An Introduction to Revision of the Federal Estate and Gift Taxes

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The estate and gift taxes have been the neglected stepchildren of the Federal revenue system. The care and attention lavished on the federal income tax have been noticeably absent in the case of these transfer taxes. The rudimentary beginnings in 1916 of the "modern" estate tax, to use the adjective in only a chronological sense, have been succeeded by patchwork revisions both as to technical structure and revenue features. An attempt at some technical revision in 1942 did not meet with material success, and the power of appointment provision, one of the important changes, has given rise to the annual festival of postponement of one of its effective dates. These transfer taxes were thus already in a sorry legislative state when in 1948 they were swept into the maelstrom of the marital deduction, in which the taxes and all concerned have been whirling ever since.

This absence of careful legislative attention to the framework of the taxes has been accompanied by an extreme changeableness in the judicial supervision over their application. The cold sternness of the 1920's and early 1930's, marked by the threat of banishment for unconstitutionality, gave way to the warm support of the latter 1930's and 1940's, marked by a possible extension of application that had not been sought on behalf of the estate tax. The administration of

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1 Eisenstein, Estate Taxes and the Higher Learning of the Supreme Court, 3 Tax L. Rev. 395 (1948); Oliver, Property Rationalism and Tax Pragmatism, 20 Tax L. Rev. 675 (1942).

2 Cf. the dicta of Justice Black in Estate of Spiegel v. Commissioner, 335 U.S. 701, 705 (1949) and Commissioner v. Estate of Church, 335 U.S. 632, 645 (1949), respecting imposition of the estate tax unless the settlor of a trust "absolutely, unequivocally, irrevocably, and without possible reservations, parts with all of his title and all of his possession and all of his enjoyment of the transferred property."
the tax fumbled along an irresolute way, its pace necessarily uncertain as judicial searchlights blinked on and off in unpredictable patterns. The Technical Changes Act of 1949 came as a welcome legislative effort to delineate clearly one portion of the road which the judiciary had indicated it would gladly surrender for more legislative surveying.

The inadequacies of these transfer taxes are patent both in their technical structure and in their contribution to the Federal revenues. In the latter respect their recent development is in marked contrast to that of the income tax. The dramatic increase of the federal budget from a $10 billion level in 1939 to a $42 billion level in 1950 has resulted in enormous pressure on our tax system. In response to this pressure, the entire revenue system has increased its yield about eightfold, from $5 billion to $40 billion. The individual income tax yield has risen from $1 billion to $18 billion, 18 times prewar; the corporation tax yield has gone from $1.1 billion to $11.5 billion, 11 times prewar; the excise taxes from $1.7 billion to $7.5 billion, 4½ times prewar. The estate and gift taxes, however, have increased from only $400 million to $800 million, or only twice the prewar level. It is not to be expected that the increase in these taxes would be as great, but their feeble showing is initially suspect. Other comparisons present an even more serious picture. As the income tax became a mass tax under the pressure of swollen war-time budgets and a much higher postwar budget plateau than the prewar level, its exemption level dropped about 40 to 50%. But the estate tax exemption has taken the other course, with the single person’s estate tax exemption up 50% and that of the married person increased 200%. The income

3 E.g., Bittker, The Church and Spiegel Cases: Section 811(c) Gets a New Lease on Life, 58 Yale L. J. 825 (1949); Bittker, Church and Spiegel, The Legislative Sequel, 59 Yale L. J. 825 (1950).

4 This statistical material is taken from the following: the Statement of the Secretary of the Treasury in Hearings before the House Ways and Means Committee, 81st Cong., 2nd Sess. (Feb. 3, 1950) (referred to hereafter as Statement of the Secretary), in which the text comparisons are presented; the annual Budget statements; and the annual Reports of the Commissioner of Internal Revenue.

The text figures relate to the fiscal year 1949. The estimates for the fiscal year 1951 are about the same, except that the estimate for the corporation tax is $10.5 billion, that for the estate and gift taxes $700 million, and the over-all revenue estimate is $37.3 billion.

5 The single person’s exemption dropped from $1,000 to $600 and the married person’s exemption from $2,500 to $1,200. The credit for dependents rose, however, from $400 to $600, so that the net decrease in any particular case depends on the number of dependent credits, including also those for age and blindness.

6 The estate tax exemption in 1939 was $40,000, disregarding the special $40,000 insurance exclusion. The present exemption is $60,000 but in effect becomes $120,000.
tax club has lost its select character, but the estate tax club can still confer a badge of exclusiveness to compensate its posthumous wealthy members for the dues they must pay. Nearly anybody can belong to the income tax club—41% of the population over the age of 14 are members compared with 4% in 1939. But the estate tax club has become even a bit stricter in its membership—1.2% of adult decedents obtain this honorary membership on death as compared to 1.3% in 1939. And while the income tax club is charging much higher dues to its new members, the estate tax club has drastically reduced its membership fees. In a period when all other parts of the federal tax system have necessarily had to take the high road of increased revenue, the transfer taxes have strangely enough been permitted to go off by themselves on the low road.

It now appears, however, that the transfer taxes are about to enter a new era. Revision of these taxes is in the air today, and their long overdue remodelling would seem ready to begin. The President has stated, in the portion of his recent Message urging additional revenue from certain sources, that

A substantial part of the additional revenue should be obtained from revision of the estate- and gift-tax laws...

In originally enacting the estate tax in 1916, the Congress pointed out that "our revenue system should be more evenly and equitably balanced" and that a "larger portion of our necessary revenues" should be collected from the "inheritances of those deriving most protection from the Government." Our estate- and gift-tax laws at present fall far short of this objective. They now produce less than 2 per cent of internal revenues, compared with 7 per cent 10 years ago. To the extent that these taxes remain too low, the remainder of our tax structure must bear a disproportionate load.

The low yield from the estate- and gift-taxes is due to serious weaknesses in the present law.

These weaknesses include excessive exemptions, unduly low effec-
tive rates on most estates, and the fact that the law as written favors large estates over smaller ones, and leaves substantial amounts of wealth completely beyond the reach of the tax laws. Large fortunes may be transmitted from one generation to another free of estate or gift tax through the use of life estates. By this means, vast accumulations of wealth may completely escape tax over several generations.

