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ARTICLES

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ARTICLES

HOW WEALTH TRANSFER TAXES MIGHT REDUCE RACIAL WEALTH DISPARITY IN AMERICA[†]

Jonathan G. Blattmachr^{*}

This Article will discuss what seems to be the impact of estate, gift and generation-skipping taxes (collectively and commonly referred to as wealth transfer taxes)¹ imposed by the United States (Federal) on the disparity of wealth in America. It describes, in general terms, how those taxes “work.” It also describes, again in general terms, the impact of taxes and alternative forms of funding governments. It describes some of the consequences of the

[†] Portions of this Article are based upon and are derived from other articles. See Jonathan G. Blattmachr & Mitchel M. Gans, *Wealth Transfer Tax Repeal: Some Thoughts on Policy and Planning*, 3 NAT’L TAX J. 569 (2001); Turney P. Berry & Jonathan G. Blattmachr, *A Case For and Against An Estate Tax*, WEALTH MGMT.: TRS. & ESTS. (Nov. 23, 2020), <https://www.wealthmanagement.com/estate-planning/case-and-against-estate-tax>. Those arguments for and against an estate or similar tax will not be repeated in this Article. This Article primarily will deal with how the wealth transfer tax system might be used to provide reparations for descendants of people enslaved in the United States as part of the system of chattel slavery. It will not discuss other potential reparations such as for Native Americans among others. The author thanks Professor Bridget J. Crawford her review and thoughtful comments of an earlier draft of this Article. Any errors contained herein should only be attributed to Mr. Blattmachr.

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¹ The estate, gift and generation-skipping transfer taxes (collectively, referred to as “wealth transfer taxes”) are imposed by Subtitle B of Title 26 of the United States Code, commonly called the Internal Revenue Code of 1986 as amended. Any reference to a Section in this Article is to one of such Code, except where otherwise noted.

taxes and their impact on human behavior. It discusses how three changes could substantially increase the receipts from wealth transfer taxes. The Article also discusses the potential of using a refundable estate tax credit to provide reparations to families of those who were enslaved in the United States.² Such a credit might be politically more likely to be enacted because it would spread the cost of reparations over time, which, in turn, may make them more likely to reduce wealth disparity in America between Black and other Americans. The Article does not discuss other methods of raising revenue through other means, such as the sale of real property owned by the Federal government, or the use of other taxes that could generate revenue, such as by not permitting the so-called tax-free step-up in basis of assets owned at death,³ the income taxation of interest on certain “municipal bonds,”⁴ or the income taxation of certain life insurance proceeds,⁵ or the enactment of new taxes such as one on certain internet activities.⁶

² This Article refers to “those who were enslaved” or “enslaved persons” instead of slaves in order to emphasize “that slavery was forced upon that person, rather than an inherent condition.” THE BUFFALO LIBRARY, TELLING THE STORY: ENSLAVEMENT OF AFRICAN PEOPLE IN THE UNITED STATES (2019–2021), <https://www.buffalolib.org/sites/default/files/exhibit/pdf/Vocab%20&%20Key%20Concepts%20-%20mc.pdf>.

³ See I.R.C. § 1014.

⁴ See I.R.C. § 103.

⁵ See I.R.C. § 101(a)(1).

⁶ There have been recent discussions of a wealth tax. However, it is of questionable constitutionality in the minds of some. Cf. Mitchell M. Gans, *Progressive Taxation and a Conservative Supreme Court: Reading the Tea Leaves*, 47 ACTEC L.J. 283 (2022).

I. GENERAL DESCRIPTION OF AMERICA'S WEALTH TRANSFER TAXES

The current estate tax system⁷ imposed by the Federal government⁸ of America started in 1916 and, it is understood, to raise funds for America's possible entry into the First World War. Rates have been as high as 77% and as low as 0%⁹ with essentially a flat rate today of 40%.¹⁰ It is a complicated system applying not just to the transfer of property at the death by a decedent but, in some cases, to property transferred well before death and even property that the decedent never owned.¹¹ But it was not our country's first estate tax.¹² The exemption¹³ from the tax also has varied widely from

⁷ There are a number of different types of "death" taxes, including inheritance tax, which is imposed on each inheritor and, in that sense, is akin to an income tax on the inheritance; succession tax which is similar; and estate tax. However, the distinctions among these varies tremendously. For example, inheritance taxes often impose its tax at different rates depending upon the inheritor's relationship to the decedent. *See, e.g.*, PA DEP'T OF REVENUE, INHERITANCE TAX (2022), <https://www.revenue.pa.gov/TaxTypes/InheritanceTax/Pages/default.aspx>. And the Federal estate tax system has some elements of an inheritance tax. For example, certain property transferred at death by a decedent to or for the decedent's spouse is not subject to Federal estate tax but only if the surviving spouse is a U.S. citizen. *See* I.R.C. § 2056. Moreover, the Federal gift tax imposed by § 2501 and the Generation-Skipping Transfer (GST) tax imposed by § 2601 supplement the estate tax.

