
<tr>
<td>4. Agree</td>
</tr>
<tr>
<td>5. Strongly Agree</td>
</tr>
<tr>
<td><strong>Average 1-5 ranking</strong></td>
</tr>
</tbody>
</table>

The professors favored this proposal slightly more than practitioners. Conservative practitioners\(^8\) and professors\(^9\) more strongly supported the

---

\(^8\) Some critics view the TRA 1997 increases in the unified credit as only a “down payment,” and they seek further liberalization, or repeal. See sources cited *supra* note 4.

\(^9\) In a cross-tabulation of the responses with political identification, 35.71% of the conservative practitioners agreed with the statement, while 12.73% of liberal practitioners agreed with the statement. Overall, a Spearman's correlation coefficient of responses with political identification was a moderately weak 0.208 at a statistically significant 0.001 level.
Muddling Along With the Federal Wealth Transfer Tax

statement.

This simple alternative to increase income tax rates would probably burden the same group that is subject to the wealth transfer tax. However, although estimates vary, higher income tax rates could be a greater impediment to entrepreneurial activity than wealth transfer taxes, which are discounted, subject to repeal or increased exemptions, and levied only once.91

Statement 9 “The federal wealth transfer tax should be eliminated, replaced by inclusion of gifts and inheritances in taxable income.”

90 See Wayne M. Gazur, Congressional Diversions: Legislative Responses to the Estate Valuation Freeze, 24 U.S.F. L. Rev. 95, 104 nn.52-53 (1989) (summarizing commentary on the income tax versus wealth transfer tax effect on incentives). See also PATRICK FLEENOR & J.D. FOSTER, AN ANALYSIS OF THE DISINCENTIVE EFFECTS OF THE ESTATE TAX ON ENTREPRENEURSHIP 17 (Tax Foundation 1994) (“The various simulations conducted using the model developed in this paper showed that the estate tax has roughly the same effect on entrepreneurial incentives as a doubling of income tax rates.”).
At one time, this proposal received a substantial amount of scholarly attention. The professors' responses indicated some of that interest, but only 25% agreed with the statement. The practitioners are not enthusiastic about this statement.

Statement 10 "I would support the elimination of the federal wealth transfer tax even if the trade-off were implementation of some form of carryover basis (e.g., repeal of I.R.C. § 1014) or taxation of accrued gains at death."

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93 Of the professors aged 30 to 49, 23.08% agreed with the statement. Of the professors aged 50 to 80, 26.09% agreed with the statement. Of the liberal professors, 21.05% agreed with the statement, while 20% of the conservative professors agreed with the statement. Of the professors with a taxable estate, 12.50% agreed with the statement, while 37.50% of those with a non-taxable estate agreed with the statement.

94 Of practitioners aged 25 to 49, 87.74% disagreed with the statement compared with 83.7% of the practitioners overall. In the same age group, 1.89% agreed compared with 5.9% overall. Cross-tabulating the responses with political identification disclosed that 3.6% of conservative practitioners agreed with the statement, while 1.85% of liberal practitioners agreed with the statement. Of practitioners with a taxable estate, 6.9% agreed with the statement, and 5.3% of those with a non-taxable estate agreed with the statement.
Although some scholars have embraced this approach, the numbers no longer support the claim that the bulk of federal wealth transfer tax revenues could be replaced by the adoption of carryover basis for decedents. In 1999 the estimated revenue loss due to the section 1014 “step-up in basis” rule is nearly $9.5 billion, while the 1996 federal estate and gift tax collections totaled nearly $17.2 billion. In comparison, federal estate and gift tax receipts were $7.2 billion in 1986, while the revenue loss from the step-up in basis at death was $4.9 billion.

The practitioners were less supportive than the professors.

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96 Tax Expenditures Chapter, supra note 11, at 925 tbl.5-3.

97 See STATISTICAL ABSTRACT OF THE UNITED STATES, supra note 10, at 347 tbl. 551.


100 A cross-tabulation of the practitioners’ responses against their ages disclosed that younger practitioners were more inclined to favor this statement. Of practitioners aged 25 to 49, 53.77% disagreed with the statement compared with 58.7% of the practitioners overall. In the same age group, 28.3% agreed with the statement compared with 24% of the practitioners overall. A cross-tabulation of the responses to political identification disclosed that 28.57% of conservative practitioners agreed with the statement, while 16.36% of liberal practitioners agreed with the statement. A cross-tabulation of the responses against personal estate tax concerns revealed that 26.72% of the practitioners reporting a taxable estate
Statement 11 “The federal wealth transfer tax should be replaced with a consumption-based tax.”

<table>
<thead>
<tr>
<th>Figure 27</th>
<th>Practitioners</th>
<th>Professors</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Strongly Disagree</td>
<td>29.3%</td>
<td>42.8%</td>
</tr>
<tr>
<td>2. Disagree</td>
<td>29.3</td>
<td>34.3</td>
</tr>
<tr>
<td>3. Neither Agree nor Disagree</td>
<td>18.4</td>
<td>14.3</td>
</tr>
<tr>
<td>4. Agree</td>
<td>14.6</td>
<td>2.9</td>
</tr>
<tr>
<td>5. Strongly Agree</td>
<td>8.4</td>
<td>5.7</td>
</tr>
<tr>
<td>Average 1-5 ranking</td>
<td>2.44</td>
<td>1.94</td>
</tr>
</tbody>
</table>

Professor McCaffery is one noted scholar who has proposed a consumption tax as a substitute for the federal wealth transfer tax. More than 58% of the practitioners disagreed with this statement. An overwhelming 77% of the professors also disagreed with the statement,

agreed with the statement, while 24.56% of those reporting a non-taxable estate agreed with the statement. Note that individuals with a non-taxable estate get the best of both worlds under the present system, that is (1) the section 1014 basis adjustment for income tax purposes and (2) freedom from the federal wealth transfer tax.

Of the professors aged 30 to 49, 38.46% agreed with the statement, and 43.48% of the professors aged 50 to 80 agreed with the statement. Of liberal professors, 47.37% agreed with the statement, while 60% of conservative professors agreed with the statement. Of those professors with a taxable estate, 18.75% agreed with the statement, while 68.75% of those with a non-taxable estate agreed with the statement.

Cross-tabulating for political identification, 32.14% of conservative practitioners agreed with the statement, and 10.91% of liberal practitioners agreed with the statement. Overall, the relationship between political outlook and approval of the statement was moderately weak with a Spearman’s correlation coefficient of 0.208 at a statistically significant level of 0.001. A cross-tabulation of the practitioners’ responses against their ages disclosed that older practitioners were slightly more in favor of this statement. Of practitioners aged 50 to 100, 26.52% agreed with the statement compared with 23.0% of the practitioners overall. Of practitioners reporting a taxable estate, 26.55% agreed with the statement, while 19.13% of those reporting a non-taxable estate agreed with the statement.
Comparing the results, more practitioners supported the proposal in Statement 11 to replace wealth transfer taxes with a consumption-based tax, than the proposal in Statement 9 to include wealth transfers in taxable income. Roughly the same number of practitioners that agreed with Statement 11 agreed with the proposal in Statement 10 to adopt carryover basis. Professors agreed with Statement 10 the most. Statement 11 was clearly their least favorite option.