To strengthen the estate- and gift-tax laws, several steps are necessary. The laws concerning the taxation of transfers by gift and by bequest, by outright disposition and through life estates, need to be coordinated to provide uniform treatment and a base for more effective taxation. In addition, the present exemptions should be reduced and the rates should be revised. These changes will not only bring in more revenue, but they will also improve the fairness of the estate- and gift-tax laws and bring these taxes nearer to their proper long-term place in our tax system.  

The Secretary of the Treasury followed this declaration of Executive tax policy by recommending that the yield of the transfer taxes be increased $400 million, from an estimated $700 million to $1.1 billion, and that considerable revision be made in their technical structure. The bulk of the additional revenue would come from lowering exemptions and raising the rates.

The increase recommended can hardly be termed excessive, for overall it will probably produce a yield from these taxes that is only about $100 to $150 million more than the yield prior to the 1948 reduction. Thus, as respects married persons making no taxable inter vivos gifts, the combined tax payable by both spouses under the recommended increase would seem to be less than the pre-1948 tax at every bracket up to about $750,000, and not to be significantly higher above that level. It will be recalled that the tax fraternity as a whole did not regard the pre-1948 level as severe, except for some in the

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8 Message of the President on Revision of the Tax Laws, H. R. Doc. No. 451, 81st Cong., 2nd Sess. 6-7 (1950).

9 Statement of the Secretary, recommending a rate schedule that would start at 10% for a first bracket of 0-$10,000 in place of a present 3%-7% rate in this area, follow about the present schedule to 30% at the $100-150,000 bracket, rise to 45% at $500,000 as compared with present 32%, to 60% at $1,000,000 as compared to 39%, and 77% at $3,000,000 as compared to 56%. The significant increases come in the area between $100,000 and $1 million where at present progression is about non-existent, 30% to 37% as compared with a recommended 30% to 37% progression. The Secretary recommended that the existing estate and gift tax exemptions be reduced to a combined $45,000 exemption, of which $15,000 would be available during life; for married persons these figures in effect become $90,000 and $30,000. The $3,000 per donee exclusion would become a $3,000 per donor exclusion and a $500 per donee exclusion, with similar doubling for married persons.
community property states whose clients were placed on that level for the first time in 1942. As respects single persons, the tax is materially increased over the 1948 level, the percentage of increase becoming about 25% at the $750,000 level and rising after that.\footnote{The marital deduction operates as a checkrein on raising the rates too steeply, since while the impact on married persons is always to some extent moderated by the deduction, single persons have no such refuge to temper rate severity and the rates would become inequitable as to them. While the same situation exists in the income tax under the joint return split income, it can be solved there, if we find it necessary in the future to increase income tax rates sharply, by switching from the split income concept to mandatory joint returns, either directly or by restricting married couples filing separate returns to rate brackets half the width of those afforded single persons. U.S. Treas. Dept., \textit{The Tax Treatment of Family Income in Hearings before the House Ways and Means Committee on Revenue Revisions, 1947-8}, 80th Cong., 1st Sess. 846, 854 (1947). In the estate tax field it may similarly become necessary in the future to provide for cumulation of the transfers of husband and wife, though the technical problems here are far more difficult than under the income tax. See Surrey, \textit{Federal Taxation of the Family—The Revenue Act of 1948}, 61 \textit{Harv. L. Rev.} 1097, 1159 (1948).}

Whether Congress will agree is uncertain, and in fact pessimism is probably the outlook warranted—if one's view is that such changes are warranted. Our concern at this point is not, however, with the desirability of an increase in the revenue yield of these taxes. I and, I gather, most of the other commentators in this symposium are on the side of the increased revenue yield, and in that sense the symposium is a biased survey. The doctors desire to cure the patient and make him stronger—none wants to kill him. But the final answer will be that of the legislator-politician and not of the tax technician. Nor is there any quarrel with the nature of this response, for the tax policy issues respecting the rates and exemptions determinative of revenue yield are ultimately political issues. Our inquiry is rather with the technical structure of these taxes, for here the tax technician has a proper role to play in the shaping of the answers.

Our examination of the technical issues must pause for a moment, however, to permit a rejoinder to other voices that would cause us to abandon all such inquiry. These are the voices urging that "the Federal estate and gift taxes should be repealed and returned to the states where they more properly belong."\footnote{Osgood, \textit{The Case Against Estate Tax Increases}, 38 \textit{Trusts \\& Estates} 770, 819 (1949).} In a sense these voices are the present-day political echoes of the three dissents in \textit{Bromley v. McCaughn},\footnote{280 U.S. 124 (1929), Justices Sutherland, Van Devanter and Butler dissenting.} contending that the gift tax was unconstitutional as an unapportioned direct tax. Harold Groves' paper is a response to this
point of view and a demonstration that these transfer taxes have an essential place in a federal revenue system required to perform a tough task. In this respect, we must not overlook the backstopping role of the transfer taxes. For one thing, they alone today can bring some equalization to the otherwise great disparity that would exist between families whose wealth was obtained in the wondrously low income tax period between World Wars I and II and the families who now find that their efforts at accumulation face a real income tax barrier. Further, many persons will always urge great liberality in certain areas of the income tax, as today in the treatment of capital gains or percentage depletion, contending that the benefits to the economy from such liberality outweigh rigorous application of the income tax. Others will contend that liberality is but a euphemism for loophole. But inevitably there will be such gaps in the income tax wall, for one reason or another and for better or for worse. Federal transfer taxes in a sense permit this flexibility, experimentation, or avoidance under the income tax, since they can here also operate as an equalizing force. The Texas oil millionaire or the business promoter specializing in capital gains who manages to dodge the clutches of the income tax is thus in the end required to return a share of his wealth. This is not to condone unjustified escape from the income tax. Rather it is to indicate that transfer taxes are necessary to complement variations in the income tax, whether the variations represent weaknesses or justifiable distinctions. A proper tax structure, in short, requires that the same authority be able to determine the toll due the Government both during life and at death.

