THE COSTS OF ESTATE TAX DITHERING

PAUL L. CARON†

Thank you for that very kind introduction, Ed. But I fear that it has added to the burden I face in talking about tax law on a Friday afternoon at 4:30 p.m., following three excellent panels.

I was honored last May when Ed called to invite me to deliver this lecture named after your former dean, Louis TePoel, especially in light of the distinguished folks that have stood behind this podium over the past thirty-five years.

Ed and I talked about several possible topics for this lecture, and we soon agreed that I would discuss the new estate tax law that everyone — academics, lawyers, politicians, pundits — assumed would be enacted before the end of 2009. I was working on a new edition of our Estate & Gift Tax casebook1 in anticipation of the new law, so I thought that by today I would surely have a lot to say about the ins and outs of the new estate tax law.

But a funny thing happened . . . there is no new estate tax law.

Thank you very much for your time.

As Ed and I spoke in Fall 2009 about a new topic for this lecture, one issue was dominating the political debate in Washington, D.C. [PowerPoint Slide 1, Clip 1: Former Vice-President Dick Cheney accusing President Barack Obama of “dithering” over the decision of whether to add more troops in the Afghanistan War, followed by White House Press Secretary Robert Gibbs’s defense of the President and criticism of the President’s “dithering” by Fox News personalities Fred Barnes, Lynn Cheney, Charles Krauthammer, and Bill O’Reilly.]

Hence the title of this lecture . . . The Costs of Estate Tax Dithering. [PowerPoint Slide 2]

I would like to talk this afternoon about what the failure to enact a new estate tax law by the end of 2009 tells us about the state of our tax law and politics. But before I get there, I would like to talk a bit about how we got to this point.

Let me first talk briefly about the history of the estate tax, which was forged during times of war. Congress imposed some form of estate taxes three times during wars or threats of war, and each time repealed the taxes after the hostilities (or threat of hostilities) ended.

† Associate Dean of Faculty and Charles Hartsock Professor of Law, University of Cincinnati College of Law. E-mail: paul.caron@uc.edu.

Early Estate Taxes

- 1797-1802: War Threat with France
- 1862-1870: Civil War
- 1898-1902: Spanish American War

Congress enacted the estate tax in 1916 as World War I approached, and it endured for ninety-three years until December 31, 2009—106 days ago. The companion gift tax was soon added to prevent the easy avoidance of the estate tax. And a generation-skipping tax followed.

There was a rough consensus that the estate tax served three goals.

Goals of the Estate Tax

- Raise Revenue
- Enhance Progressivity of Estate Tax
- Curb Concentrations of Wealth

Here are some numbers showing that, for most of its history, the estate tax has by and large achieved these goals.

For eighty-five years, the estate tax applied to roughly one to two percent of decedents dying each year, and raised roughly one to two percent of federal tax revenues each year.

---

2. Id. at 2-3.
6. McDANIEL, REPETTI & CARON, supra note 1, at 49.
During this period, the estate tax enhanced the progressivity of the tax system and helped curb concentrations of wealth.

### PowerPoint Slide 57

<table>
<thead>
<tr>
<th>Year</th>
<th>% of Deaths</th>
<th>Exemption (2009 $)</th>
<th>Top Rate</th>
<th>Revenue(2009 $)</th>
<th>% of Revenues</th>
</tr>
</thead>
<tbody>
<tr>
<td>1916</td>
<td>n/a</td>
<td>$50,000 ($984,115)</td>
<td>10%</td>
<td>$6m ($118m)</td>
<td>0.8%</td>
</tr>
<tr>
<td>1931</td>
<td>0.9%</td>
<td>$100,000 ($1,411,428)</td>
<td>20%</td>
<td>$65m ($917m)</td>
<td>2.7%</td>
</tr>
<tr>
<td>1941</td>
<td>1.1%</td>
<td>$100,000 ($1,459,435)</td>
<td>20%</td>
<td>$353m ($5.2b)</td>
<td>6.9%</td>
</tr>
<tr>
<td>1951</td>
<td>1.5%</td>
<td>$60,000 ($495,085)</td>
<td>77%</td>
<td>$638m ($5.3b)</td>
<td>1.8%</td>
</tr>
<tr>
<td>1961</td>
<td>3.7%</td>
<td>$60,000 ($430,509)</td>
<td>77%</td>
<td>$1.6b ($11.5b)</td>
<td>1.7%</td>
</tr>
<tr>
<td>1971</td>
<td>6.5%</td>
<td>$60,000 ($317,833)</td>
<td>77%</td>
<td>$3.6b ($19.1b)</td>
<td>1.9%</td>
</tr>
<tr>
<td>1981</td>
<td>1.8%</td>
<td>$175,000 ($413,025)</td>
<td>70%</td>
<td>$6.4b ($15.1b)</td>
<td>1.2%</td>
</tr>
<tr>
<td>1991</td>
<td>1.3%</td>
<td>$600,000 ($945,097)</td>
<td>55%</td>
<td>$11.5b ($18.1b)</td>
<td>1.1%</td>
</tr>
<tr>
<td>2001</td>
<td>2.1%</td>
<td>$675,000 ($817,688)</td>
<td>55%</td>
<td>$29.0b ($35.1b)</td>
<td>1.4%</td>
</tr>
</tbody>
</table>