**Statement 12** “If a consumption-based tax were adopted, it should incorporate a progressive rate structure.”

<table>
<thead>
<tr>
<th>Figure 28</th>
<th>Practitioners</th>
<th>Professors</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Strongly Disagree</td>
<td>22.4%</td>
<td>11.1%</td>
</tr>
<tr>
<td>2. Disagree</td>
<td>22.8</td>
<td>2.8</td>
</tr>
<tr>
<td>3. Neither Agree nor Disagree</td>
<td>27.8</td>
<td>16.7</td>
</tr>
<tr>
<td>4. Agree</td>
<td>20.7</td>
<td>36.1</td>
</tr>
<tr>
<td>5. Strongly Agree</td>
<td>6.3</td>
<td>33.3</td>
</tr>
<tr>
<td>Average 1-5 ranking</td>
<td>2.66</td>
<td>3.78</td>
</tr>
</tbody>
</table>

Among conservative practitioners, 15.32% agreed with the statement, while 47.27% of liberal practitioners agreed with the statement.  105 The law
professors emphatically favored a progressive tax rate structure, with 84.21% of liberal professors agreeing with the statement.\textsuperscript{106}

In summary of the responses to the alternatives to the current system, the professors most favored Statement 10, which provided for carryover basis, or taxation of gains at death. The average 1-5 ranking on this issue for practitioners was 2.47. For professors, it was 3.0.\textsuperscript{107} The practitioners slightly favored Statement 8, which provided for an increase in upper marginal income tax rates. Notably, this was also the second most favored statement by professors. The average 1-5 ranking for practitioners was 2.53. For professors, it was 2.61.\textsuperscript{108}

Comparing the proposals to replace the system with the proposals to modify the system, the proposal in Statement 5 to increase the general exemption won the highest level of approval from practitioners and tied the highest level for professors.\textsuperscript{109} The average 1-5 ranking for practitioners was 3.46. For professors, it was 3.11. Because the practitioners' practices would be largely unaffected, and the professors cannot agree on other alternatives, adjusting the status quo appears to be the prevailing view.

\textsuperscript{106} Professor McCaffery's consumption tax proposal "could feature progressive marginal rates."  See McCaffery, Estate Tax Reform, supra note 102, at 124. Of conservative professors, 20% agreed with the statement. The Spearman's correlation coefficient for the responses of all professors against their political identification produced a moderately strong correlation of -0.580 at a statistically significant 0.000. The Spearman's correlation coefficient for liberal professors' answers was a -0.315 correlation coefficient at a non-statistically significant level of 0.188. No age-related pattern appeared to result. Of the professors aged 30 to 49, 76.92% agreed with the statement, while 65.22% of the professors aged 50 to 80 agreed with the statement. Of those professors with a taxable estate, 81.25% agreed with the statement, and 62.50% of those with a non-taxable estate agreed with the statement.

\textsuperscript{107} See supra Figure 26 and text accompanying notes 95-99. This support for enactment of a carryover basis solution was echoed by the 106th Congress. In that regard the 1999 Act vetoed by President Clinton on September 23, 1999 would have adopted a modified carryover basis regime to supplant the wealth transfer taxes effective for years following December 31, 2008. See supra note 4 for a brief description of the legislation.

\textsuperscript{108} See supra Figure 24 and text accompanying notes 89-91.

\textsuperscript{109} See supra Figure 20 and text accompanying notes 69-71. The professors gave the same approval ranking of 3.11 to Statement 2, which was that the federal wealth transfer tax should be abolished because the costs of administration and taxpayer compliance exceed revenue. See supra Figure 17 and text accompanying notes 54-59.
The incrementalism proposal is not profound or new. Legislative behavior in the federal wealth transfer tax area is incrementalist in nature.

If a pattern is discernible, it is one of patchwork amendments. . . . The frequent but largely technical tinkering with the statutory language may, in part, also be reflective of the legislative "incrementalism" best demonstrated by the income tax.

Incrementalism would also explain the tax reduction bias in recent legislation. . . .

If legislative incrementalism is a factor in wealth transfer taxation, fundamental changes to the wealth transfer taxation system may be too radical at this time . . . . The commentators who advocate incremental changes to the current system, an example being the American Bar Association proposals, have perhaps correctly appraised the political realities.10

C. Focusing on Family Businesses

Owners of family businesses, including family farms, have been extremely vocal in debates over federal wealth transfer taxes.11 These owners are appealing candidates for exemptions from wealth transfer taxes because they may not represent the entrenched, inherited wealth that the federal wealth transfer taxes system seems to target. In The Millionaire Next Door, the authors portray the typical millionaire as a hardworking, frugal, self-employed, small business owner who is the first generation to be wealthy.112 The authors argue that millionaires fit the following description: only 19% receive income or wealth from a trust fund or estate; fewer than 20% inherited 10% or more of their wealth; more than half did not inherit any wealth; fewer than 25% received $10,000 or more from parents, grandparents, or other relatives; 91% did not receive the ownership of a family business as a gift; and fewer than 10% believe they will inherit

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111 See sources cited supra note 8.
While these statistics portray millionaires as self-made, the statistics also suggest that the wealth transfer tax did not impair their success. Simply stated, an inheritance, including an inheritance of a family business, was not a factor in the creation of the typical millionaire’s successful business. The statistics on gifts of interests in the family business, coupled with other possible parental concerns, raise some questions about the dynamics of family business succession apart from the wealth transfer tax issues. Except for the argument that wealth transfer taxes sap the entrepreneurial desire of the first generation, the impassioned talk about saving family businesses actually may be about preserving family wealth for the next generation.

1. The Impact of Wealth Transfer Taxes on Family Businesses

Several statements and questions in the survey reflected opinions and perceptions of the impact of the federal wealth transfer tax on family businesses. Because practitioners are directly involved with planning issues across a broad spectrum of client circumstances, their opinions about these issues are particularly valuable.

Statement 13 “The federal wealth transfer tax is a significant obstacle to the continuation of family businesses.”

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113 See id. at 16.
114 Stanley and Danko contend that many business people want their children to become professionals, rather than carry on the family business. See id. at 235-37; infra text accompanying note 138.
115 See supra text accompanying note 51.
The practitioners, especially conservatives, expressed stronger support for this statement than the professors.\(^{116}\) Likewise, conservative professors expressed stronger support for this statement.\(^{117}\) The apparent relationship between the answers and political viewpoints is disturbing because it suggests that other objective questions in the survey may be affected. However, this result is not surprising because politics play a significant part in the debate. The popular press is a prime example.

More than 51% of the practitioners agreed with Statement 13 that the wealth transfer tax is a significant obstacle to the continuation of family businesses. Other studies have addressed this issue. For example, in March

\(^{116}\) Cross-tabulating the responses against political identification, 68.14% of the conservative and 33.33% of the liberal practitioners agreed with the statement. A Spearman’s correlation of the responses to political identification produced a moderately weak 0.302 correlation coefficient at a statistically significant 0.000. A cross-tabulation of the practitioners’ responses against their ages disclosed slightly more approval of this statement by younger practitioners. Of practitioners aged 25 to 49, 31.48% disagreed with the statement compared with 35.7% of the practitioners overall. In the same age group, 55.56% agreed with the statement compared with 51.1% of the practitioners overall. Of those practitioners reporting a taxable estate, 60.34% agreed with the statement, while 42.61% of those reporting a non-taxable estate agreed with the statement.

\(^{117}\) Of liberal professors, 21.05% agreed with the statement, while 80% of the five conservative professors agreed with the statement. For all professors, the responses produced a Spearman’s correlation to political identity of 0.408 at a statistically significant 0.017. Focusing only on liberal professors, the correlation was a moderately strong 0.519 at a statistically significant 0.023. Of the professors aged 30 to 49, 53.85% agreed with the statement, while 26.09% of those aged 50 to 80 agreed with the statement. Of the professors with a taxable estate, 18.75% agreed with the statement, while 50% of those with a non-taxable estate agreed with the statement.
and April of 1995, the Center for the Study of Taxation sponsored Travis Research Associates in a national mail survey of more than 2,500 family businesses. The survey asked participants to rank the potential impact of federal estate taxes on their business. The scale ranged from 1-10, and a 10 ranking indicated that the potential impact was a major concern. The participants gave the following rankings: 42% chose 10, 9% picked 9, 16% chose 8, 7% marked 7, 5% picked 6, 10% chose 5, 3% marked 3, 2% chose 2, and 3% indicated 1. The mean was 7.9. Of the 2,529 respondents, 426 also provided an estimate of the amount of federal estate tax that could be levied on their business. The mean amount was $2,300,000, and the median amount was $900,000.