⁸ I.R.C. § 2001 *et seq.*

⁹ Darien B. Jacobson, Brian G. Raub & Barry W. Johnson, *The Estate Tax: Ninety Years and Counting*, 27 STAT. OF INCOME BULL. 118, 122 (2007) [hereinafter *The Estate Tax*]. There was no estate tax for decedents who died in 2010 although their estates could elect to have the tax apply in which case their assets would receive the automatic change in basis to estate tax values under § 1014.

¹⁰ *See* I.R.C. § 2001(c).

¹¹ Property transferred in trust or otherwise over which the transferor retained the right to income (which right may be imputed in some cases and need not be legally enforceable), the right to control the beneficial enjoyment of the property (even if consent to do so is held by someone who would be adverse to the exercise of that control) and life insurance proceeds on the decedent's life even if the decedent never owned the policy and had no interest in the policy or the proceeds are treated as part of the estate that may be subject to tax. *See* I.R.C. §§ 2036, 2037 and 2042. It even applies to property which the decedent never owned but over which the decedent held a general power of appointment even where the exercise of the power requires the consent of someone else who is not adverse to its exercise and even if the decedent was unaware of the power. *See* I.R.C. § 2041.

¹² *See* Andrew M. Schocket, *Death, Taxes, and the American Founders*, ORIGINS: CURRENT EVENTS IN HISTORICAL PERSPECTIVE (Dec. 2010), https://origins.osu.edu/history-news/death-taxes-and-american-founders?language_content_entity=en.

¹³ Although referred to as an exemption, it is no longer a true exemption but a credit against the tax which may be viewed as an exemption equivalent but will be referred to as an exemption in this paper.

\$60,000 per decedent in 1976¹⁴ to about \$13 million¹⁵ per decedent today.¹⁶ Some states also impose a death tax.¹⁷ Two related taxes are the gift tax,¹⁸ which imposes a tax on certain gratuitous transfers of property by an individual during lifetime (with exceptions and special rules), and the generation-skipping transfer (GST) tax,¹⁹ which imposes a tax on property transferred outright to a person younger than the transferor's children or in a trust (or trust equivalent) when the interest of trust beneficiary terminates in favor of a younger trust beneficiary (with exceptions and special rules). There are many differences among the estate, gift, and GST tax systems but they have similar rates and exemptions.

The low rates and large exemptions from the estate, gift, and GST taxes have significantly reduced the number of estates (or equivalent) that pay any such taxes and have significantly reduced the amount of such taxes imposed by the Federal government by the wealth transfer tax system.²⁰

As indicated above, only the wealthiest of Americans and their estates pay estate or related taxes. Gift tax and GST tax on lifetime transfers are based upon voluntary action (that is voluntary transfers) by the property owner.²¹ A married couple may transfer nearly \$26 million to persons (other than themselves or charity, both of which usually are not subject to wealth

¹⁴ *The Estate Tax*, *supra* note 9.

¹⁵ Rev. Proc. 2022-38, § 3.41, 2022-45 I.R.B. 445. The exemption equivalent is adjusted annually for inflation and is scheduled to be cut in half beginning after 2025.

¹⁶ There has not been a true exemption since 1976. Rather a credit against the estate tax is allowed which may be viewed as a type of exemption. *See* I.R.C. §§ 2001 and 2010. This exemption equivalent is much smaller for individuals who are neither domiciliaries nor citizens of the United States. *See* I.R.C. § 2102(b).

¹⁷ John Waggoner, *17 States With Estate or Inheritance Taxes*, AARP (Mar. 9, 2022), <https://www.aarp.org/money/taxes/info-2020/states-with-estate-inheritance-taxes.html>.

¹⁸ I.R.C. § 2503.

¹⁹ I.R.C. § 2611.

²⁰ DEP'T OF THE TREAS., HOW MUCH REVENUE HAS THE U.S. GOVERNMENT COLLECTED THIS YEAR? (2023), <https://fiscaldata.treasury.gov/americas-finance-guide/government-revenue/#sources-of-federal-revenue>.