Professor Groves' analysis thus permits us to proceed on the assumption that the transfer taxes are properly an integral part of the federal tax system, and even that the revenue from these taxes should be increased, as the Treasury is now contending. The propriety of an increase can be rested on the need for making the transfer taxes bear their fair share of the load placed upon the federal tax system. But it is a serious question whether this increase, desirable in that sense, is appropriate from the standpoint of the present state of disrepair of the technical structure of these taxes. A tax should not be required to yield, and cannot properly yield, large amounts of revenue unless its substantive provisions are in order. The income tax needed the elimination, under the Revenue Act of 1942, of inequities and loopholes, the introduction of withholding and current tax payment, and the simplification techniques of the standard deduction, per capita
exemptions, a tax table and elementary tax forms before it could properly carry the tax load forced upon it by the war.

The present estate and gift taxes are not technically adequate to stand lowered exemptions and increased rates. The taxes are complex, inefficient, and uncertain in their application. They require a highly skilled understanding of their provisions, singly and in combination, for intelligent planning by the taxpayer. As in one sense only a few are affected by the taxes, it can be argued that these defects are not too serious. Thus, there were only 14,000 taxable estates in 1945, totalling about $1.9 billion in taxable estates after deductions and exemptions. And even as respects this limited group, the bulk of the revenue came from a still smaller segment. In 1945, one-half of these returns related to estates under $100,000 and produced about $10 million, or 2% of the total estate tax yield in that year. Another 46% of the returns were in the $100,000-$500,000 group, and provided 34% of the yield. The balance, about 800 returns or 6%, produced about $300 million or 65% of the yield.13 As for the gift tax, there were only 5,000 taxable returns filed in 1944, out of 18,000 returns. The taxable amount of gifts was $148 million, yielding $38 million in tax.

But these figures do not tell the real story. The intense interest of lawyers in the material on estate planning and in lectures and institutes dealing with these taxes indicates a widespread concern on the part of the bar about transfer taxes. Wills, trust agreements, and business planning are significant in the practice of the average lawyer. He knows that estate and gift taxes are important, that an error may be very costly to his clients, and he has the uneasy feeling that technically these taxes are getting to be too much for him. To be told that a small "possibility of reverter" worth $4,000 can produce a tax of more than $450,000 (and take complicated legislation of a special sort to remove the tax) does not produce a state of confidence in planning his clients' affairs.14 We are here discussing the average lawyer and not the tax specialist. The latter can take care of himself, though that is no justification for unnecessary complexity. The former can no longer competently cope with these taxes; and he does not desire, nor is there any reason why he should be forced, to send his steady clients to the tax specialist. Nor is the average lawyer's life made any the easier by a torrent of materials on estate planning, or by the con-

13 Statement of the Secretary, Exhibit 5 relating to Analysis of 1945 estate tax returns, hereafter referred to as Exhibit 5.
14 The reference is to Estate of Spiegel v. Commissioner, supra note 2.
trivances of insurance specialists and other architects desiring to build estate plans with the funds of the decedent-to-be.

All these difficulties will increase significantly if exemptions are reduced and rates increased. Additional actual taxpayers will be swept under the tax, and still more taxpayers will require intelligent advice if they are to stay away from taxes that they can with planning prevent. The effects of errors and of injudicious planning become far more serious under heavier rates. Consequently, while I think it proper that the estate and gift taxes, as a type of taxation, should produce greater revenue, I think it unwise and in a sense unfair to increase their yield without at the same time materially improving their substantive provisions.

What improvements are in order? Part of the answer to this question requires a consideration of what people are actually doing in the transmission of their wealth, and even of what they should be doing. The estate and gift taxes are, after all, founded on the simple fact that "You can't take it with you." Instead one must divide his wealth between the objects of his bounty, generally his family, and the Government. Today the relative shares of the family and of the Government differ depending on the methods adopted in transferring the property to the family and on which members of the family one chooses to benefit. If a person desires—and if he is financially able—to give away a part during life, the Government takes less and the family more than when for one reason or another all must be given at death. If a person desires to give away a part to his wife—if he has a wife— the Government takes less and the family more than when all is given to children, provided in turn that the person is willing to give it to his wife in a certain way.

We can suppose that, all things being equal, a person would normally prefer to act so that the Government's share is kept at a minimum. Consequently, when a decedent has followed a course that results in more tax than another course would have produced, speaking generally, it must have been out of ignorance of the consequences (in which we include bad advice and for which we can in part blame the complexities of the taxes) or because the lesser tax route was a route which the decedent did not prefer for non-tax reasons. These

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15 In 1945 14% of the returns were filed by widowers, 11% by single persons, 2% by divorced persons, and 20% by widows. The statistics furnished do not indicate what proportion of the widowers or widows had received property on the death of a previous spouse, though they do show that only 7% of the returns were filed by wives. Exhibit 5, supra note 13.
non-tax reasons may have been family considerations, business considerations, financial inability to take presently the action required by the lesser tax route, premature death, and so on. In other words, our assumption of all things being equal is unwarranted in the transfer tax field. Tax considerations all too frequently pull in one direction—non-tax factors in another.

Properly constructed transfer taxes would keep such opposing forces at a minimum. They would offer tax neutrality instead of tax preferences, and thereby permit an individual to shape the transmission of his wealth uninfluenced by the tax magnetism of certain courses of action. The Government’s share of the wealth would as far as possible be determined by the amount of that wealth and not by the manner of its transfer to others. Consequently, a reshaping of the structure of the transfer taxes leads us to an inquiry as to the ways in which tax magnetism is affecting the transfer of property and whether the effect is socially desirable or undesirable. This inquiry also involves determination of the areas in which tax preferences are available but are rejected by many people for non-tax reasons, so that some benefit by the preferential routes but others do not or cannot. These are the questions to which Charles Looker and Walter Nossaman have addressed themselves in a search for the answers. They conclude on the whole that we have much to learn before we can gauge the full impact of transfer taxes upon the conduct of transferors and the pattern of wealth transfers. Further, realizing that these taxes do have an impact, we need more knowledge before we can determine whether there are socially desirable patterns of transfer that should perhaps be encouraged by tax preferences.

But their articles do give us an insight into areas in which tax considerations are cutting athwart non-tax desires, and thereby in effect favoring certain transferors to an unwarranted extent. Two significant areas are the favoritism shown to inter vivos gifts under the dual estate and gift tax structure and the vagaries of the marital deduction. It is in these areas that the transfer taxes offer the greatest disparity in the relationships between the Government’s share and the family’s share depending on which course of action the decedent has chosen.