In Statement 13, I used the phrase “significant obstacle” to describe the impact of the wealth transfer tax. To quantify the proportion of situations in which the wealth transfer tax would have such an effect, I also asked the following question: “In your experience, in what percentage of family business situations would the imposition of the federal wealth transfer tax have a significant effect on the long-term survival of the business (assuming the use of customary planning techniques such as life insurance, gifting, valuation discounts, etc.)?”

118 See TRAVIS RESEARCH ASSOC., CENTER FOR THE STUDY OF TAXATION, FEDERAL ESTATE TAX IMPACT SURVEY 3 (1995) [hereinafter IMPACT SURVEY]. The survey did not randomly select its subjects from all family businesses, but focused on several industry groups such as construction (33%), transportation (18%), and contractors (28%). See id. at 32.

119 See id. at 8-9.

120 See id. at 9.

121 The question for professors was slightly different. It began with the phrase “[a]s your estimate, in approximately what percentage . . . ”
I included the parenthetical about avoidance techniques for clarity, but it also indicates flaws in the system. Many people avoid wealth transfer taxes through creative planning. Professor Cooper’s planning tools are exotic examples,\(^{122}\) but the system practically demands gimmicks like the irrevocable life insurance trust or the “A-B trust” for married couples with barely more than $625,000 in assets. Those who propose a less elective tax, as well as those who deplore pointless transaction costs, can find fault with

\(^{122}\) See Cooper, supra note 29, at 161.
a system that encourages this kind of game-playing. Life insurance companies, estate planners, and charities drive the development of estate planning techniques. For example, in the estate tax survey sponsored by the Center for the Study of Taxation, the most common planning technique was the purchase of life insurance (62%), followed by the use of buy-sell agreements (39%), lifetime gifts of stock (28%), business restructuring or formation of family partnerships (20%), charitable bequests of interests in the family business (4%), and other techniques (9%).123 Of those businesses that had taken such steps, 62% of owners stated that they would not have done so if the estate tax did not exist.124

The results of my question about the impact of federal wealth transfer taxes on the long-term survival of family businesses is especially interesting in comparison to the results of a similar question in the survey by the Center for the Study of Taxation. The business owners in that survey answered the following question: "Taking into consideration [the steps taken to minimize the potential impact of the tax], what would be the likely effect of the federal estate tax on the long term survival of the family business after the death of the current principal owner(s)?" Only 10% responded that the tax would not affect the continuation of the business, 25% responded that the tax would make it slightly more difficult to continue, 51% said that it would make it significantly more difficult, and 14% answered that it would make it impossible.125 Accordingly, 65% responded that the tax would probably hurt their business or force them to close down.126

These surveys reveal a great disparity in perceptions of the effect the federal estate tax has on the survival of family businesses. In my survey, an average of 36% of practitioners thought that the system threatened the

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123 See IMPACT SURVEY, supra note 118, at 10-11. The percentage of respondents that took no planning steps was 19%.
124 See id.
125 See IMPACT SURVEY, supra note 118, at app. 3.
126 See IMPACT SURVEY, supra note 118, at 13.
127 See id. Thirty percent of family businesses in the Center for the Study of Taxation survey stated that they would likely have to sell all or part of the business to pay the estate taxes. See id. at 14. However, the Center prefaced the question with the following statement: "In many cases, estate taxes must be paid in cash, as soon as nine months after death." Id. at app. 3. By omitting a discussion of I.R.C. § 6166 installment payment plans, this question probably created the misperception that a fire sale would be required.
survival of family businesses, and 26% of the professors perceived a threat. Compare those percentages with the 65% estimate of the business owners in the Center for the Study of Taxation survey. Anecdotal evidence of this tax burden feeds the perception.\(^{128}\)

This difference in opinion is not unusual for this issue. The popular press and political debates are ripe with dire predictions and broad claims.

Karen Kerrigan of the Small Business Survival Committee estimates that 90 per cent of family businesses that close after the death of the founder do so because heirs cannot pay the estate tax without liquidating the business. That’s bad for everybody; 78 per cent of all new jobs created in the U.S. are spawned in family businesses, according to the Center for the Study of Taxation.\(^{129}\)

Some claims are somewhat misleading. One writer stated that: "[t]he Wall Street Journal reported on Aug. 4, 1988, that only 30 percent of family businesses survive the death of the founder. Failure to prepare qualified successor management, family squabbles and liquidity shortages caused by estate taxes contribute to this figure. Estate taxes continue to haunt the small business owner."\(^{130}\)

However, that Wall Street Journal article did not discuss the estate tax or even use the word "tax." The article is about family business succession and the struggles that parents face to decide which of the children should assume control of the family enterprise. The statistical discussion was merely the statement that "[o]nly about 30% of family businesses outlive their founders, usually for lack of planning. And with many founders of the large number of small companies started in the post-World War II boom now reaching retirement age, the question of succession is becoming more

\(^{128}\) See, e.g., Lee Berton, Enterprise, Inheritance Tax is Choking Successors to Family Firms—Removal of Estate-Tax Freeze Puts Big Burden on Small Business, WALL ST. J. Aug. 23, 1989 at B2 (giving the accounts of several family businesses facing large estate tax bills).


\(^{130}\) Tom Waters, Gifts Create Legacy and Protect Assets, DENV. BUS. J. May 9-15, 1997, at 18B. The estate tax often has a silver lining for someone. Mr. Waters is "a director of planned giving for Porter Care Hospitals-Centura Health." Id.
pressing."\textsuperscript{131}

While the estate tax is a concern, it is probably not the principal concern of the owners of closely held businesses. The \textit{Wall Street Journal} reported a survey by Nancy Bowman-Upton of Baylor University on the family succession issue.\textsuperscript{132} She found that 31\% of business owners were most concerned about treating all children fairly. Other concerns included the reaction of non-family employees (22\%); family communication conflict (20\%); and estate taxes (20\%).

Family business owners probably feel a level of apprehension about the impact of wealth transfer taxes that is unfounded in light of the actual impact of taxes. This misperception may drive unneeded planning and the emotional movement to repeal wealth transfer taxes. The Center for the Study of Taxation asked its survey participants the following question: "To date, has there been the death of a family owner that has adversely affected the business due to the imposition of estate taxes?"\textsuperscript{133} Surprisingly, only 7\% responded "yes."\textsuperscript{134} That is a dramatic result considering the dire predictions about the effect of estate taxes in other survey responses. Moreover, the question asked only whether businesses had been "adversely affected," which is mild language compared with terms like impossibility, devastating, or confiscatory.\textsuperscript{135} Arguably, any tax paid is an adverse result.

Of the family businesses responding, 51\% were the first generation. Thus, they probably had not dealt with the issue yet. However, the remaining 49\% of respondents included 31\% who were second generation, 15\% who were third generation, and 3\% who were fourth generation.\textsuperscript{136}

\textsuperscript{133} \textit{IMPACT SURVEY}, supra note 118, at app. 3.
\textsuperscript{134} See \textit{id.} at 17.
\textsuperscript{135} See \textit{id.} at app. 3.
\textsuperscript{136} See \textit{id.} at 25.
2. The Role of Non-Tax Factors in the Continuation of the Family Business

I included one question in the survey to address the ability or interest of the next generation to continue the family businesses. Practitioners and professors responded to the following question: "In your experience, in what percentage of family business situations do members of the next generation have the interest and aptitude to continue operating the business?"

