

# Commentary

## Tax Revolts, Pregnancy Envy, Race, and the “Death Tax”

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Many political scientists and sociologists are puzzled by the fact that the more progressive taxes are, the less they are accepted by populations. There is, for example, broad acceptance of value added taxes (VATs) or sales taxes, but more resistance to an income tax, which is, of course, generally more progressive than consumption taxes. But the fiercest opposition, it turns out, is to wealth or property taxes. The United States has seen property tax revolts, such as California’s Proposition 13;<sup>1</sup> perhaps this is to be expected. But the most notable tax resistance in recent European history was directed at a highly unpopular (and later rejected) wealth tax in Denmark<sup>2</sup>—social democratic Denmark of all places!

Placing the U.S. debate on estate or inheritance taxes in this context raises a few interesting issues: Will moving from a tax on the decedent—that is, the estate tax—to a tax on the recipient of a bequest—that is, an inheritance tax—reduce political resistance to taxation at the point of intergenerational transfer? Does taxing the inheritor, as Lily Batchelder proposes,<sup>3</sup> cut through the political opposition to the so-called “death tax?”

The political results of such a move depend on whether or not the current resistance to the estate tax rests in the fact that it is a wealth tax, or, alternatively because it is a family tax. Is political unease with the estate tax as it currently stands simply due to the fact that it—like the real property taxes that were resisted in California and Denmark—is a tax on a pool of private property that has been accumulated? Under such a paradigm it makes little difference that the wealth holder is dead in the case of the estate tax. It is still a tax on private property. If this is indeed the case, the shift to an inheritance or transfer tax that taxes the flow of money as income may soften

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<sup>1</sup> Cal. Const. art. XIII A (amended 1986).

<sup>2</sup> Stat. No. 1105 (Dec. 20, 1995) (L112, 1995-1996) (Denmark).

<sup>3</sup> Lily L. Batchelder, *What Should Society Expect from Heirs? The Case for a Comprehensive Income Tax*, 63 Tax L. Rev. 1 (2009).

resistance. But if, instead, most of the opposition is rooted in the fact that it is a tax that overreaches beyond the marketplace of exchange into the “private” familial sphere of within-family kinship relationships, then merely shifting the tax burden to the recipient from the donor will do little to nothing to generate consent among the U.S. population for such a policy. Of course, this is not necessarily an either-or proposition: The important issue becomes, then, the relative importance of these two explanations in accounting for the vehement opposition to the estate tax as it currently stands.

The answer to this question takes us on a rather dramatic detour from tax policy into political and psychoanalytic theory. In this vein, we need a social-psychological theory of property and transfers. The political scientist Jacqueline Stevens offers us one. She eloquently critiques the Freudian notion of gender role development as arising through castration anxiety (on the part of boys) and penis envy (on the part of girls).<sup>4</sup> Like Melanie Klein before her,<sup>5</sup> she argues that this is an overly phallo-centric view of sexual identity development. But unlike Klein, she locates the decisive “trauma” in the fact that little boys are shocked when they realize they do not possess a uterus and thus cannot give birth to a child like their mothers (who, up until then have generally been their primary caregiver and parental figure in most kinship structures). Given that they are typically so closely bonded to their mothers, this is a moment of alienation, and Stevens argues that this developmental milestone leads to a male obsession with land ownership and property.<sup>6</sup> That is, as a compensation for the inability to be fertile oneself, boys/men seek to acquire the ultimate external fertile object: the land. Further, she suggests that the transfer of wealth to children is the substitution for both this inability to conceive of a child and secondarily the issue of paternity uncertainty, which until two decades ago has been universal across all societies.<sup>7</sup> Thus, the tenuous role of males (who generally control more of the wealth in a household) within kinship structures and the childrearing process is not a trivial emotional consideration to a political psychology analysis and understanding the so-called death tax.

So, is opposition to wealth transfer taxes due to the fact that wealth transfer is all men have when it comes to defining kinship relationships? In developing societies the flow of labor and wealth goes more from children to adults. In much of rural Africa, for example, children are important for collecting firewood, hauling water, and helping dur-

<sup>4</sup> Jacqueline Stevens, *Pregnancy, Envy and the Politics of Compensatory Masculinities*, 1 *Pol. & Gender* 265 (2005).

<sup>5</sup> Melanie Klein, *The Psychoanalysis of Children* (3d ed. 1949).

<sup>6</sup> Stevens, note 4, at 268.

<sup>7</sup> *Id.* at 268-69.