²¹ Although some may disagree, it seems virtually certain any lifetime transfer required by law probably is not subject to gift or GST tax. *Cf.* *Harris v. Commissioner*, 340 U.S. 106 (1950).

transfer taxes²²) without paying any wealth transfer tax. That amount is to be adjusted for inflation for years after 2023, although it is slated to be cut in half (but adjusted for inflation) for transfers after 2025.²³

II. SOME PURPOSES AND IMPACTS OF TAXATION AND AN ALTERNATIVE

The purpose of taxation is to arm society with the means to provide “civilization.” Supreme Court Justice Oliver Wendell Holmes once said, “I like to pay taxes. With them, I buy civilization.”²⁴ It has been contended that the purposes of taxation are to raise revenue, promote fairness and influence behavior.²⁵ Not all people agree that the U.S. tax system is fair.²⁶ The fact that taxes influence behavior needs no verification.²⁷ It affects the behavior of the rich, the poor and everyone in between.

An alternative to imposing taxes might be to have the government “print money.” That probably would be unacceptable to many although a significant portion of the funding of government occurs that way.²⁸ Also, it

²² See I.R.C. §§ 2055, 2056, 2522 and 2523.

²³ See I.R.C. § 2010(c).

²⁴ Oliver Wendell Holmes Jr. Quotes, <https://www.goodreads.com/quotes/17105-i-like-to-pay-taxes-with-them-i-buy-civilization> (last visited June 7, 2023).

²⁵ See I.R.S., UNDERSTANDING TAXES, https://apps.irs.gov/app/understandingTaxes/whys/thm05/les01/media/ss_thm05.pdf (last visited June 7, 2023).

²⁶ See generally PHILIP M. STERN, *THE RAPE OF THE TAXPAYER* (1974). See MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* (2006) for a fascinating tale of how the estate tax came to be slated for repeal, or not, in 2001.

²⁷ The Joint Committee (of the Congress) on Taxation among other tasks forecasts what revenues will be generated or lost by tax law changes. See JOINT COMM. ON TAXATION, ABOUT THE JOINT COMMITTEE ON TAXATION (last visited June 7, 2023), <https://www.jct.gov/CMSPages/GetFile.aspx?guid=3609dc53-02fd-4ff1-92c9-cd50e88bfe5c>.

²⁸ For deficit spending by the federal government, see Kimberly Amadeo, *U.S. Budget Deficit by Year Compared to GDP, the National Debt, and Events*, THE BALANCE (Apr. 5, 2022), <https://www.thebalance.com/us-deficit-by-year-3306306>.

causes an “inflation tax”—that is, it reduces the value of what members of society own and earn.²⁹

The income tax on individuals is the primary source of receipts by the Federal government.³⁰ It comes in at 45%. Medicare and social security taxes produce around 39%. The corporate tax comes in at 12%, while estate and gift taxes produce only about 1%.³¹

III. THE UNEVEN HAND OF TAXATION

Almost every person in the country would devise a different tax system than the one we have, and each person’s system would be different from the one every other person would devise. Some would drastically reduce taxes; others would increase them; but almost everyone would structure the tax systems in a manner quite different than what we have today. Indeed, note that not only have taxes risen, but the actual percentage of total revenue each type of tax generates is constantly changing. In any case, we have a tax system devised by our elected officials. And it is virtually guaranteed that the American tax system will change again and again.

There have been many calls to repeal the estate tax. The chorus too does not seem to be as loud as it has been in the past apparently because the exemption is so large and the top rate of tax so low. But some still advocate for its repeal.³²

Getting rid of the estate tax is a complicated matter with many ramifications.³³ Although some contend that the economy would grow by the

²⁹ Antony Davies, *Where does the government get the money it spends?*, MERCATUS CENTER (July 31, 2010), <https://www.mercatus.org/publications/government-spending/where-does-government-get-money-it-spends>.

³⁰ The income tax on individuals is the primary source of receipts by the federal government. It comes in at 45%. Medicare and social security taxes produce around 39%. Corporate tax comes in a 12%, while estate and gift taxes produce only 1%. Davies, *supra* note 29.

³¹ Davies, *supra* note 29.

³² See, e.g., Kevin Dayaratna & Adam Michel, *Keeping the Death Tax Would Make No Sense At All*, THE HERITAGE FOUND. (Oct. 31, 2017), <https://www.heritage.org/taxes/commentary/keeping-the-death-tax-would-make-no-sense-all>.