<table>
<thead>
<tr>
<th>Family Businesses with the Next Generation's Interest</th>
<th>Practitioners</th>
<th>Professors</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-5%</td>
<td>1.7%</td>
<td>3.0%</td>
</tr>
<tr>
<td>6-10</td>
<td>5.4</td>
<td>0.0</td>
</tr>
<tr>
<td>11-15</td>
<td>1.3</td>
<td>0.0</td>
</tr>
<tr>
<td>16-20</td>
<td>7.5</td>
<td>15.2</td>
</tr>
<tr>
<td>21-25</td>
<td>11.7</td>
<td>3.0</td>
</tr>
<tr>
<td>26-30</td>
<td>7.9</td>
<td>12.1</td>
</tr>
<tr>
<td>31-35</td>
<td>6.3</td>
<td>6.1</td>
</tr>
<tr>
<td>36-40</td>
<td>10.8</td>
<td>18.2</td>
</tr>
<tr>
<td>41-45</td>
<td>0.4</td>
<td>0.0</td>
</tr>
<tr>
<td>46-50</td>
<td>31.3</td>
<td>27.2</td>
</tr>
<tr>
<td>51-55</td>
<td>0.8</td>
<td>0.0</td>
</tr>
<tr>
<td>56-60</td>
<td>3.3</td>
<td>6.1</td>
</tr>
<tr>
<td>61-65</td>
<td>1.3</td>
<td>0.0</td>
</tr>
<tr>
<td>66-70</td>
<td>3.3</td>
<td>0.0</td>
</tr>
<tr>
<td>71-75</td>
<td>2.9</td>
<td>3.0</td>
</tr>
<tr>
<td>76-80</td>
<td>2.9</td>
<td>0.0</td>
</tr>
<tr>
<td>81-85</td>
<td>0.4</td>
<td>6.1</td>
</tr>
<tr>
<td>86-90</td>
<td>0.8</td>
<td>0.0</td>
</tr>
<tr>
<td>Mean Percentage of Family Businesses</td>
<td>39.12%</td>
<td>39.65%</td>
</tr>
</tbody>
</table>
I designed this question to address the role of other non-tax factors in the longevity of family businesses. The responses were consistent with the widely varied results of the survey's other questions about the impact of the estate tax on the continuation of the family businesses. The survey results suggest that the younger generation's lack of interest is the primary reason many family businesses fail to continue into subsequent generations.

In commenting on studies that show that only 35% of family businesses survived through the second generation and only 20% remained successful in the third generation, an attorney with over thirty years' experience in estate planning observed that:

Much of this has to be laid at the doorstep of the managerial skills of the second generation of management. But from the writer's personal observations, this low rate is due even more to the lack of drive in the second generation of managers to succeed, coupled with their desire to consume the financial assets of the business. . . . There is also the matter of the "trapped child." This is the member of the second generation who is primarily in the business to please his or her parents and has no commitment beyond that objective.

The Center for the Study of Taxation asked respondents in its survey whether the next generation was interested in continuing to operate the family business. An overwhelming majority, 73% answered that the next generation was interested. This percentage is much higher than the 39% estimate of both practitioners and professors in my survey.

Compare the anecdotal observations in The Millionaire Next Door.

If you're like most successful business owners, you will advise [the children] to become professionals. So it is with the affluent in

137 Compare this percentage to the results in Figure 31, which indicates a mean of 39%.
138 Stephen B. Hill, How to Succeed at Estate Planning Without Destroying the Business and/or the Family, PRAC. TAX LAW, Winter 1998, at 5, 7. In the survey conducted by Nancy Bowman-Upton of Baylor University that was reported in the Wall Street Journal, children most often gave the following reasons for entering family business: make money-67%; like the business-50%; good career opportunity-43%; family influence-40%; and help family-39%. See Emshwiller, supra note 132, at B1.
139 See IMPACT STUDY, supra note 118, at app. 3.
America. The first-generation affluent are typically entrepreneurs. They beat the odds. Their businesses succeed, and they become affluent....

Their children will have it better. They will not have to take significant risks. They will be well educated. They will become physicians, attorneys, and accountants.¹⁴⁰

Some participants in the wealth transfer tax debate have an exaggerated perception of the overall impact of the federal wealth transfer taxes on family businesses. Therefore, I asked both the practitioners and professors the following question: “As your estimate, what percentage of gross estates (in which a federal estate tax return is filed) is represented by family farms or closely-held businesses?” Additionally, the practitioners answered the following question: “What percentage of the gross estates (in which a federal estate tax return is filed) of your clients is typically represented by family farms or closely-held businesses?”

<table>
<thead>
<tr>
<th>Family Farm or Closely Held Business Clients</th>
<th>Figure 32</th>
<th>Practitioners</th>
<th>Professors</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Taxpayer Estates Overall</td>
<td>Their Own Clients' Estates</td>
<td></td>
</tr>
<tr>
<td>0-5%</td>
<td>12.6%</td>
<td>16.5%</td>
<td>5.9%</td>
</tr>
<tr>
<td>6-10</td>
<td>18.6%</td>
<td>11.4%</td>
<td>29.4%</td>
</tr>
<tr>
<td>11-20</td>
<td>19.9%</td>
<td>8.9%</td>
<td>23.5%</td>
</tr>
<tr>
<td>21-30</td>
<td>16.0%</td>
<td>14.8%</td>
<td>20.6%</td>
</tr>
<tr>
<td>31-40</td>
<td>13.4%</td>
<td>15.7%</td>
<td>5.9%</td>
</tr>
<tr>
<td>41-50</td>
<td>10.0%</td>
<td>10.2%</td>
<td>11.8%</td>
</tr>
<tr>
<td>51-70</td>
<td>5.2%</td>
<td>11.9%</td>
<td>0.0%</td>
</tr>
<tr>
<td>71-80</td>
<td>3.0%</td>
<td>5.5%</td>
<td>2.9%</td>
</tr>
<tr>
<td>81-90</td>
<td>0.4%</td>
<td>3.0%</td>
<td>0.0%</td>
</tr>
<tr>
<td>91-100</td>
<td>0.9%</td>
<td>2.1%</td>
<td>0.0%</td>
</tr>
<tr>
<td>Mean Percentage of Gross Estates</td>
<td>24.90%</td>
<td>32.58%</td>
<td>21.06%</td>
</tr>
</tbody>
</table>

¹⁴⁰ STANLEY & DANKO, supra note 112, at 235-37.
Based on 1997 estate tax returns, about 8% of the gross assets in taxable estates are comprised of family farms and small businesses.\textsuperscript{141} Practitioners in this survey may deal with more family farms and small businesses than the overall statistics suggest. Nevertheless, the practitioners and professors overstated the overall impact of family businesses on the estate planning practice by at least 230% to 280%.

This kind of overstatement can influence the debate over wealth transfer taxes. For example, Harry Gutman argued that the loud complaints of the family business and farm lobbies during the deliberations over the Economic Recovery Tax Act of 1981 tended to bubble over into the larger debate.\textsuperscript{142} He believed politicians used the ordeals of the family business to generate larger exemptions for all estates. In that regard, the current debate is focused on the complete repeal of wealth transfer taxes and the rest of the Internal Revenue Code, rather than exemptions crafted to meet the family business concerns.\textsuperscript{143} Ironically, the relatively small stake of family businesses in the total wealth transfer tax picture, compared to the volume of criticism, makes additional exemptions for family businesses a pragmatic political solution. Accordingly, I designed several questions of the survey to address proposals for a special exemption for family businesses.

3. Proposing an Exemption for Family Businesses

Statement 14 “I would support an expanded exemption for family businesses, preserving, however, the estate tax for other types of assets.”

\textsuperscript{141} Noncorporate business assets were $705,585,000 for taxable returns, and farm assets were $255,875,000 for taxable returns. Closely held stock assets were $6,901,834,000. These assets totaled $7,863,294,000. This calculation omits the category of limited partnerships that could include some family business assets, which was worth $1,961,061,000. On the other hand, the estimate ignores $2,933,932,000 in debts and mortgages, some of which could pertain to (and decrease) noncorporate business assets. Compared with the taxable estate amount for taxable returns of $89,035,200,000, the percentage of the small business and farm assets would be 8.83%. If one made the comparison to gross assets of taxable estates, which was $97,650,463,000, the percentage of small business and farm assets would be 8.05%. Johnson & Mikow, \textit{supra} note 74, at 103-108.

\textsuperscript{142} See Gutman, \textit{supra} note 2, at 1197-1202.

\textsuperscript{143} See sources cited \textit{supra} note 4.
The practitioners were almost equally divided in their responses to this statement. However, the professors were not enthusiastic about the creation of additional subsidies for specific businesses or assets, and only 14.7% agreed with the statement.