Let's look at how the United States compares internationally. These charts show that the world's wealth is concentrated in North America, Europe, Japan, and Australia.

10. Id.
Other countries use estate taxes to raise revenue, enhance progressivity of their tax systems, and curb concentrations of wealth.
<table>
<thead>
<tr>
<th>Country</th>
<th>as a percentage of total tax revenue</th>
<th>as a percentage of GDP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Austria</td>
<td>0.13</td>
<td>0.06</td>
</tr>
<tr>
<td>Belgium</td>
<td>1.30</td>
<td>0.59</td>
</tr>
<tr>
<td>Canada</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>0.06</td>
<td>0.02</td>
</tr>
<tr>
<td>Denmark</td>
<td>0.40</td>
<td>0.20</td>
</tr>
<tr>
<td>Finland</td>
<td>0.70</td>
<td>0.31</td>
</tr>
<tr>
<td>France</td>
<td>1.19</td>
<td>0.52</td>
</tr>
<tr>
<td>Germany</td>
<td>0.53</td>
<td>0.18</td>
</tr>
<tr>
<td>Greece</td>
<td>0.41</td>
<td>0.11</td>
</tr>
<tr>
<td>Hungary</td>
<td>0.19</td>
<td>0.07</td>
</tr>
<tr>
<td>Iceland</td>
<td>0.20</td>
<td>0.08</td>
</tr>
<tr>
<td>Ireland</td>
<td>0.50</td>
<td>0.15</td>
</tr>
<tr>
<td>Italy</td>
<td>0.01</td>
<td>0.00(1)</td>
</tr>
<tr>
<td>Japan</td>
<td>1.14</td>
<td>0.31</td>
</tr>
<tr>
<td>Korea</td>
<td>0.91</td>
<td>0.23</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>0.38</td>
<td>0.15</td>
</tr>
<tr>
<td>Mexico</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Netherlands</td>
<td>0.86</td>
<td>0.33</td>
</tr>
<tr>
<td>New Zealand</td>
<td>0.01</td>
<td>0.00(1)</td>
</tr>
<tr>
<td>Norway</td>
<td>0.21</td>
<td>0.09</td>
</tr>
<tr>
<td>Poland</td>
<td>0.07</td>
<td>0.02</td>
</tr>
<tr>
<td>Portugal</td>
<td>0.05</td>
<td>0.02</td>
</tr>
<tr>
<td>Slovak Republic</td>
<td>0.00(1)</td>
<td>0.00(1)</td>
</tr>
<tr>
<td>Spain</td>
<td>0.73</td>
<td>0.26</td>
</tr>
<tr>
<td>Sweden</td>
<td>0.08</td>
<td>0.04</td>
</tr>
<tr>
<td>Switzerland</td>
<td>0.67</td>
<td>0.20</td>
</tr>
<tr>
<td>Turkey</td>
<td>0.06</td>
<td>0.02</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>0.70</td>
<td>0.26</td>
</tr>
<tr>
<td>United States</td>
<td>0.89</td>
<td>0.24</td>
</tr>
</tbody>
</table>