³³ President George W. Bush proposed the repeal not just the estate tax but also the gift tax. See generally David Johnston, *Questions Raised On New Bush Plan To End Estate Tax*, THE NEW YORK TIMES (Jan. 29, 2001), <https://www.nytimes.com/2001/01/29/business/questions-raised-on-new-bush>.

repeal of the estate tax and, therefore, would result in the Federal government receiving more revenue, that likely is not true.³⁴ And if it does cause Federal tax revenues to fall, what will cover the shortage? Other taxes? Which ones? If the estate tax is repealed and more taxes are collected, how is this reduction in tax “benefit” to be shared? Should it be used to provide reparations for descendants of enslaved Americans?

The bottom line is that relieving the tax burden on the wealthiest Americans by the repeal of wealth transfer taxes means that another revenue source must be found and almost certainly will fall on less wealthy citizens and residents.

IV. A CONCLUSION: WEALTH TRANSFER TAXES LESSEN THE DISPARITY IN WEALTH

Hence, a rational hypothesis is that wealth transfer taxes appear to reduce the disparity in wealth in America because it is imposed, in general, on the wealthiest Americans. If reducing that disparity is a national goal, then those taxes not only should be retained but increased.

plan-to-end-estate-tax.html. The *Times* article discusses the article by Blattmachr & Gans, *supra* note †. It also quotes Mr. Blattmachr, who after the article was published, was called by a member of the professional staff of the Joint Committee on Taxation (of the Congress) and told that the Blattmachr/Gans article had convinced the Treasury the gift tax could not be repealed because it would significantly reduce the receipts from the income tax. For one thing, it shows how different type of taxes are intertwined. *See generally Who Pays Taxes*, PETER G. PETERSON FOUND. (Apr. 6, 2021), https://www.pgpf.org/budget-basics/who-pays-taxes?utm_term=the%20federal%20income%20tax%20is&utm_campaign=Who+Pays+Taxes&utm_source=adwords&utm_medium=ppc&hsa_acc=1523796716&hsa_cam=723350289&hsa_grp=43665064996&hsa_ad=599243021016&hsa_src=g&hsa_tgt=kwd-295552192227&hsa_kw=the%20federal%20income%20tax%20is&hsa_mt=b&hsa_net=adwords&hsa_ver=3&gclid=EAIaIQobChMlleDg_9-Q_AIVjaXIch2X9gjDEAAAYASAAEgLAffD_BwE.

³⁴ “A 2022 review of 18 countries’ tax policies between 1965 and 2015 found no evidence that tax cuts for the rich trickled down to bolster the economy as a whole.” TRICKLE-DOWN ECONOMICS, WIKIPEDIA, https://en.wikipedia.org/wiki/Trickle-down_economics#External_links (last visited on July 19, 2023). *See* Berry & Blattmachr, *supra* note †. While proponents of supply side economics contend that cutting certain taxes spurs the economy, it seems that is not the case for estate tax. *See generally* Richard Cloutier, *How Tax Cuts Affect the Economy*, INVESTOPEDIA (Aug. 1, 2022), https://www.investopedia.com/articles/07/tax_cuts.asp.

V. HOW TO INCREASE WEALTH TRANSFER TAXES

Increasing revenue from the wealth transfer tax system would be easy in theory to accomplish, although recent history suggests it would be difficult to accomplish politically. Three steps likely would substantially increase the wealth transfer tax revenue. One way is to reduce exemption and increase the rate, perhaps, back to prior levels.³⁵ A second way would be to eliminate or reduce the marital deduction which postpones the tax and provides an enhanced way to reduce wealth transfer taxes.³⁶ A third way is to eliminate “gimmicks” which are widely used, and which produce no significant benefit for the economy but allow wealth to continue to be concentrated in a family.

These gimmicks include methods to transfer property at reduced tax cost, including through the use of qualified personal residence trusts, grantor retained annuity trusts³⁷ and “family” partnerships,³⁸ among others. In fact, the estate tax has been called a “voluntary” tax.³⁹

However, recent history suggests there would be significant “political” pushback although several proposals to curb these “strategies” have recently been made. See for example, proposals contained in S.309⁴⁰ introduced in 2019 by Senator Sanders (I, VT).⁴¹

³⁵ Essentially, the exemption is fixed although adjusted for inflation and is slated to be halved after 2025. The rate of the tax is essentially fixed at 40% with no bracket differentials as occur with many other taxes such as the income tax. See I.R.C. § 2001(c).