Adrian DeWind’s article focuses on these problems. He deals first with the existence of the estate and gift taxes as two separate taxes, and properly indicts this dual structure on grounds of technical difficulties and overlapping application as well as absence of neutrality.
between methods of transfer involving inter vivos gifts and those
limited to transmission at death. I would add to the indictment, as
indicated above, the unfair burden cast on the average lawyer who
attempts to wrestle with the whole elaborate mathematics of estate
planning in this area: This amount in inter vivos transfers will save
you so much in taxes if you are in these gift tax brackets and if you
are (and will be) in these estate tax brackets and if you keep in mind
the differences in the basis provisions and the consequent capital gains
or losses if the property has appreciated or depreciated in value (or
will so change in value) and if you transfer all of your property to
someone other than your spouse or all to your spouse or divide it
properly between your spouse and others and if you watch the con-
templation of death provision and the rest of section 811(c) and (d)
but nevertheless keep in mind the effects of the gift tax credit and
if you balance the fact that the gift tax paid is being excluded from
the base of these taxes and that there will be a change in income
taxes if the gift is not to a spouse against the fact that interest is being
lost on the money used to pay the gift tax but remembering that such
interest would in turn be subject to income tax and if you take ac-
count of the effect of state income and transfer taxes . . . . There is no
tax policy reason that can justify the infliction of this tax calculus
on a lawyer doing his best to see that John gives his property to Mary
and the children in a way that will properly provide for the family
and enable them to lead useful lives.

A large part of the remedy, as Mr. DeWind and others have
pointed out, lies in the integration of the two taxes into one transfer
tax. Such integration is merely an extension of the cumulative gift
tax to include transmission at death as the last gift in the cumulation.
Such an integrated single transfer tax has now been recommended by
the Secretary of the Treasury as a necessary part of transfer tax re-
vision.\footnote{Statement of the Secretary, supra note 4.} One very important fact to observe with respect to this pro-
posal for integration of the present estate and gift taxes is that, con-
sidered by itself, it is not a revenue increasing proposal. At present
rates and exemptions, integration would probably yield only $10
million of additional revenue.

The negligible revenue aspects of the proposal are due to the fact
that decedents subject to the estate tax have not made taxable inter
vivos gifts in significant amounts. In part the overall revenue yields
of the two taxes tell the story, for the gift tax yield has generally been
less than 10% of the estate tax yield. More pertinent data has been submitted by the Secretary of the Treasury, based on 1945 decedents' returns.\textsuperscript{17} Out of 15,898 estate tax returns in that year, only 2038 or 12.8% of the decedents had filed gift tax returns since 1932, and only 822 or 5.2% had paid any gift tax. In the upper estate tax brackets this percentage is much higher, for example, being 30.5% at $500,000-$1 million, 45% at $1-2 million, 61.5% at $3-5 million and 75% over $5 million. But, as indicated below, while most decedents at these levels do make gifts, the total amount of gifts in relation to the estates is not large. The reported gifts for the entire group totalled $194 million plus $12 million gift tax paid, as compared with net estates before exemption for the entire group of $2.8 billion. On the average, such gifts came to about 6.4% of the total property transferred inter vivos since 1932 and at death. In some brackets the percentage was higher, such as 12.3% on that over $5 million and 11.8% on that between $2 and $3 million. But even as respects the 28 decedents with estates over $5 million, there were 6 who had not reported any gifts since 1932.\textsuperscript{18}

While estate planners may stress the dollars saved through inter vivos giving many taxpayers are unwilling or unable to achieve such tax savings. Whether it be the King Lear factor, an absence of liquidity, a pressing business need for resources, or other matters discussed by Mr. Looker, these taxpayers end up at a disadvantage compared with those who can neatly approach the inter vivos breaking points of the estate planners. For it is apparent that some taxpayers, especially in the upper brackets, do achieve tax savings by virtue of the dual system. Further, more will attempt to secure such savings if rates are increased, even at the expense of persuasive non-tax factors in the other direction.

Integration of the estate and gift taxes into a single transfer tax, therefore, is primarily required for the purposes of simplification and equity among taxpayers.\textsuperscript{19} It is the first step to be taken in the struc-

\textsuperscript{17} Exhibit 5, \textit{supra} note 13.

\textsuperscript{18} As respects the 753 returns over $500,000, out of $1.3 billion of property transferred, $1 billion or 80% was transferred at death; $150 million was transferred inter vivos since 1932, and $114 million was transferred inter vivos prior to 1932. These figures (and those in the text) do not take account of inter vivos gifts covered by the annual exclusion, and the pre-1932 transfers are probably understated. Exhibit 5, \textit{supra} note 13.

\textsuperscript{19} The Secretary recommended, as part of the integration proposal, that the exemption for the integrated tax be $45,000, of which $15,000 would be available during life. See \textit{supra} note 9. Such lowering of present exemptions is not a necessary part of an integration plan, but rather represents a separate recommendation for increasing transfer
tural remodelling of these taxes. Mr. DeWind describes a number of important subsidiary improvements that flow from integration. Thus, the disgraceful contemplation of death litigation would disappear from the scene, and the transfer taxes would no longer be subject to Mr. Eisenstein’s scathing indictment: “Any tax provision becomes unduly pathetic when it gears liability to such nonsense as the decedent’s happy disposition, his practice of golfing once a week, or his entrenched habit of puttering about in his garden.” 20 We could say farewell without regret, if still with a measure of respect, to the Oliver Johnson who became immortal as the composite of those decedents able to dismiss the Grim Reaper from their thoughts. 21 His engaging habit of heel-clicking is reminiscent of a practitioner equally skilled:

“You are old, Father William,” the young man said,
And your hair has become very white;
And yet you incessantly stand on your head—
Do you think, at your age, it is right?”

* * *

“You are old,” said the youth, “as I mentioned before.
And have grown most uncommonly fat;
Yet you turned a back-somersault in at the door—
Pray, what is the reason of that?”

* * *

“In my youth,” said his father, “I took to the law . . . .”
from Chapter V, Alice's Adventures in Wonderland.