But the estate tax consensus evaporated in the United States during the 1990s and 2000s, as anti-tax advocates turned large swaths of the public and politicians against the estate tax\(^{13}\) culminating in the 2001 Bush tax cuts.\(^{14}\)

---

The 2001 Bush tax cuts unfolded much like the recent health care law. Early in his administration, President Bush and the Republican Congress pushed forward a number of tax cuts, including the repeal of the estate tax. Under Senate rules, legislation that causes a loss of revenues beyond a ten-year budget window must be approved by sixty votes\(^1\) – but the Republicans only had fifty-eight votes. To minimize the revenue loss, the estate tax cuts were phased in slowly, raising the exemption and lowering the rate gradually. To avoid the necessity of getting sixty votes, the estate tax was repealed for only one year (2010), and would be resurrected in 2011 at the prior exemption and rate.\(^2\)

**PowerPoint Slide 11**

<table>
<thead>
<tr>
<th>Year</th>
<th>Exemption</th>
<th>Top Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>$1,000,000</td>
<td>50%</td>
</tr>
<tr>
<td>2003</td>
<td>$1,000,000</td>
<td>49%</td>
</tr>
<tr>
<td>2004</td>
<td>$1,500,000</td>
<td>48%</td>
</tr>
<tr>
<td>2005</td>
<td>$1,500,000</td>
<td>47%</td>
</tr>
<tr>
<td>2006</td>
<td>$2,000,000</td>
<td>46%</td>
</tr>
<tr>
<td>2007</td>
<td>$2,000,000</td>
<td>45%</td>
</tr>
<tr>
<td>2008</td>
<td>$2,000,000</td>
<td>45%</td>
</tr>
<tr>
<td>2009</td>
<td>$3,500,000</td>
<td>45%</td>
</tr>
<tr>
<td>2010</td>
<td>Estate Tax Repealed</td>
<td>Estate Tax Repealed</td>
</tr>
<tr>
<td>2011</td>
<td>$1,000,000</td>
<td>55%</td>
</tr>
</tbody>
</table>

Even by Washington, D.C. standards, the legislation was breathtakingly cynical. For example, an elderly widow with $10 million would be able to leave $6.4 million, $7.1 million, or $10 million to her

---

16. As I have previously noted (Caron & Repetti, supra note 13, at 156 n.19), budget rules permitted a total revenue loss of $1.35 trillion in 2001-2010, and full estate tax repeal effective immediately would have absorbed from 1/3 to 1/2 of the amount available for all tax cuts. See Richard L. Schmalbeck, *Class War and the Estate Tax: Have the Troops Gone AWOL*, in *Law and Class in America* 191 (Paul Carrington & Trina Jones, eds., 2006).
heirs, depending on when she died in the 367-day window between December 31, 2009 and January 1, 2011.

**PowerPoint Slide 12**

*Elderly Widow with $10m*

- Dies Dec. 31, 2009: $7.1m to Heirs
- Dies Jan. 1, 2010: $10m to Heirs
- Dies Jan. 1, 2011: $6.4m to Heirs

Paul Krugman called it the “Throw Momma from the Train Act” because of the financial incentive for children (and grandchildren) to kill their parents (and grandparents) in 2010. [PowerPoint Slides 13-14, Clip 2: Movie poster and trailer from *Throw Momma from the Train.*] Everyone laughed and agreed that Congress and the President would never allow the scenario to play out.

Republicans focused on 2010: once even the temporary repeal was in place, the thought was that the politics would shift and it would be impossible for Congress to re-impose the estate tax in 2011.

Democrats focused on 2011: with the threatened return of a $1 million exemption and fifty-five percent top rate, they expected Republicans to trade the one-year repeal for a higher exemption and lower rate.

Everyone expected that the parties would eventually compromise on the exemption and rate in the run-up to 2010. President Obama and various congressional leaders last year proposed extending 2009’s exemption ($3.5 million) and top rate (forty-five percent), either permanently or as a one-year patch to give Congress time to resolve the issue. But Congress did not act, leaving taxpayers and their counsel with the current absurd state of affairs.