³⁶ See Jonathan G. Blattmachr, *Economic Ramifications of the Use of the Marital Deduction and Related Matters*, THE CHASE REV. (Oct. 1985), <https://interactivelegal.com/economic-ramifications-of-the-use-of-the-marital-deductions-and-related-matters/?issoredir=true>.

³⁷ Both qualified personal residence trusts and grantor retained annuity trusts and their potential estate tax savings are discussed in detail in Jonathan Blattmachr, Georgiana Slade & Diana Zeydel, *Partial Interests—GRATs, GRUTs, QPRTs (Section 2702)*, 3 BLOOMBERG TAX MANAGEMENT PORTFOLIO 836 (2007).

³⁸ Hundreds of articles have been written about family partnerships and how they may reduce wealth transfer taxes. See, e.g., Jonathan Blattmachr, Mitchell Gans & Diana Zeydel, *Turner II and Family Partnerships: Avoiding Problems and Securing Opportunity*, 117 J. TAX’N 32 (2012).

³⁹ George Cooper, *A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance*, 77 COLUM. L. REV. 164, 221 (1977).

⁴⁰ S.309 116th Cong. § 2001(c) (2019).

⁴¹ Matthew Yglesias, *Bernie Sanders’s new plan to supercharge the estate tax, explained*, VOX (Jan. 31, 2019, 12:10 PM), www.vox.com/2019/1/31/18205294/bernie-sanders-estate-tax-99-percent.

And, perhaps, the pushback to increasing wealth transfer taxes⁴² would be greater if the taxes or their increases were to be used for reparations.

VI. HOW TO PAY FOR REPARATIONS

If the decision is made to provide reparations, a source of funding needs to be found. Having them paid from general tax revenues would arguably result either in greater deficit spending or an increase in taxes or diversion (or reduction in the availability) of revenues from current applications. History shows that proposing cuts in expenditures usually results in great resistance from those who would be adversely affected by the reduction in that spending.⁴³

VII. DIVERSION OF TAXES VS. NEW TAXES

There has been resistance in the United States to providing reparations and disagreement as to how and to whom any should be provided.⁴⁴ Reparations could come in a number of different forms such as direct payments to those who have suffered from the harms the reparations are aimed at alleviating, to making no interest or low interest loans, to providing reduced-cost education or otherwise. In any case, if a decision is made to provide reparations, regardless of the form, we would need to determine how to raise the funds for such reparations.

⁴² One of the greatest tax advantages in estate planning is the income tax free change (typically, an increase or “step up”) in basis for most assets owned by a decedent at death. *See* I.R.C. § 1014(a). Proposals also have been made to eliminate this “step up” in basis and have the decedent’s basis carryover to the inheritors or, as in Canada, tax the gain at death. *See* Greg Iacurci, *Senate Democrats propose capital gains tax at death with \$1 million exemption*, CNBC (Mar. 30, 2021, 11:58 AM), <https://www.cnbc.com/2021/03/30/senate-dems-propose-capital-gains-tax-at-death-with-1-million-exemption.html>.

⁴³ *See Cutting Park Funding*, NATIONAL PARKS CONSERVATION ASSOCIATION, <https://www.npsa.org/case-studies/cutting-park-funding> (last visited on July 19, 2023).

⁴⁴ *See* Sarah Moore Johnson & Raymond Odom, *The Forgotten 40 Acres: How Real Property, Probate & Tax Laws Contributed to the Racial Wealth Gap and How Tax Policy Could Repair It*, 57 REAL PROP., TR. & EST. L.J. 1, 19–29 (2022). This Article presents a powerful argument on why the United States is obligated to address the economic loss of African American families on account of slavery. *See also* Matthew Schlimm, *The Book of Exodus Includes a Story About Reparations for Slavery*, THE CHRISTIAN CENTURY (Dec. 27, 2021), <https://www.christiancentury.org/article/critical-essay/book-exodus-includes-story-about-reparations-slavery>.

A. Increase Wealth Taxes and Earmark the Increase for Reparations

As explained earlier, increasing taxes on the transfer of wealth would be relatively simple such as reflected in S.309⁴⁵ introduced by Senator Sanders and/or taxing unrecognized gain at death (or having the decedent's income tax basis carryover to the inheritors).