Integration in addition would permit the needed correlation with the income tax to be accomplished more efficiently. Mr. DeWind's use of present income tax principles to locate the dividing line separating those transfers still producing income tax but no transfer tax and those transfers relieving the transferor from income tax but yielding a transfer tax seems desirable. Such income tax criteria appear more practicable under the circumstances than those utilized by the Treasury Advisory Committee. 22 The latter, by stressing estate tax con-

20 Eisenstein, Are We Ready for Estate and Gift Tax Revision? 23 Taxes 316, 319 (1949).
21 Estate of Oliver Johnson, 10 T.C. 680 (1948).
22 The revisions necessitated by correlation would also permit clarification of the section 811(c) and (d) overlap, especially as regards the use in section 811(c)(1)(B) of “the right . . . to designate the persons who shall possess or enjoy the property” to encompass only the “income” enjoyment of property and not to refer to future enjoyment of the fee.
cepts, would have extended the income tax coverage beyond its present boundaries. There is one additional area, not considered either by Mr. DeWind or that Committee, in which correlation should be obtained. This concerns the issue whether a transfer treated as a gift for gift tax purposes is also to be treated as a gift for income tax purposes as respects the donee, such as the section 22(b)(3) exclusion of gifts and the section 113(a)(2) basis for gifts. The correlation discussions to date have concerned themselves only with the income tax aspect of taxation of the transferor on the income from the transferred property and have not considered these other areas in which a gift may still not be a gift. An illustration of the latter is the many intriguing income tax problems to which Doris Farid-Es-Sultaneh has lent her equally intriguing name.23 Bonus and honorarium payments by an employer to an employee are another—may the bonus be exempt under section 22(b)(3) as an income tax gift but still not be a gift tax gift. These difficulties extend also to the estate tax, as for example, in a United States v. Merriam24 bequest to an executor contingent upon his assumption of duties. The suggestion has been made that correlation could be achieved by amending the income tax to define "gift" as used therein in terms of the concept of a gift under the gift tax. In other words, correlation would be achieved by permitting the gift tax definition to control the other two taxes.25 It would also seem desirable, at the same time, to amplify the definition of the “transfer by gift” phrase of section 1000 and the section 1002 standard of inadequate monetary consideration, so that much of the Regulations and ruling learning on business transactions, support rights, and so on could be found in the statute.

The next step in the remodelling necessary to bring transfer tax rules into harmony with patterns of property disposition and to achieve some order out of present chaos is concerned with the marital deduction. Mr. DeWind's article describes the numerous policy and technical objections that may be made to the marital deduction. These objections are not to the principle of the deduction itself, if that principle is understood as being the desirability of excluding from transfer tax burdens the transfers from one spouse to the other. In fact Mr. DeWind and others, recognizing the policy justifications

23 160 F. 2d 812 (2d Cir. 1947).
24 263 U.S. 179 (1923).
for that principle and realizing that much of the opposition to higher transfer tax rates and lower exemptions arises from a desire to protect the wife against a sharply reduced standard of living on her husband’s death, have urged that the 50% marital deduction become a 100% exclusion. The objections to the present marital deduction relate instead to the execution of this desirable policy of favoring inter-spousal transfers. Basically the sorry mess we now face resulted from the illicit alliance in 1948 of transfer tax reduction and community property concepts. Inter-spousal transfers may produce tax savings only if families are willing to abandon a traditional method of property disposition—in trust for the wife for life, remainder (or under a special power of appointment) to the children. The husband has to choose between obtaining tax savings through releasing his hand from the control of the property on his wife’s death and the risk that when she dies some alien hand will be guiding her actions. In this fashion what appeared to be the community property pattern of outright ownership in the wife was foisted upon the rest of the nation as the price of estate tax reduction. At the same time, however, the community property families are able to avoid the dilemma they thus exported, through an election by the wife to take under the husband’s will establishing a trust in the community property for her life; with remainder to the children.

The remedy suggested for the marital deduction area goes to the heart of the problem and consists simply of taking the one next step that was not taken in 1948. In the Revenue Act of 1948 the marital deduction was given to the husband on the condition that his wife pay a tax on her death. Compliance with the condition was guaranteed by the requirement that the disposition to the wife be placed property-wise in a form that would render it includible in her gross estate—outright ownership or complete power of appointment. But compliance with this condition could as readily have been secured by changing the tax laws instead of making spouses change their patterns of property disposition. Thus, permit husbands to continue to leave only life interests to their wives and still obtain a marital de-

20 While the Treasury Department has so far not been willing to move from 50% to 100%, it has apparently recognized that there is no turning back of the clock as respects the principle of the marital deduction. Thus, the Statement of the Secretary in his specification of needed revisions of the estate and gift taxes did not include elimination of the marital deduction and a return to Revenue Act of 1942 concepts, apart from a wistful observation that if the marital deduction were eliminated, rate and exemption changes would be largely unnecessary.
duction, but provide that on the wife’s death the property in which such life interest existed will be includible in her gross estate as if she had obtained outright ownership. There would be no real change in the present tax burden on the wife where the marital deduction is now obtained, because she is taxable today. Rather, such taxability would exist without the present necessity of requiring the husband to give her full control over the property in order to bring about such taxable status on her death.

This change in the marital deduction approach would permit property dispositions to return to their accustomed channels. As Mr. DeWind indicates, it would also materially lessen geographical factors and in large part would sweep away as unnecessary debris all of the complicated learning of the marital deduction—terminable interest, “tainted property,” adjusted gross estate (if there were a 100% marital deduction), qualifying trusts, qualifying insurance, etc. Finally, it would take us to the threshold of a new venture—that of the taxation of life interests generally. We will consider this new venture later; it suffices here to say that this solution of the marital deduction does not require or commit us to the larger venture.

There are related structural reforms, minor in comparison but possessing independent significance, which should be made in the transfer taxes. The power of appointment area needs clarification, and an end to the annual extension of the cut-off date. As part of the correlation of the income and transfer taxes, the income tax basis provisions should be harmonized. While one may have misgivings as to the wisdom of section 113(a)(5), it appears that this provision represents a Congressional policy not likely to be changed. That being the situation, all transfers taxable as transfers at death should as far as possible receive the same basis treatment of value at death. In another area, a study should be undertaken of the problems of valuation for transfer tax purposes: what are the techniques being used and can they be improved; what are the complaints of taxpayers, are they justified and if so can they be remedied; should new mortality tables be adopted and can further use be made of other actuarial learning; are there other ways to reduce the uncertainties, disputes and complications attendant upon the valuation process?