---

It is worth pausing to talk about the curious politics that have brought us to this point. Michael Graetz and Ian Shapiro have written a wonderful book on the subject, *Death by a Thousand Cuts: The Fight Over Taxing Inherited Wealth*.\(^{21}\) I have written about the subject, drawing on the Graetz and Shapiro book,\(^{22}\) as have many others.\(^{23}\) Much of this material was mined in two episodes of the third season of *The West Wing*.\(^{24}\)

The first *West Wing* clip illustrates how referring to the estate tax as the “death tax” helped move public opinion against the tax. It also shows that at various points along the way, Republicans could have compromised on ever-higher exemption amounts, but the issue had become a theological one for the party. In addition, the clip highlights the subtle split in the anti-estate tax coalition. The “merely wealthy” (e.g., a first-generation small business owner) benefit most from an increased exemption (e.g., $2.5 million, $3.5 million, $5 million), doubled for married couples. But the “super wealthy” (e.g., a scion of inherited wealth) benefit most from a reduction in the top rate (e.g., a ten percentage point drop in the top rate (from fifty-five to forty-five percent) saves $50 million in a $500 million estate). So the only thing that both sides could agree on was total repeal.

---

\(^{21}\) *Michael J. Graetz & Ian Shapiro, Death by a Thousand Cuts: The Fight Over Taxing Inherited Wealth* (2005).

\(^{22}\) Caron & Repetti, *supra* note 13, at 155-58.


\(^{24}\) *NBC, 2001*.
I have noted elsewhere that eighteen “super wealthy” families contributed over $500 million to the estate tax repeal effort.\textsuperscript{25}

The second \textit{West Wing} clip [PowerPoint Slide 20, Clip 4: \textit{The West Wing}, Third Season, Episode 4 (originally aired Oct. 24, 2001).] shows the strange bedfellows in the anti-estate tax coalition. The African-American and gay/lesbian communities played significant roles in the repeal effort. The explanation is that because African-Americans and gays/lesbians have had to overcome discrimination and prejudice to accumulate wealth, it is especially unfair for the estate tax to tax that wealth away before it can be passed on. [PowerPoint Slide 21: Freedom Works Press Release (April 5, 2001), from Jack Kemp: \textit{African-American Business Leaders Support Repeal of the Death Tax}.]

The third \textit{West Wing} clip [PowerPoint Slide 22, Clip 5: \textit{The West Wing}, Third Season, Episode 4 (originally aired Oct. 24, 2001).] shows one of the enduring myths in the estate tax debate: the allegedly destructive impact of the tax on family farms. As folks in this audience know, the estate tax has a series of special relief provisions aimed at family farms. Neil Harl, an agricultural economics professor at nearby Iowa State University, and the American Farm Bureau Federation, could not cite a single instance of a family farm that had to be sold to pay the estate tax.\textsuperscript{26} [PowerPoint Slide 23: Neil Harl’s faculty webpage.]

The fourth \textit{West Wing} clip [PowerPoint Slide 24, Clip 6: \textit{The West Wing}, Third Season, Episode 5 (originally aired Oct. 31, 2001).] illustrates the public’s attitude toward the estate tax.

\textbf{PowerPoint Slide 25}\textsuperscript{27}

\textit{Tax Polling}

- 67\% Favor Estate Tax Repeal
- Taxes That Are “Not Fair at All”
  - 18\%: Personal Income Tax
  - 18\%: Social Security Tax
  - 20\%: Cigarette, Beer, Wine Taxes
  - 29\%: Corporate Income Tax
  - 29\%: Gas Tax

\textsuperscript{25} Caron & Repetti, supra note 13, at 156 & n.24.
\textsuperscript{27} American Enterprise Institute, \textit{Public Opinion on Taxes}, 2010 (April 2010).
As President Bartlet stated, “It doesn’t matter if voters don’t benefit. They all believe that someday they will. That’s the problem with the American Dream – it makes everyone concerned for the day they’re going to be rich.”

The final West Wing clip [PowerPoint Slide 26, Clip 7: The West Wing, Third Season, Episode 5 (originally aired Oct. 31, 2001).] brings to mind the “Cornhusker Kickback”28 and other legislative machinations used to strong-arm the health care bill through the House and Senate. As Finley Peter Dunne said, “politics ain’t beanbag.”29

So what changed in the political landscape between 2001 and 2009? Recall the three goals of the estate tax.