As a related inquiry, the survey included the following question: "The Taxpayer Relief Act of 1997 creates an additional exemption under newly

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144 Of practitioners aged 25 to 49, 40.95% disagreed with the statement compared with 44.5% of practitioners overall. In the same age group, 43.81% agreed with the statement compared with 40.3% of practitioners overall. Cross-tabulating for political identification, 39.09% of conservative practitioners and 46.3% of liberal practitioners agreed with the statement. Although support for an exemption by liberal practitioners appears counter-intuitive, an explanation may be that the other portion of the question called for retention of the wealth transfer taxes. In other words, the liberals' enthusiasm for retaining the system may explain their unexpected support for an expanded exemption for family businesses. Of practitioners reporting a taxable estate, 36.52% agreed with the statement, and 44.25% reporting a non-taxable estate agreed with the statement.


146 Of the professors age 30-49, 25% agreed with the statement, and 9.09% of the professors aged 50 to 80 agreed with the statement. Of the liberal professors, 17.65% agreed with the statement, while 40% of the conservative professors agreed with the statement. Of the professors with taxable estates, 6.25% agreed with the statement, while 20% of those with non-taxable estates agreed with the statement.
enacted I.R.C. § 2033A\textsuperscript{147} for family businesses in which at least 50% of the business is owned by the decedent and members of the decedent’s family (or 70% is owned by two families, or 90% is owned by three families). In your view, what should be the amount of that exemption?”

<table>
<thead>
<tr>
<th>Exemption Amount</th>
<th>Practitioners</th>
<th>Professors</th>
</tr>
</thead>
<tbody>
<tr>
<td>$ 0</td>
<td>18.5%</td>
<td>42.7%</td>
</tr>
<tr>
<td>1- 500,000</td>
<td>7.2</td>
<td>5.7</td>
</tr>
<tr>
<td>500,001-1,000,000</td>
<td>21.4</td>
<td>25.7</td>
</tr>
<tr>
<td>1,000,001-1,500,000</td>
<td>3.6</td>
<td>0.0</td>
</tr>
<tr>
<td>1,500,001-2,000,000</td>
<td>17.6</td>
<td>11.4</td>
</tr>
<tr>
<td>2,000,001-2,500,000</td>
<td>3.6</td>
<td>2.9</td>
</tr>
<tr>
<td>2,500,001-3,000,000</td>
<td>3.6</td>
<td>2.9</td>
</tr>
<tr>
<td>3,500,001-4,000,000</td>
<td>0.9</td>
<td>2.9</td>
</tr>
<tr>
<td>4,000,001-4,500,000</td>
<td>0.5</td>
<td>0.0</td>
</tr>
<tr>
<td>4,500,001-5,000,000</td>
<td>11.3</td>
<td>2.9</td>
</tr>
<tr>
<td>5,500,001-6,000,000</td>
<td>0.5</td>
<td>0.0</td>
</tr>
<tr>
<td>6,500,000-7,000,000</td>
<td>0.9</td>
<td>0.0</td>
</tr>
<tr>
<td>7,000,001-7,500,000</td>
<td>0.5</td>
<td>0.0</td>
</tr>
<tr>
<td>9,500,001-10,000,000</td>
<td>3.6</td>
<td>0.0</td>
</tr>
<tr>
<td>More than 10,500,000</td>
<td>1.8\textsuperscript{148}</td>
<td>0.0</td>
</tr>
<tr>
<td>Unlimited</td>
<td>4.5</td>
<td>2.9</td>
</tr>
</tbody>
</table>

| Mean Exemption\textsuperscript{149} | $2,798,349 | $816,176 |

\textsuperscript{147} The questionnaire referred to the former section 2033A. Congress has amended and redesignated this section as section 2057. See I.R.S. Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 6007, 112 Stat. 685, 807. Although the 1998 legislation made some technical changes to the statute, the changes do not affect the validity of the survey comments. See id.

\textsuperscript{148} The exemptions in excess of $10,500,000 were $15,000,000, $20,000,000, $25,000,000, $40,000,000, and $100,000,000.

\textsuperscript{149} The mean does not include the unlimited exemptions because those numbers are not ascertainable. Also, respondents apparently intended most of the unlimited exemptions as a call for abolition. However, that was not always the case. One participant wrote “$10,000,000 or unlimited.” That response was compiled as unlimited, but the context suggests that complete abolition of the system was not the goal. Another participant wrote “unlimited—as long as family continues to operate business for minimum period (i.e. 10 years).” If the computation does not include exemptions in excess of $10,500,000, the mean exemption is $1,890,625.
Muddling Along With the Federal Wealth Transfer Tax

Notably, almost half of the professors supported no exemption. Only a small percentage of practitioners and professors supported an unlimited exemption.

Practitioners and professors answered the following additional question: “If you were designing an exemption for family businesses, what ownership or participation criteria would you use? (circle all that apply.)

1. The newly enacted I.R.C. § 2033A parameters
2. Legal control of voting stock
3. Effective control of strategic directions
4. Founder’s descendant is CEO, director, or chair of the board
5. Other (specify) ____________________

<table>
<thead>
<tr>
<th>Ownership Criteria</th>
<th>Practitioners</th>
<th>Professors</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. I.R.C. § 2033A parameters</td>
<td>25.4%</td>
<td>23.7%</td>
</tr>
<tr>
<td>2. Legal control</td>
<td>25.4%</td>
<td>11.8%</td>
</tr>
<tr>
<td>3. Effective control</td>
<td>12.4%</td>
<td>8.8%</td>
</tr>
<tr>
<td>4. Founder’s descendant</td>
<td>2.2%</td>
<td>2.9%</td>
</tr>
<tr>
<td>6. Combinations of 1-4</td>
<td>19.8%</td>
<td>17.6%</td>
</tr>
<tr>
<td>7. I.R.C. § 6166 parameters</td>
<td>1.3%</td>
<td>0.0%</td>
</tr>
<tr>
<td>8. No exemption</td>
<td>5.3%</td>
<td>14.7%</td>
</tr>
<tr>
<td>9. Misc. other</td>
<td>8.2%</td>
<td>20.5%</td>
</tr>
</tbody>
</table>

Both practitioners and professors embraced the I.R.C. § 2033A parameters,\(^\text{151}\) which more clearly define measures of family control and

\(^{150}\) See I.R.C. § 6166 (West Supp. 1999) (establishing the ownership criteria of a closely held corporation that are necessary to qualify for the extension of time for an estate taxpayer).

\(^{151}\) Critics attacked this section from the outset. The recently enacted Sec. 2033A, which was seen by some as saving family owned businesses from the scourge of death taxes, is now, as individuals gain a better understanding of it, seen by many as window dressing . . . . In fact, several groups, including the American Bar Association’s Real Property and Probate Section, have called for repeal of section 2033A since its complex provisions make it applicable to only a few family-owned businesses and, even then, the
legal control of voting stock. The survey participants found effective control of strategic directions less appealing, and they did not like the option of the founder’s descendant as CEO.

The Code contains somewhat narrow definitions of closely held or family businesses in its exemption provisions. Essentially, the exemptions apply to closely held family businesses, rather than publicly held companies that a family controls. Furthermore, even if the business is closely held and not publicly traded, the exemption is limited. These exemptions are the product of political compromises that generally target the Main Street, rather than Wall Street, family businesses described in The Millionaire Next Door. For example, I.R.C. § 6166 requires 20% or more of the value of the voting stock in a corporation to be included in the value of the decedent’s gross estate, and the corporation must have fifteen or fewer shareholders. Recently enacted I.R.C. § 2057 (formerly I.R.C. § 2033A) requires the decedent and the decedent’s family to own no less than 30% or as much as 50% of the entity. It also expressly excludes stock that is “readily tradable on an established securities market or secondary market.”