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ing the planting and harvesting seasons—hence the relatively high fertility rate. As development progresses and societies become wealthier, however, the stream of resources starts to flow the other way since there is an accumulation of assets as individuals save across the lifecourse and there is also a more prolonged (nonproductive) educational career and adolescence. The result is that, overall age structure aside, the net private flows (since public flows may go in another direction) increasingly go from the aged (or dead) to the young, the richer a society (or sub-group of that society) becomes. One important additional consideration is the emergence of a public pension system, which also sets the stage for the aggregation of surplus private savings available for transfer as we age since we need less as insurance of a basic income stream. Along with this reversal of the flow of private wealth across generations, there comes the notion that this is still a quid pro quo and that inheritance upon death (or *intra vivos* transfers) is the reward, for both the emotional and physical labor, or at least as an insurance mechanism for the aging parents to exact compliance among the young under threat of disinheritance (rules about divisions of estates obviously vary among rich countries quite substantially in this regard).

When seen in this light, it raises the question: Is there not some value from excluding inheritance and *intra vivos* transfers from the market exchange (and therefore tax) system? By allowing this transfer tax-free within families, just as spouses’ pocketbooks are legally one and the same, we affirm the private kinship sphere outside of the market. Thus, psychoanalytic theory aside, the role of tax policy in creating boundaries between public and private spheres has been underappreciated by tax policy scholars and that is where—I imagine—a lot of this emotional resistance comes from regarding estate or inheritance taxes. If this is indeed the case, then we must reconceptualize transfer tax policy as not just an economic issue of fairness, efficiency, or incentives but rather as part and parcel of family policy.

If indeed tax-free transfers are one way that kinship structures are maintained and, in fact, created by the state, then inheritance tax policy allows us to think of this realm as robust for politics of the family. That is, should exclusions and preferred tax status only be applied to ties of blood and marriage? Or is this an opportunity for the state to redefine kinship by expanding the “common pocketbook” to voluntary living and care arrangements that go well beyond marriage and offspring.<sup>8</sup>

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<sup>8</sup> Consider the case of the Burden sisters. Two sisters who lived together their entire life challenged U.K. inheritance laws on the basis that married couples and same-sex couples could inherit property tax free but they could not. The European Court of Human Rights

Lastly, another important—if lurking—issue in this debate is race. Martin Gilens, Jill Quadagno, and other sociologists and political scientists have persuasively demonstrated that race is a key factor driving the relatively stingy U.S. public welfare system simply because whites do not want to pay for African Americans to receive benefits.<sup>9</sup> And, some argue, this parsimonious explanation trumps all other accounts of U.S. exceptionalism with respect to our European counterparts: lack of a feudal aristocracy prior to our industrial development, a more federalist—less centralized—government, the historical lack of a labor party, or the tripartite and bicameral nature of the national government (as opposed to parliamentary systems that allow for easier passage of major social welfare legislation). If these scholars are correct and one thinks of the estate/inheritance tax as the converse of this—namely a policy that “disproportionately” affects whites due to the staggering racial gap in wealth, then we are provided with yet another fruitful lens through which to view opposition. (In the contemporary United States, the median black family holds about one-sixth the net-worth of the median white family<sup>10</sup>—a difference that is only partially explained by earnings or savings differences and is intimately tied to a legacy of inheritance.)

Thus, to think through the political issues surrounding the restoration of a significant estate tax or the reformulation of this revenue source as an inheritance tax (or other proposals such as adjusting basis upon death), we must think through the other realms of life upon which this tax touches. As discussed here, that list includes everything from paternity uncertainty to the definition of the family as distinct from the marketplace to race and the legacy of slavery. I am sure that other scholars could add to this list. The bottom line is that these issues are not “peripheral” to the debate and must be tackled head on if tax policy changes promoting opportunity and meritocracy are to be implemented.

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ruled that the British law was not unfair discrimination. *Burden v. United Kingdom*, 47 Eur. Ct. H.R., 857 (2008).

<sup>9</sup> See, e.g., Martin Gilens, “Race Coding” and White Opposition to Welfare, 90 Am. Pol. Sci. Rev. 593 (1996); Jill Quadagno, *The Color of Welfare: How Racism Undermined the War on Poverty* (1994).

<sup>10</sup> Brian K. Bucks, Arthur B. Kennickell, Traci L. Mach & Kevin B. Moore, Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances, 95 Fed. Res. Bull. A11 tbl.4 (Feb. 2009), available at <http://federalreserve.gov/pubs/bulletin/2009/pdf/scf09.pdf> (reporting median net worth of white families in 2007 as \$170,400 and nonwhite/Hispanic families as \$27,800).