B. Divert Wealth Transfer Taxes to Pay for Reparations

Arguably, the wealth transfer taxes are the appropriate source for funding reparations because those taxes are to be paid by those who have most greatly benefitted from America's economy which benefitted, in part, from labor of enslaved people.⁴⁶ Certainly, some did benefit financially from slavery. It seems unlikely that a successful attempt could be made to track down those who benefitted from slavery (such as receiving an inheritance from ancestors who were enslavers) and have them bear the cost of reparations to descendants of enslaved persons. Perhaps, in an ideal world, that could be accomplished but it seems exceptionally unlikely even to be tried.⁴⁷

⁴⁵ S.309 116th Cong. § 2001(c) (2019).

⁴⁶ See Johnson & Odom, *supra* note 44; see also Schlimm, *supra* note 44. It might be contended that overall, the American economy was diminished by slavery as, perhaps, the Three-fifths Compromise, originally contained in the United States Constitution, reflects (under the misguided contention that enslaved persons were deemed only 60% as productive as non-slaves). See generally *What Is the 3/5 Compromise?*, CONSTITUTION U.S. (Oct. 25, 2022), <https://constitutionus.com/constitution/what-is-the-3-5-compromise/>. It might be contended that many people who were not enslaved also were prejudiced financially from slavery, in part because it kept certain free people from being paid greater wages. It has been contended that the slave states themselves suffered financially from slavery. See, e.g., S. Mintz & S. McNeil, *The South's Economy*, DIGITAL HISTORY, https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=2&psid=3558 (last visited on July 19, 2023). And a rational argument can be maintained that if the economic situation for Black Americans were increased, the economy overall would benefit. Cf. Sarah Cwiek, *The Middle Class Took Off 100 Years Ago . . . Thanks To Henry Ford?*, NPR (Jan. 27, 2014, 4:00 PM), <https://www.npr.org/2014/01/27/267145552/the-middle-class-took-off-100-years-ago-thanks-to-henry-ford> ("In January 1914, Henry Ford started paying his auto workers a remarkable \$5 a day. Doubling the average wage helped ensure a stable workforce and likely boosted sales since the workers could now afford to buy the cars they were making. It laid the foundation for an economy driven by consumer demand."); cf. WILLIAM GATES & CHUCK COLLINS, *WEALTH AND OUR COMMONWEALTH: WHY AMERICA SHOULD TAX ACCUMULATED FORTUNES* (2014).

⁴⁷ One can be confident that those who inherited wealth from enslavers would contend that they, also, were financially harmed by slavery in that it diverted their ancestors' attention away from what would have been more fruitful financial activities.

The diversion of wealth transfer taxes to pay for reparations, would likely, at least in the short run, result in cutbacks in funding other government projects; although, perhaps, it would not have this effect if only the increase in such taxes were so used. On the other hand, in the long run, if using reparations in such a manner that the wealth diversity between Black Americans and members of other racial groups were narrowed, the economy might increase, and tax revenues likewise increase, but it would certainly take more time for the economy to receive those benefits than the time to incur and pay the reparations.

C. Earmarking Wealth Transfer Taxes to Pay Reparations

There is precedent to earmark certain tax revenues for specific purposes. That is the case for the gasoline tax, the social security (FICA) tax, the Medicare tax and other taxes. The taxes are used to cover costs associated with the items that are taxed. For example, FICA taxes fund social security benefit and the gasoline tax is used to build roadways.

That is not always the case. For example, although revenue from the sale of lottery tickets is earmarked for education in some states, it is not in all states.⁴⁸ Moreover, politicians in some cases cut back funding for items, such as for education, and use the funds that otherwise would go to such purposes elsewhere and use the lottery profits to fund the education funding shortfall.

D. A Special Tax for Reparations

There is arguably precedent for creating a special tax system to provide reparations. In the Deficit Reduction Act of 1984,⁴⁹ the Internal Revenue Code was amended (together with amendments made by the Tax Reform Act of 1986⁵⁰) to allow Alaska Native Corporations to sell their tax losses. (In general, the sale of losses was prohibited in the Code.) The law even

⁴⁸ Robert J. Quinn, *State Lotteries*, ENCYCLOPEDIA.COM (May 11, 2018), <https://www.encyclopedia.com/social-sciences-and-law/law/state-lotteries>.

⁴⁹ Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 60(b)(5), 98 Stat. 579.