Our conclusion so far is that the structural remodelling represented by the integration of the transfer taxes and the revision of the

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marital deduction is of real urgency, and in fact is imperative if the revenue yield of the taxes is to be increased. There remains for major consideration one other significant area of exploration in this regard, that of the economic and social effects resulting from the requirement that the transfer tax be paid in cash dollars. Where the estate is in a sufficiently liquid condition, with cash, government bonds, marketable stock and other securities of publicly-held corporations, insurance and the like, the economic and social effects of the transfer tax burden are basically a part of the broader question of the level of rates and exemptions. The dollars are there to be paid—the issue is what are the effects of demanding that this or that proportion of the dollars should be paid in taxes. But where the cash dollars are not there, so that property values not readily liquid somehow must first be turned into cash dollars, the problem becomes quite different.

In recent years this latter problem of liquidity, or rather non-liquidity, has been presented in terms of the family business. The husband, who founded the business and built it into an active enterprise, dies leaving his ownership of the business as just about his sole asset. His family desires to continue the business—but where can they obtain the cash dollars to pay the estate tax. Or even if they wish to sell part or all of the business, who will buy it from them. Is the end result a forced sale at a sacrifice in value, though one not reflected in the estate tax valuation. Or is it the transfer to a large corporation, thereby presumably furthering monopoly growth and depriving the locality of the advantages of a locally-owned enterprise. While these situations do exist, do they exist to a sufficiently significant degree. And, if so, are the consequences harmful to our society and our economy.

It is to this issue of liquidity as it affects the family business that Lowell Harriss' article relates. His analysis serves as a warning signal both to those who wish to move mountains with the problem as a fulcrum and those who insist on passing the problem by. The problem is one that cannot be neglected—yet at the same time estate taxation need not come to a halt nor is the problem the “Open Sesame” to warrant wide breaches in the income tax or the estate tax. Rather, as Professor Harriss concludes, we need considerably more information than we now possess in order properly to assay the problem and prescribe the measures needed for its solution.

Such caution should be heeded. On the one hand, we should not rush ahead in the name of estate liquidity alone to sanction inter
vivos income tax avoidance by dividend or reorganization bailouts, split-ups, and the like which lack a genuine business urgency. Nor should we hastily carve redemption of estate-held stock out of the scope of section 115(g), and thus provide added zest to circumvention of section 102. Similarly, as Professor Harriss has demonstrated elsewhere, we should not yield to pressures to build estate tax exempt islands of liquid assets, be they life insurance, government bonds, or other assets. Until more is known, such solutions appear greatly to overshoot the mark and to produce much more of loophole and inequity than of benefit to our economy. On the other hand, increases in rates and exemptions should not be pushed without some thought given to possible danger signals in this area. Thus the statement of the Secretary of the Treasury on this point seems insufficient recognition of the problem. He said:

The amount of tax (under the recommended increase in estate tax revenue) on the estate involving a business which might properly be considered small would not materially affect the normal development of such a business. In the infrequent instances in which liquidity is a problem, the extension of tax payments permitted by present law up to a maximum of ten years protects estates from having to make forced sales of property at a serious financial loss.

It would seem appropriate to consider the merits of an automatic extension, at a lower rate of interest or perhaps no interest, where the taxpayer requests the extension and shows that the assets of the estate consists largely of the ownership of a family business, or perhaps other forms of relatively non-liquid property. Such automatic extension would at least remove the uncertainties attendant on administrative discretion and guarantee a breathing spell if one were thought necessary by the taxpayer. At any rate, the Treasury should, if it has not already done so, undertake a comprehensive study of this entire area, both statistically and with case histories. Perhaps the study should be in conjunction with other agencies, such as the Federal Trade Commission as respects the role of the estate tax among the causes of mergers and similar acquisitions.

The above discussion represents a summary of the structural revisions necessary in the present transfer taxes, especially if these taxes are called upon to bear an increased revenue load. Such remod-

\footnote{28 Harriss, Proposals to Exempt Life Insurance Used to Pay Estate Tax, \textit{5 Tax L. Rev.} 119 (1950).}

\footnote{29 Statement of the Secretary.}
elling would produce a rational, defensible structure that could occupy its proper place in the federal tax system. Accomplishment of these revisions would alone be a notable achievement in the tax field. But the Treasury Department asks us to push ahead still further and enter upon a brave new world of transfer taxation—the taxation of life interests. It has decided to disclose to the Congress one of the facts of transfer tax life, that the trust device is being used to permit the skipping of an estate tax for one, two, or sometimes more generations. In so doing, it has determined to come to grips with a challenging problem that will not easily yield a solution.

The Treasury's statistical evidence is quite impressive. Its analysis of 753 estate tax returns filed in 1945 with $500,000 or more of net estate before specific exemption shows that 45% of the amount transferred, $366 million out of $818 million, was transferred in trust. A large number of decedents, of course, transferred a much greater proportion in trust—thus 92 cases showed trust transfers totalling 60% to 70% of the total property transferred, and 54 cases showed 70% to 80%. Further, and significantly, when property is transferred in trust, the duration of the trust is for long periods. $216 million or 59% by value of such trust property is to stay in trust one generation; $107 million or 29% is to exist for two or more generations. As respects the generations involved, the real question here, in 21% by value of the cases, or $76 million, the estate tax will fall due on the death of the children, so that there is no real skipping of a generation. In most of these cases the spouse is the life tenant, so that the skipping, if it can be said to exist at all, is merely that inherent in the policy of the marital deduction. But in 37% of the cases, or $136 million, the next estate tax will fall due at the death of grandchildren, thus really skipping one generation. In 15% of the cases, or $56 million, the next estate tax will not fall due until the death of great-grandchildren, thus skipping two generations. In 26% of the cases, or $96 million, the next estate tax will fall due at the death of other relatives (other than brothers or sisters). The extent of the skipping involved in these cases thus cannot be ascertained from this description. If these are eliminated from the percentage computations, so that only spouses and direct descendants are involved, the above percentages become: in 28% of the cases the tax falls due at the children's death, in 50% at the grandchildren's death.