In considering an exemption for family businesses, people may have an overly broad view of what constitutes a family business. For example,
14.6% of the practitioners would use effective control or the founder's descendant as a corporate functionary as a criterion for a family business exemption. Such a broad criterion could include numerically small, but controlling, stock positions in public companies, as well as family figureheads in control of public companies. Therefore, I included the following question to elicit perceptions about the boundaries of family businesses: "As your estimate, what percentage of publicly held companies are 'family' businesses (i.e., where a descendant of the founding family is a key officer, director, or owner, 4-5% or more of the voting stock is held by a family or group of families; inside and outside representation by the family on the board of directors)?"

<table>
<thead>
<tr>
<th>Public Companies that are Family Businesses</th>
<th>Practitioners</th>
<th>Professors</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-5%</td>
<td>41%</td>
<td>45.1%</td>
</tr>
<tr>
<td>6-10</td>
<td>24.3</td>
<td>19.4</td>
</tr>
<tr>
<td>11-20</td>
<td>16.8</td>
<td>22.6</td>
</tr>
<tr>
<td>21-30</td>
<td>4.6</td>
<td>9.7</td>
</tr>
<tr>
<td>31-40</td>
<td>3.5</td>
<td>3.2</td>
</tr>
<tr>
<td>41-50</td>
<td>4.6</td>
<td>0.0</td>
</tr>
<tr>
<td>51-70</td>
<td>2.3</td>
<td>0.0</td>
</tr>
<tr>
<td>71-80</td>
<td>2.9</td>
<td>0.0</td>
</tr>
<tr>
<td>Mean Percentage of Companies</td>
<td>13.66%</td>
<td>9.79%</td>
</tr>
</tbody>
</table>

In another study sponsored by the Center for the Study of Taxation, the authors used underlying studies to combine definitions of family.158 Using

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158 Joseph Astrachan & Melissa Carey, Family Businesses in the U.S. Economy 18 (unpublished presentation to the Center for the Study of Taxation on file with the author). One study defined a family business as one "that involved a member from at least the second generation who was a descendant of the founding family and who was a key officer, director or owner." Id. Another study defined family business as "one in which the CEO, President, or Chairperson is a descendant of the founding family." Id. A third study used "(1) 4-5% or more of the voting stock held by a family or group of families, or one affluent individual; (2) inside or outside representation on the part of the family on the board of directors, generally over a long period of time." Id.
those multiple criteria, they concluded that 37% of the 1992 Fortune 500 list and 21% of the Business Week 1000 list are family businesses. They also estimated that 60% of the 54,000 public companies identified by the National Association of Securities Dealers are under family control.

If these definitions and estimates are accurate, they indicate that both the survey practitioners and professors have vastly underestimated the extent of family ownership in public businesses. If Congress expands exemptions for family businesses, the focus must be on the meaning of family.

IV. OPEN-ENDED RESPONSES

I solicited general comments about the wealth transfer tax system so respondents could provide comments without the constraints of the survey format. Thirty-nine of the 250 practitioners and seven of the thirty-seven professors offered comments.

A. Bias

Practitioner number 005 stated that the questionnaire is "biased and one sided." Practitioner number 083 echoed that opinion and noted that many believe that Congress should abolish the system and not replace it with anything. This respondent argued that supply side economics suggests that eliminating the estate tax will cause more growth in the economy and increase income tax revenues accordingly. Therefore, no new or higher taxes are required.

The questions were compound by design. If the question asked about simple abolition without giving a reason or an alternative, the responses would not reveal as much. However, one question did reflect a supply side argument.161

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159 See id.
160 See id. at 19.
161 See supra text accompanying notes 60-63.
B. Abolition

Practitioner number 048 would abolish the wealth transfer tax by including gifts in the income tax base with five-year retroactive averaging, unless Congress adopts a flat tax. This respondent also advocated a deferred payment of income taxes, with interest, for sudden increases in wealth. Practitioner number 063 suggested eliminating the transfer tax and the section 1014 basis adjustment. Additionally, this practitioner thought the system should subject gifted and inherited property to a long-term capital gains tax at 150% of the standard capital gains rate. Several practitioners, including numbers 038, 087, 118, and 120, responded that they would abolish the tax or limit it to large estates by reducing the maximum rate. The majority of respondents that provided comments would abolish or otherwise change the system, although some wrote in favor of the system in wealth distribution terms.

C. Modifications

Several practitioners, including numbers 035 and 180, proposed a transferable unified credit to avoid the need for family trusts. Few commentors were happy about the current system, although changes that eliminate or further reduce wealth transfer taxes could endanger their livelihoods. Practitioner number 194 summed up a lot of the frustration that was evident in other answers:

I think we have all the clever and able people on the wrong side of the tax planning issue. Most tax lawyers I know are smart, honest people. I think it is a real tragedy in the United States that we have all these smart tax lawyers devoting all this fabulous energy and ingenuity into saving taxes. Can you imagine how wonderful it would be if we could somehow shift all this brilliant creative energy over to the other side of the equation and had these clever people trying to figure out how to spend the money we raise from taxes instead of the professional lobbyists, bureaucrats, and idiots who get themselves elected to Congress by “buying votes” through new deficit financed social welfare give-aways.

Most professors expressed comments about changing the system, but
stopped short of saying they wanted to abolish it. Some expressed the sentiment that Congress should fix, or even abolish, the system to give serious attention to taxing transferred wealth. Others made lists of specific changes, such as increasing exemptions or eliminating *Crummey*

**V. CONCLUSIONS**

A. Transaction Costs and Incremental Reforms

The survey responses dealing with the impact of the TRA 1997 changes, such as the increase in the unified credit, suggest that the changes will have little impact on estate planning revenues and the need for tax-driven estate planning. This indicates that reduced transaction costs probably will not materialize.

B. The Financial Impact of Repeal

Although the respondents predicted that incremental changes such as the TRA 1997 will have little impact on attorney estate planning revenues, they also predicted that a repeal of wealth transfer taxes could cut an attorney's estate planning revenues by almost half.

C. Incrementalism (Muddling Along) Triumphs

Based on the responses to modification questions, the practicing bar apparently does not embrace many of the longstanding scholarly proposals, particularly those based on income tax solutions. Overall, the practicing bar appears content to allow the system to continue with modifications, like increases in the overall exemption. Among practitioners, the proposal that received the most support was retaining wealth transfer taxes with increases in the unified credit. That modification preserves the estate planner's livelihood while also relieving some of the political steam for repeal.

Among professors, no consensus exists as to the direction or form of reform, although eliminating the wealth transfer tax system along with

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162 See *Crummey v. Commissioner*, 397 F.2d 82 (9th Cir. 1968).
section 1014 gained the most approval.\footnote{The 1999 Act vetoed by President Clinton on September 23, 1999 would have reached such a compromise through adopting a modified carryover basis regime to supplant the wealth transfer taxes effective for years following December 31, 2008. See supra note 4 for a brief description of the legislation.}

D. The General Political Outlook Influenced the Survey Results

Although I tried to capture other variables such as age, the taxability of the participants' estates, and political identification, the respondents' general political outlook appeared to be the most influential factor.

E. Expect Additional Family Business Exemptions

Practitioners offered significant support for special exemptions for family businesses, although the professors were less generous. Among both groups, a perceived importance of family businesses exceeded the overall impact of those assets on wealth transfer tax revenues. If the practitioner responses accurately reflect the views of those who will influence the future of the wealth transfer taxes, further increases in a separate exemption for family or closely held business assets are likely.\footnote{Predicting future political actions is a foolhardy exercise in many respects. For example, despite my theme of an incrementalist "muddling along" course for the wealth transfer taxes, the 106th Congress, flush with the prospect of budget surpluses that would ease fiscal constraints, passed legislation (vetoed by President Clinton on September 23, 1999) that would have abolished the wealth transfer taxes for years following December 31, 2008. See supra note 4 for a brief description of the legislation. The repeal issue is far from settled. Republican presidential candidate George W. Bush, for example, has proposed a phased-in reduction of the wealth transfer tax rates, completely eliminating the taxes for years after 2008. See Bush To Propose Detailed Tax Cut Plan, THE WHITE HOUSE BULLETIN, Dec. 1, 1999, available in LEXIS, News Library, CURNWS file. Meanwhile possible presidential candidate Donald J. Trump proposed a one-time tax on the net worth of individuals and trusts with net worths in excess of $10,000,000, coupled with an outright repeal of the wealth transfer taxes. See Adam Nagourney, Trump Proposes Clearing Nation's Debt at Expense of the Rich, N.Y. TIMES, Nov. 10, 1999, at A19.}
APPENDIX A – Practitioner Survey Instrument

The Future of the Federal Wealth Transfer Tax: A Study of Attitudes and Perceptions

The Taxpayer Relief Act of 1997 was a partial response to a continuing debate concerning the direction of federal wealth transfer taxation. This survey explores:

- the perceptions of estate planners and law teachers concerning the impact of the taxes on family businesses in particular;
- attitudes toward various proposals for changes to the federal wealth transfer tax; and
- the importance of common estate planning techniques and issues.