⁵⁰ Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085.

permitted the corporations to generate losses essentially out of thin air.⁵¹ It was justified by some on the ground that the Federal government delayed transferring land to the corporations pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.),⁵² which caused the native corporations to lose profits. In any case, it basically “flew under the radar,” which likely might not have happened had the Congress merely granted the corporations’ funds in the amount of the tax value of the losses sold. Very few people seemed to be aware of it.⁵³

E. Reducing Wealth Transfer Taxes on Descendants of Enslaved People

However, there might be a more “palatable” source for the funding of reparations, such as providing for lower taxation on descendants of enslaved people, either through deductions, credits or exemptions. Black Americans make up approximately 12% of the U.S. population.⁵⁴ They also have much less per capita wealth than do White Americans.⁵⁵ Under 1% of Americans

⁵¹ See Monica E. Thomas, *The Alaska Native Claims Settlement Act: An Update*, 24(151): 328-29 ALASKOOL, http://www.alaskool.org/projects/ancsa/ARTICLES/mthomas/ANCSA_Update.htm (last visited July 19, 2023); Bretwood Higman, Andrew Mattox, David Coil & Elizabeth Lester, *Loss Selling in Alaska*, GROUND TRUTH ALASKA, <http://www.groundtruthtrekking.org/Issues/Forestry/Loss-Selling-Net-Operating-Losses-NOLS-Alaska-Native-Corporations.html> (last modified: Aug. 12, 2019) [hereinafter GROUND TRUTH ALASKA].

⁵² For a summary and history of the Alaska Native Claims Settlement Act, see *Alaska Native Claims Settlement Act*, WIKIPEDIA, https://en.wikipedia.org/wiki/Alaska_Native_Claims_Settlement_Act (last visited June 7, 2023).

⁵³ The claimed tax losses recognized by the Alaska Native Corporations were sold to profitable U.S. corporations which used them to offset their profits and thereby reduce their income taxes. See Thomas, *supra* note 51; and GROUND TRUTH ALASKA, *supra* note 51; *In re Chugach Alaska Corporation*, 147 B.R. 214 (Bankr. D. Alaska 1992).

⁵⁴ USA FACTS, *Our Changing Population: United States* (July 2022), https://usafacts.org/data/topics/people-society/population-and-demographics/our-changing-population?utm_source=google&utm_medium=cpc&utm_campaign=ND-DemPop&gclid=EAlaIQobChMIz-SMtMid_AIVhbLICH1PhAZSEAAAYASAAEgI3fvD_BwE.

⁵⁵ See, e.g., Dedrick Asante-Muhammad, Esha Kamra & Connor Sanchez, *Racial Wealth Snapshot: Women, Men, and Racial Wealth Divide*, NAT’L COMMUNITY INVESTMENT COALITION (Mar. 3, 2020), <https://ncrc.org/racial-wealth-snapshot-women-men-and-racial-wealth-divide/>; John A. Powell, *Beyond Equity: Targeted Universalism and the Closing of the Racial Wealth Gap*, NON-PROFIT Q. (Jan. 19, 2022), <https://nonprofitquarterly.org/beyond-equity-targeted-universalism-and-the-closing-of-the-racial-wealth-gap/>.

(or their estates) pay any wealth transfer tax.⁵⁶ Hence, granting Black Americans deductions or credits for estate tax would not produce significant reparation payments.⁵⁷

F. Providing a Refundable Estate Tax Credit for Descendants of Enslaved People

However, a refundable estate tax credit⁵⁸ (perhaps, up to a certain limit of wealth or using a scaled credit) could be allowed for the estates of descendants of enslaved persons.⁵⁹ That would postpone the “payment” of these reparations and thereby possibly reduce the present value cost of them.

Such a credit system might avoid publicly identifying the individuals who benefit from the refundable credit. A United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706) is not a public document and, although wills generally are in public records, alternative forms of disposition (such as through so-called “revocable” or “living” trust) generally are not.⁶⁰

⁵⁶ TAX POLICY CENTER, BRIEFING BOOK, <https://www.taxpolicycenter.org/briefing-book/how-many-people-pay-estate-tax#:~:text=To%20put%20the%20number%20of,will%20pay%20any%20estate%20tax> (last viewed June 7, 2023).

⁵⁷ See Johnson & Odom, *supra* note 44, for a discussion of how much slavery cost Black Americans.

⁵⁸ A refundable tax credit means that if the credit exceeds what otherwise would be the taxpayer’s tax liability, the excess may be claimed by and paid to the taxpayer. See generally Gayle Sato, *Refundable vs. Nonrefundable Tax Credits*, EXPERIAN TAXES (May 16, 2022), <https://www.experian.com/blogs/ask-experian/refundable-vs-nonrefundable-tax-credits>.