**PowerPoint Slide 27**

*Goals of the Estate Tax*

- Raise Revenue
- Enhance Progressivity of Estate Tax
- Curb Concentrations of Wealth

As I previously noted, the estate tax was born to meet revenue needs driven by the cost of war. And yet the estate tax repeal efforts reached their apogee during the wars in Iraq and Afghanistan. As a new book notes, this is the first time in American history that we cut taxes – let alone not raise taxes – during a time of war.30

**PowerPoint Slide 29**

*Estate Taxes and War*

- 1797-1802: Threat of War with France
- 1862-1870: Civil War
- 1898-1902: Spanish-American War
- 1916: World War I
- 2010 Repeal: Iraq and Afghanistan Wars

Moreover, the “Great Recession” of 2007 to 201031 has left the country with crippling budget deficits as far as the eye can see.

---

There is thus a greater need today than in 2001 for the revenue provided by the estate tax.

Similarly, today the tax system is less progressive, and there is a greater concentration of wealth, than in 2001.

---

Shifting the Tax Burden

Compared with the 1960s, the highest and the lowest earners pay a smaller share of their income in federal taxes, while those in the middle pay somewhat more.

Numbers include income taxes, capital gains taxes, payroll taxes, estate taxes, gift taxes and corporate taxes (which are effectively paid by stockholders). 2004 tax rates are based on 2004 tax law applied to 2000 income adjusted for income growth.

Source: Thomas Piketty and Emmanuel Saez

---

Although the estate tax thus is needed now more than ever, Congress and President Obama allowed it to expire on December 31, 2009. And this brings me (finally) to the title of this lecture – what are The Costs of Estate Tax Dithering?

Recall the *Throw Momma from the Train* clip I showed earlier. That is not an idle threat – at least two economics papers have demonstrated that estate tax changes can affect the timing of death.36

---

35. *Id.*

Impact of Estate Tax on Timing of Death

- Kopczok & Slemrod, Dying to Save Taxes: Evidence From Estate-Tax Returns on Elasticity
- Gans & Leigh, Did the Death of Australian Inheritance Taxes Affect Deaths?

Of course, the current situation—no estate tax in 2010, scheduled re-imposition of the tax in 2011—is unprecedented. And it is difficult for the studies to distinguish a death occurring in a tax-favorable period from a death occurring in a non tax-favorable period but reported as occurring in a tax-favorable period.37

As many of the speakers on the earlier panels today noted, the current state of affairs has made planning impossible.

The Costs of Estate Tax Dithering

- “Throw Momma from the Train”
- Planning/Chaos

I would like to make five points here.

Planning/Chaos

- ABA/AICPA
- Disposition of Property
- Lifetime Gifts
- Charitable Gifts
- Basis

The ABA Tax Section38 and American Institute of Certified Public Accountants39 have recently sent letters to the House Ways & Means Committee and Senate Finance Committee detailing the planning nightmare faced by estate planners, tax lawyers, and accountants.

37. [PowerPoint Slide 36: Weekend at Bernie’s (20th Century Fox, 1989) DVD cover.]
One of the thorniest issues is the disposition of a decedent’s property where the estate planning documents employ commonly-used formula clauses tied to the estate tax. Other areas of uncertainty are the role of lifetime non-charitable gifts (with a $1 million exemption and thirty-five percent rate) and charitable gifts and bequests in the face of the no-estate-tax year of 2010 and the scheduled return of the estate tax in 2011. In addition, how do the new basis rules work in 2010 in the absence of any IRS guidance?

**PowerPoint Slide 39**

<table>
<thead>
<tr>
<th>Year</th>
<th>Heirs’ Basis</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>FMV @ Death</td>
</tr>
<tr>
<td>2010</td>
<td>Lesser of:</td>
</tr>
<tr>
<td></td>
<td>Carryover Basis</td>
</tr>
<tr>
<td></td>
<td>FMV @ Death</td>
</tr>
<tr>
<td></td>
<td>Basis Increase (Up To FMV @ Death):</td>
</tr>
<tr>
<td></td>
<td>$1.3 Million: Anyone</td>
</tr>
<tr>
<td></td>
<td>$3.0 Million: Spouse</td>
</tr>
<tr>
<td>2011-</td>
<td>FMV @ Death</td>
</tr>
</tbody>
</table>

The biggest area of uncertainty is the potential for Congress to retroactively bring back the estate tax, in some form, retroactive to January 1, 2010.