30 Ibid.
31 The data in the text is from Exhibit 5, supra note 13.
and in 21% at the great-grandchildren's death. Finally, the statistics demonstrate that the wealthier the decedent, the greater the proportion of his wealth that will be placed in trusts lasting for two generations.

Non-tax factors must here also play a considerable role, since as respects these 753 decedents there were transfers outright of $452 million. The beneficiaries of these outright transfers are the same close family group as in the case of trust transfers. Thus, $118 million in outright transfers or 26% of such transfers went to spouses and $205 million or 45% went to children. In the trust cases, 72% of the life beneficiaries were spouses and direct descendants, and 70% of the remaindermen were direct descendants. With 70% to 75% of the decedents' transfers, whether in trust or outright, thus being made only to spouses, children and other direct descendants, the choice between the trust device and the outright transfer obviously involves non-tax as well as tax considerations. Consequently, many families who for non-tax reasons choose the outright transfer suffer a tax disadvantage vis-a-vis those families in which non-tax reasons indicate the trust device or who permit tax reasons to dictate the choice, since the latter are able in either event to skip one or more applications of the estate tax. The failure of the estate tax to reach the termination of a life interest thus involves inequities among taxpaying families as well as a serious revenue defect.

There would seem to be little room for quarrel with the Treasury's assertion that a transfer tax should be imposed each time one generation hands down its wealth to another. Treating the spouses as one generation (though in some cases of extreme age differences two generations may actually be involved), there should be a tax when the property goes to their children, again when it goes to grandchildren and so on. While the goal is thus clear enough, there are real difficulties in reaching it. Two distinct approaches are possible.

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32 As respects the balance of the outright transfers, $7 million (1-2%) went to parents, $34 million (7-8%) to brothers and sisters, $12 million (2-3%) to grandchildren, $59 million (13%) to other relatives, and $16 million (3-4%) to non-relatives. The trust transfers show a similar choice of non-direct family beneficiaries. The total transfers excluded charitable transfers.

33 To avoid obvious difficulties, the principle would have to apply to trusts where members of the settlor's generation, as brothers and sisters, or even of a previous generation, as parents, were the life beneficiaries. Brothers and sisters were life beneficiaries in trusts involving $15 million, other relatives in $34 million, non-relatives in $7 million, combinations of these classes in about $13 million, and parents in a negligible amount—in all, roughly 20% of the total.
Under one, the tax would be imposed on the life beneficiary on his death, payable of course out of the trust property. Under the other, the tax would fall directly on the remainderman as the taxpayer. Both approaches present complex technical problems.34

The first method, that of fastening on the life beneficiary as the taxpayer, is known as the British method. In the simple case of a trust for A for life, remainder to B, on A's death the value of the corpus is included in A's total estate, and then a pro-rata part of such total tax is payable out of the trust corpus. Under this approach two principles are involved: one, that cessation of enjoyment of a life interest is a taxable event; and two, that the value of the underlying corpus should be aggregated with the transmissible property interests of the life beneficiary.35 This method would as readily apply in the case of successive life interests as in the single life interest, the corpus being taxed at each life beneficiary's death.

In a simple case, the British method works satisfactorily and achieves tax equality with an initial outright transfer of full ownership to A instead of a life interest.36 But all cases are not simple.37 The British apparently do not tax where the transfer is to A for 20 years, remainder to B since they do not have a gift tax; under an integrated transfer tax or even a separate gift tax, A could be taxed when his interest for a term ended. Similarly, where the transfer is to A for C's life, remainder to B, under an integrated tax or a gift tax A could be taxed just as in the case of an interest for a term. But suppose the trust is to accumulate income during A's life, with the corpus and accumulations then going to B. The British leave this device untaxed; it could be made subject to a tax at A's death but one not involving aggregation with A's property. Let us now change the trust to one under which the trustee has discretion to pay the income to A

34 The following discussion has no pretense at complete analysis. It is based in large part on conferences participated in as a consultant with Treasury tax technicians. As such, it represents some of the research of these technicians but none of their policy conclusions.

35 The power of appointment problem is considerably diminished under this approach, since taxation of the life beneficiary rests on his life interest and makes examination of his powers over corpus unnecessary. The problem would still exist where the power was held by one not having an income interest.

36 An appropriate property-previously-taxed ameliorating factor could be devised to cover the premature death of the life beneficiary.

37 And, of course, if one is firmly convinced that at death the cessation of a life interest is not sufficiently equivalent to the cessation of a fee interest, even the simple case is not properly treated. Necessarily, consideration of the British method must assume the equivalence for tax purposes of the two situations.
or to accumulate it, with the corpus and any accumulations then going to B. Is this trust to be treated as was our trust in the simple case or is it to be classified with the accumulation trust, the issue of aggregation being the real issue here. Or perhaps the corpus could be divided between these two treatments, the division being based on a ratio of income received by A to total income. While the British do not tax such a device, it is obvious that our tax bar and trust lawyers would have a merry time steering their clients along this freedom road. Change the trust once more, to give the trustee discretion to allocate income among A, C, and D or to accumulate it, with the corpus and accumulations going to B at the death of the last survivor. Such a proportionate division of the corpus would also work here, but would be quite complicated—and yet failure to tax in some fashion is simply to force many trusts into this pattern of escape. Other difficult situations can be presented, which the British have not solved, such as an annuity to A coupled with insurance on A’s life payable to B, or an annuity to A with a trust accumulating income until A’s death, the fund then going to B—essentially variations on the simple trust for A for life, with remainder over to B.

It is clear that neat solutions are not possible. But the unavoidable complexity of the solutions that must be resorted to does not mean that the British method must be abandoned. Our major premise still remains acceptable—that a method must be devised which copes as successfully as possible with the present inroads on the transfer taxes caused by trust devices which permit the skipping of one or more generations. The assignment is to find the method that best accomplishes this task, keeping in mind that one important criterion is the avoidance of a tax distortion of the normal pattern of property disposition. The British method, with American improvements, is still a leading candidate for the role. In this connection, we should not forget that ever present and ever annoying question of existing life interests. It would seem quite proper and quite constitutional—to treat them in the same fashion as future life interests. But one must reckon with the emotional clouds that often obscure logic when this question of existing trusts is raised—and remember that the tax, though only applicable to future deaths, will be immediately described as a retroactive tax, with all the penalizing connotations of

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38 Where under the trust the income is to be distributed simultaneously to three beneficiaries, the British tax the corpus only on the death of the last survivor when the remainder falls in.

that terminology. Perhaps a compromise between logic and emotion might be to tax the existing life interest but not to aggregate it with the other property.