Please answer all of the questions. You may be assured of complete anonymity. If you wish to comment on any questions or qualify your answers, please use the margins.

Thank you for your help.

Return this questionnaire in the enclosed envelope or to:

Associate Professor Wayne M. Gazur
University of Colorado School of Law
Campus Box 401
Boulder, CO 80309-0401
(303) 492-7013
Our first concern is addressing the impacts of the Taxpayer Relief Act of 1997.

Q-1. With respect to the Taxpayer Relief Act of 1997, what do you expect to be the impact of the amendments on your estate planning practice revenues? (circle one)
1. Decline __________ (estimate the percentage) 3. Roughly no change
2. Increase __________ (estimate the percentage) 4. Do not know

Q-2. If the federal estate, gift, and generation skipping transfer tax were abolished entirely (without a direct replacement), what would you expect to be the impact on your estate planning practice revenues? (circle one)
1. Decline __________ (estimate the percentage) 3. Roughly no change
2. Increase __________ (estimate the percentage) 4. Do not know

Q-3. Although it is very difficult to generalize, what would be your estimate of the fee paid to you for estate planning services by a typical estate planning client? (circle one)
1. $300-$1,000 5. $10,001-$20,000
2. $1,001-$2,000 \ 6. $20,001-$35,000
3. $2,001-$5,000 7. Other (specify) $___________
4. $5,001-$10,000

Q-4. By how much, if any, will the Taxpayer Relief Act of 1997 changes increase or decrease the typical estate planning fee amount in Question 3? (circle one)
1. Increase (specify) $________________________ 3. No change
2. Decrease (specify) $________________________ 4. Do not know

Q-5. Again, although this is very difficult to quantify in most situations, what percentage of the fee in Question 3 would be strictly succession and disposition related, without any federal wealth transfer tax consequences? (circle one)
1. 0-20% 4. 61-80%
2. 21-40% 5. 81-100%
3. 41-60% 6. Do not know

Q-6. After taking into account the Taxpayer Relief Act of 1997 changes, what would be the percentage in Question 5? (circle one)
1. 0-20% 4. 61-80%
2. 21-40% 5. 81-100%
3. 41-60% 6. Do not know
Next, we would like your perceptions and attitudes about the federal wealth transfer tax in the family business context.

Q-7. In your experience, in what percentage of family business situations would the imposition of the federal wealth transfer tax have a significant effect on the long-term survival of the business (assuming the use of customary planning techniques such as life insurance, gifting, valuation discounts, etc.)? (please complete)

_____________________%

Q-8. In your experience, in what percentage of family business situations do members of the next generation have the interest and aptitude to continue operating the business? (please complete)

_____________________%

Q-9. The Taxpayer Relief Act of 1997 creates an additional exemption under newly enacted I.R.C. § 2033A for family businesses in which at least 50% of the business is owned by the decedent and members of the decedent’s family (or 70% is owned by two families, or 90% is owned by three families). In your view, what should be the amount of that exemption? (please complete)

$____________________ Amount of the exemption in dollars

Q-10. If you were designing an exemption for family businesses, what ownership or participation criteria would you use? (Circle all that apply.)
1. The newly enacted I.R.C. § 2033A parameters
2. Legal control of voting stock
3. Effective control of strategic directions
4. Founder’s descendant is CEO, director, or chair of the board
5. Other (specify) ________________________________

Q-11. As your estimate, what percentage of publicly held companies are “family” businesses (i.e., where a descendant of the founding family is a key officer, director, or owner; 4-5% or more of the voting stock is held by a family or group of families; inside and outside representation by the family on the board of directors)? (please complete)

_____________________% of publicly held companies
Q-14. What percentage of the gross estates (in which a federal estate tax return is filed) of your clients is typically represented by family farms or closely-held businesses? (circle one)
1. 0-5% 7. 51-70%
2. 6-10% 8. 71-80%
3. 11-20% 9. 81-90%
4. 21-30% 10. 91-100%
5. 31-40%
6. 41-50%
7. 51-70%
8. 71-80%
9. 81-90%
10. 91-100%
11. Do not know

Q-15. As your estimate, what percentage of gross estates (in which a federal estate tax return is filed) overall for all decedents is represented by family farms or closely-held businesses? (circle one)
1. 0-5% 6. 41-50%
2. 6-10% 7. 51-70%
3. 11-20% 8. 71-80%
4. 21-30% 9. 81-90%
5. 31-40% 10. 91-100%

Q-18. In your view, what should be the amount of the general exemption for the federal wealth transfer tax?
$_____________ (Use a dollar exemption equivalent rather than a credit amount.)

Now we would like to ask about your general attitudes concerning the federal wealth transfer tax and replacements for it.

Q-21. Please indicate your agreement or disagreement with the following statements. If a question refers to a “family business” assume a business in which family members are directly involved in managing or final decisions or in which family members have substantial ownership of the business.
<table>
<thead>
<tr>
<th>Strongly Disagree</th>
<th>Disagree</th>
<th>Neither Agree nor Disagree</th>
<th>Agree</th>
<th>Strongly Agree</th>
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<td>1</td>
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</table>

1. The federal wealth transfer tax should be abolished because it significantly discourages entrepreneurial activity.

2. The federal wealth transfer tax should be abolished, even if any revenue loss were replaced by an increase in the upper marginal income tax rates.

3. The federal wealth transfer tax should be abolished because the revenue yield is probably less than the costs of its administration and taxpayer compliance and planning.

4. The federal wealth transfer tax is a significant obstacle to the continuation of family businesses.

5. The federal wealth transfer tax should be abolished because it reduces the income tax and employment tax yields by more than the wealth transfer tax revenues it collects.

6. I would support the elimination of the federal wealth transfer tax even if the trade-off were implementation of some form of carryover basis (e.g., repeal of I.R.C. § 1014) or taxation of accrued gains at death.

7. The federal wealth transfer tax should be strengthened further, eliminating loopholes and increasing its coverage.

8. I would support an expanded exemption for family businesses, preserving, however, the estate tax for other types of assets.

9. The federal wealth transfer tax should be replaced with a consumption-based tax.

10. If a consumption-based tax were adopted, it should incorporate a progressive rate structure.

11. The federal wealth transfer tax should be eliminated, replaced by inclusion of gifts and inheritances in taxable income.

12. The federal wealth transfer tax should be retained, but the general exemption should be increased significantly for all decedents.
13. The federal wealth transfer tax has failed in its goal to significantly moderate the distribution of wealth and should therefore be abolished.

12345

14. The QTIP election in application often promotes gender bias against females.

12345

Finally, we would like to ask some questions about yourself to help interpret the results.