**PowerPoint Slide 40**

_The Costs of Estate Tax Dithering_

- “Throw Momma from the Train”
- Planning/Chaos
- Retroactivity

**PowerPoint Slide 41**

_The Constitutionality of Retroactive Reinstatement of the Estate Tax_

- Unanimous Supreme Court in _Carlton_: Period of Retroactivity Cannot Be “Excessive”
- Scalia: “Bait-and-Swith Taxation”

---

In *United States v. Carlton*, a unanimous Supreme Court noted that "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." The Court held that retroactive tax legislation will survive constitutional challenge if (1) the statute has a rational legislative purpose and is not arbitrary, and (2) the period of retroactivity is not excessive. With each passing day, the constitutionality of a retroactive re-imposition of the estate tax back to January 1, 2010 thus becomes less secure (although the Court in *Carlton* approved a fourteen-month period of retroactivity). In addition, in this political and judicial climate, it is possible that a court may sympathize with Justice Scalia's criticism of "bait-and-switch taxation" in his concurrence. Who might mount a constitutional challenge to a retroactive re-imposition of the estate tax? Recent news reports present three possibilities.

---

2. *Id.* at 33.
3. Other courts following *Carlton* have approved shorter periods of retroactivity. See, e.g., Kitt v. United States, 277 F.3d 1330 (Fed. Cir. 2002) (approving a seven-month period of retroactivity); Nations Bank v. United States, 269 F.3d 1332 (Fed. Cir. 2001) (approving an eight-month period of retroactivity).

4. *Carlton*, 512 U.S. at 39 (Scalia & Thomas, JJ., concurring). See also *Nations Bank*, 269 F.3d at ____ (Plager, J., dissenting):

   I cannot dispute that the weight of judicial opinion, though not the weight of history and logic, currently argues for affirming the judgment of the trial court; the majority dutifully rounds up the usual judicial suspects. But there are times when the gap between law and justice is too stark to be ignored. This is one of them. It is simply unfair, and I believe it should be unconstitutional, in these circumstances to enact a statute that imposes a tax on a citizen based on an event that occurred before the tax was enacted. Retroactive legislation is inherently offensive to the natural law of decency, to the principles of the social compact set out in the Declaration of Independence, and to the underlying tenets of the Constitution. ... Congress is perfectly capable of raising all the revenue it needs without making its tax laws reach backward, taking property from citizens based on events that, at the time they occurred, were not subject to the new law.

Staying at the Omaha Hilton last night reminded me of the Hilton family – Barron Hilton, the son of the hotel’s founder, Conrad Hilton, has famously announced that he is leaving ninety-seven percent of his fortune to charity, in part because he is embarrassed by the antics of his granddaughter, Paris. (I attempted to find a clip of Paris Hilton to play for you, but nothing I came up with was appropriate for a conference on Moral, Ethics, and Religious Perspectives.) Paris Hilton has become a poster child for the pro-estate tax forces. She asked Johnson & Johnson heiress Casey Johnson to co-star with her in the reality television show, The Simple Life. It was only after Ms. Johnson turned her down that Ms. Hilton selected Nicole Richie for the role. In any event, Ms. Johnson was last seen alive on December 29, 2009, and her body was found on January 4, 2010. Under California law, her date of death is the date that her body was found – so her estate will pass free of estate tax unless it is retroactively reinstated.

POWERPOINT SLIDE 44

Ruth Lilly

- Died Dec. 30, 2009
- $1 Billion Estate

Ruth Lilly, the eighty-four year-old heiress to the Eli Lily and Company pharmaceutical fortune, died three days too early. As a result, her estimated $1 billion estate will be subject to the estate tax.

55. Weinman, supra note 53.
Dan Duncan, number thirty on the Forbes 400 Richest Americans, died on March 28, 2010 at age seventy-seven with an estimated $9 billion estate. The disparate tax treatment, depending on the date of death, powerfully illustrates the depravity of the current estate tax regime.

With such large stakes, Mr. Duncan’s estate surely would have an enormous incentive to challenge any retroactive re-instatement of the estate tax. In many ways, a successful constitutional challenge would be a fitting denouement to the costs of estate tax dithering.

---