⁵⁹ This might assume that the credit would be paid to those who inherit the wealth of a descendant of a formerly enslaved person. Alternatively, the refundable credit could be paid to heirs-at-law similar to how wrongful death proceeds of a decedent are shared, which is not necessarily the same as those who inherit the decedent’s estate. See U.S. DEP’T OF JUST., SUMMARY OF STATE WRONGFUL DEATH AND INTESTACY STATUTES, https://www.justice.gov/archive/victimcompensation/law_ny.pdf (last visited Feb. 20, 2023).

⁶⁰ Of course, many Americans die without a will or the equivalent of a will and it is a greater percentage of Black Americans who die without a will or equivalent. See Jeffrey M. Jones, *How Many Americans Have a Will?*, GALLUP (June 23, 2021), <https://news.gallup.com/poll/351500/how-many-americans-have-will.aspx>.

However, providing a system of a refundable estate tax credit would delay the impact of the reparations and, accordingly, delay the goal of narrowing the wealth disparity between Blacks and others, and delay when the American economy would be increased on account of the impact of reparations. Nonetheless, it is at least arguable that paying the reparations over time would increase the probability of their closing the wealth gap between Black Americans and others.

Paying reparations at one time to descendants of enslaved people might not, in the long run, help close the wealth disparity gap. There are dozens of cases of individuals who won a lottery and lost it all and, in fact, wound up with more “problems” than they had before winning the lottery.⁶¹

Hence, if a goal is to close the wealth disparity gap, paying out reparations over time and/or insuring they are used to try to achieve that goal may suggest the reparations be used in a manner designed to accomplish that, such as by paying for education, or making loans or other opportunities for business⁶² or housing⁶³ purposes. One possibility is requiring that housing be used to create diversification which might reduce discrimination.⁶⁴

In any case, providing a refundable estate tax credit might be a way of spreading reparations over time and, perhaps, by requiring its use for systems that might increase the chance of narrowing the wealth gap. There is precedent for allowing tax “breaks” when expenditures are made to achieve certain things, such as the income tax deduction for certain home mortgage

⁶¹ Mark Abadi, Erin Snodgrass & Lauren Frias, *20 Lottery Winners Who Lost it All—as millions vie for Mega Millions’ second-largest jackpot ever*, BUSINESS INSIDER (Jan. 11, 2023), <https://www.businessinsider.com/lottery-winners-lost-everything-2017-8>. It might also be sensible for the refundable credit to itself be paid over time to each person who becomes entitled to such a payment. This would kind of be the reverse of installment payments of estate tax as pursuant to I.R.C. § 6166.

⁶² There is some precedent for favoring certain minorities with business opportunities. See U.S. DEP’T HEALTH & HUM. SERV., IHS ANNOUNCES EFFORTS TO PROVIDE MORE OPPORTUNITY FOR CONTRACTING WITH INDIAN-OWNED BUSINESSES (Jan. 13, 2022), <https://www.hhs.gov/about/news/2022/01/13/ihs-announces-efforts-provide-more-opportunity-contracting-indian-owned-businesses.html>.

⁶³ See generally Margery Austin Turner & Lynette Rawlings, *Promoting Neighborhood Diversification*, THE URBAN INSTITUTE (Aug. 2009), <https://www.urban.org/sites/default/files/publication/30631/411955-Promoting-Neighborhood-Diversity-Benefits-Barriers-and-Strategies.PDF>.

⁶⁴ See *id.*

loans to increase home ownership.⁶⁵ There is also precedent in the wealth transfer tax arena. Payments for education and medical care are, generally, excluded from the base amount upon which wealth transfer taxes are imposed.⁶⁶ The allowance of the credit could be made dependent upon an “approved” use of the refund.

VIII. CONCLUSION

There is no question that slavery is morally reprehensible. It also is economically reprehensible not only for those who were enslaved but for all of society that permitted slavery. A rational case can be made that providing reparations to the estates or descendants of slaves would help close the racial gap between those descendants and other Americans. In the long run it seems likely to boost the United States economy for all. Paying reparations to such descendants should be made in a manner that it will increase the chances of achieving that goal. A refundable estate tax credit would spread the reparation payments over time because the payments would be made only as people die. Such a credit system might increase the political likelihood of reparations being paid.

⁶⁵ See I.R.C. § 163(h)(2)(D).

⁶⁶ See, e.g., I.R.C. § 2503(e).