Q-22. How many years of estate planning experience do you have? (circle one)
1. None-2 years 4. 11-20 years
2. 3-5 years 5. More than 20 years
3. 6-10 years

Q-23. What is the net worth of your typical estate planning client? (circle one)
1. $50,000-$300,000 6. $1,501,000-$2,000,000
2. $301,000-$600,000 7. $2,001,000-$2,500,000
3. $601,000-$900,000 8. $2,501,000-$3,000,000
4. $901,000-$1,200,000 9. $3,001,000-$5,000,000
5. $1,201,000-$1,500,000 10. Other (specify)

Q-24. What is the net worth of your wealthiest estate planning client? (please complete)

$________________________ net worth

Q-25. What is your age? (circle one)
1. 25-29 4. 50-59
2. 30-39 5. 60-70
3. 40-49 6. Other (specify) _________

Q-26. In which state do you practice? (please complete)

________________________ state

Q-27. What is your gender? (circle one)
1. Male
2. Female
Q-28. How would you generally characterize your political views and convictions? (circle one)
1. Very Liberal 4. Somewhat Conservative
2. Somewhat Liberal 5. Very Conservative
3. Moderate

Q-29. What percentage of your practice is devoted to estate planning? (circle one)
1. Less than 10% 5. 51-60%
2. 10-20% 6. 61-80%
3. 21-30% 7. 81-100%
4. 31-50%

Q-30. With the current exemptions, if you were to pass away, would your estate pay an estate tax? (circle one)
1. Yes
2. No
3. I don't know

* * * * *

Is there anything else you would like to tell us about the direction of the federal wealth transfer tax? If so, please use the back page for that purpose. For example, if you believe that the federal wealth transfer tax should be retained as is, abolished, or modified, please explain the basis for your opinion.

* * * * *

Your contribution to this effort is greatly appreciated. If you would like a citation to a future published article addressing this survey, please write “citation requested” on the back of the return envelope, printing your name and address below it. Please do not put this information on the questionnaire itself.

Thank you for your responses. Please enclose the survey in the prepaid postage business reply envelope and deposit it in the United States mail.
If you have questions regarding your rights as a subject, any concerns regarding this project or any dissatisfaction with any aspect of this study, you may report them (confidentially, if you wish) to the Executive Secretary, Human Research Committee, Graduate School, Campus Box 26, University of Colorado-Boulder, Boulder, CO 80309-0026 or by telephone to (303) 492-7401. Copies of the University of Colorado Assurance of Compliance to the federal government regarding human subject research are available upon request from the Graduate School address listed above.
APPENDIX B – Law Professor Survey Instrument

The Future of the Federal Wealth Transfer Tax: A Study of Attitudes and Perceptions

The Taxpayer Relief Act of 1997 was a partial response to a continuing debate concerning the direction of federal wealth transfer taxation. This survey explores:

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- the importance of common estate planning techniques and issues.

Please answer all of the questions. You may be assured of complete anonymity. If you wish to comment on any questions or qualify your answers, please use the margins.

*Thank you for your help.*

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Campus Box 401
Boulder, CO 80309-0401
(303) 492-7013
Our first concern is addressing the impacts of the Taxpayer Relief Act of 1997.

Q-1. With respect to the Taxpayer Relief Act of 1997, what do you expect to be the impact of the amendments on private estate planning practice revenues? (circle one)
   1. Decline __________ (estimate the percentage)  3. Roughly no change
   2. Increase __________ (estimate the percentage)  4. Do not know

Q-2. If the federal estate, gift, and generation skipping transfer tax were abolished entirely (without a direct replacement), what would you expect to be the impact on private estate planning practice revenues? (circle one)
   1. Decline __________ (estimate the percentage)  3. Roughly no change
   2. Increase __________ (estimate the percentage)  4. Do not know

Q-3. Although it is very difficult to generalize, what percentage of the fee paid to practitioners for estate planning services by a typical estate planning client would be strictly succession and disposition related, without any federal wealth transfer tax consequences? (circle one)
   1. 0-20%  4. 61-80%
   2. 21-40%  5. 81-100%
   3. 41-60%  6. Do not know

Q-4. After taking into account the Taxpayer Relief Act of 1997 changes, what would be the percentage in Question 3? (circle one)
   4. 0-20%  4. 61-80%
   5. 21-40%  5. 81-100%
   6. 41-60%  6. Do not know

Next, we would like your perceptions and attitudes about the federal wealth transfer tax in the family business context.

Q-5. As your estimate, in approximately what percentage of family business situations would the imposition of the federal wealth transfer tax have a significant effect on the long-term survival of the business (assuming the use of customary planning techniques such as life insurance, gifting, valuation discounts, etc.)? (please complete)

______________________ %
Q-6. As your estimate, in approximately what **percentage** of family business situations do members of the next generation have the interest and aptitude to continue operating the business? (please complete)

_____________________%

Q-7. The Taxpayer Relief Act of 1997 creates an **additional exemption** under newly enacted I.R.C. § 2033A for family businesses in which at least 50% of the business is owned by the decedent and members of the decedent's family (or 70% is owned by two families, or 90% is owned by three families). In your view, what should be the amount of that exemption? (please complete)

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Q-9. As your estimate, what **percentage** of publicly held companies are "family" business (i.e., where a descendant of the founding family is a key officer, director, or owner; 4-5% or more of the voting stock is held by a family or group of families; inside or outside representation by the family on the board of directors)? (please complete)

_____________________% of publicly held companies

... 

Q-12. As your estimate, what **percentage** of gross estates (in which a federal estate tax return is filed) is represented by family farms or closely-held businesses? (circle one)

1. 0-5%
2. 6-10%
3. 11-20%
4. 21-30%
5. 31-40%
6. 41-50%
7. 51-70%
8. 71-80%
9. 81-90%
10. 91-100%

...
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... 

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Q-18. Please indicate your agreement or disagreement with the following statements. If a question refers to a "family business" assume a business in which family members are directly involved in managing or final decisions or in which family members have substantial ownership of the business.

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1. The federal wealth transfer tax should be abolished because it significantly discourages entrepreneurial activity.

   1   2   3   4   5

2. The federal wealth transfer tax should be abolished, even if any revenue loss were replaced by an increase in the upper marginal income tax rates.

   1   2   3   4   5

3. The federal wealth transfer tax should be abolished because the revenue yield is probably less than the costs of its administration and taxpayer compliance and planning.

   1   2   3   4   5

4. The federal wealth transfer tax is a significant obstacle to the continuation of family businesses.

   1   2   3   4   5

5. The federal wealth transfer tax should be abolished because it reduces the income tax and employment tax yields by more than the wealth transfer tax revenues it collects.

   1   2   3   4   5

6. I would support the elimination of the federal wealth transfer tax even if the trade-off were implementation of some form of carryover basis (e.g., repeal of I.R.C. section 1014) or taxation of accrued gains at death.

   1   2   3   4   5

7. The federal wealth transfer tax should be strengthened further, eliminating loopholes and increasing its coverage.

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13. The federal wealth transfer tax has failed in its goal to significantly moderate the distribution of wealth and should therefore be abolished.

14. The QTIP election in application often promotes gender bias against females.

... 

Finally, we would like to ask some questions about yourself to help interpret the results.

Q-20. How many years of estate planning experience in private practice do you have? (circle one)
1. None-2 years
2. 3-5 years
3. 6-10 years
4. 11-20 years
5. More than 20 years

Q-21. How many years of teaching experience do you have in the area of Federal Estate & Gift Taxation or Estate Planning? (circle one)
1. Less than 1 year
2. 1-5 years
3. 6-10 years
4. More than 10 years

...
Q-25. What is your age? (circle one)
1. 25-29
2. 30-39
3. 40-49
4. 50-59
5. 60-70
6. Other (specify) __________

Q-26. What is your gender? (circle one)
1. Male
2. Female

Q-27. How would you generally characterize your political views and convictions? (circle one)
1. Very liberal
2. Somewhat liberal
3. Moderate
4. Somewhat conservative
5. Very conservative

Q-28. With the current exemptions, if you were to pass away, would your estate pay an estate tax? (circle one)
1. Yes
2. No
3. I don’t know

* * * * *

Is there anything else you would like to tell us about the direction of the federal wealth transfer tax? If so, please use the back page for that purpose. For example, if you believe that the federal wealth transfer tax should be retained as is, abolished, or modified, please explain the basis for your opinion.

* * * * *

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Educator Survey