When we examine the other possible method, that of a tax levied on the remainderman when he obtains possession of the corpus, a new set of problems arises. Such a tax is in effect a special accessions tax supplementing the standard transfer taxes. No question of aggregation with taxable transfers by the remainderman is involved; rather, there is the aspect of aggregating or cumulating under this special accessions tax all remainder interests to which he succeeds at various times and from various sources. Thus in the simple case of a trust for $A$ for life, remainder to $B$, a special tax would be levied on $B$ at $A$'s death. If $B$ were also the remainderman of a trust for $C$'s life, the value of the corpus of this trust would be cumulated (in the same manner as the present gift tax cumulation) with that of the trust for $A$'s life in determining the special tax applicable to $B$ at $C$'s death. This tax would apply whenever the remainderman $B$ obtained complete possession, and hence would readily work in the case of the trust for $A$ for a term of years, or the trust to accumulate for $A$'s life. And a rapid succession allowance, comparable to property previously taxed devices, could be adopted where $A$'s death followed shortly after the death of the creator of the trust; perhaps the allowance could involve an increasing percentage of corpus inclusion as the period between trust creation and $B$'s possession increases.

Here also simple cases offer simple solutions. But suppose the trust is to $A$ for life, then to $C$ for life, and then remainder to $B$. What is to happen on $A$'s death: is $C$ to be subject to the special accessions tax and, if so, in what fashion. Suppose the trustee has discretion to distribute to $A$ and thereafter similar discretion as to $C$ or to accumulate—to what has $C$ succeeded. Would taxation of $C$ in these instances in effect be no more than a second income tax on $C$ and hence an invasion of the present income tax base? Moreover, suppose the trust is one under which the trustee is to distribute income to $A$, $C$, and $D$, with remainder to $B$ on the death of the last survivor, and in addition the trustee has discretion as to distribution and accumulation. It would seem that no special accessions tax can be levied until all the income beneficiaries die and $B$ obtains posses-

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40 Our $B$, of course, would normally be a class of beneficiaries, such as children, grandchildren, etc.

41 This would be especially significant where the special accessions tax on a life interest took the form of a tax on each year's payment of income to the person obtaining the life interest. Cf. Harry Rudick's cumulative accessions tax, discussed infra.
sion. If this is the result, is it proper to tax $C$ above in the case of successive life interests? In other words, the discretionary trust problem can be solved under this approach but only by not taxing successive shifts in life interests, and instead by postponing the tax until the remainderman obtains possession. A properly tailored trust would thus be deprived of only one skip. Moreover, the power of appointment problem retains substantial vigor under this approach; suppose $C$ above has powers which permit the creation of succeeding life interests. Perhaps these issues could be met by a heavier tax on $B$ if his entrance in possession has been postponed for several generations, though $B$ might well argue that as to him patience should not be so rewarded. Other problems also exist under this special accessions tax, as where $B$ decides to sell his interest and thereby create income tax cross-currents as respects the accession-capital gain which he receives.

It is apparent that consideration of the special accessions tax as a possible method of bolstering the transfer taxes takes us to the subject of Harry Rudick's article. Why confine the accessions tax to a minor supporting measure? If it can perform well in that role, why not let it take over the entire area—and we thus arrive at Mr. Rudick's proposal for a cumulative accessions tax as a complete substitute for existing transfer taxes. Mr. Rudick presents us with a difficult problem of appraisal. Is he playing, albeit unwittingly, a siren song which in our search for more effective taxation of the devolution of property will instead lead us in the end to even a weaker and more complicated system than we possess today? Or is he sounding a clarion trumpet call heralding the discovery of a really effective method of taxing the devolution of property?

The arguments for this cumulative accessions tax are effectively presented in his article. But doubts persist. Mr. Rudick is asking us to abandon the considerable accumulation of experience—legislative, judicial and administrative—which we have painfully obtained in the 35 years of life under an estate tax regime. For this reason alone, his must well be "a better 'ole.'" Moreover, to secure under an accessions system a revenue yield that is comparable to that under a transfer tax system, it is necessary that the accessions tax have lower exemptions and a higher rate structure than the transfer tax system. This results from the larger amount of taxable wealth per taxpayer under the transfer tax system than under the accessions tax system. It may be observed from the 1945 estate tax returns that 60% of the taxable decedents were husbands (46%) and widowers (14%), while only 27% were wives (7%) and widows (20%). But as respects the
transfers of these decedents, multiple beneficiaries appear greatly to outnumber single recipients. Property transfers as a pattern thus appear to fan out from single decedents to a greater extent than they channel in to single recipients, thus providing the greater tax base per taxpayer under the transfer tax system.

To describe other doubts, Mr. Rudick's plan of taxing life interests is in effect to levy an annual tax applied to the income of the life beneficiary and measured by a rate determined with reference to other accessions of this beneficiary. This will reach the simple case of the trust to A for life, remainder to B, or even the trust involving successive life interests. To this extent Mr. Rudick would enter the income beneficiary area which the special accessions tax we considered above did not invade. But although Mr. Rudick's tax on income is called an accessions tax and not an income tax, it may seem to most to be merely an additional income tax. The unsatisfactory situation of two taxes side by side on income would probably force a further step. Perhaps it would result in all accessions, that is gifts, bequests and other inheritances, being treated as receipts to be directly included in gross income, with an accompanying averaging device, so that the income tax would swallow the accessions tax. Many economists would urge that this represents the proper application of the ability-to-pay principle claimed by Mr. Rudick as one of the arguments in his arsenal. But while economists may so urge, legislators and the tax bar may not be captivated by the idea. Consequently, a more likely development is that the cumulative accessions tax would not be made applicable to income beneficiaries but instead would be restricted to beneficiaries obtaining full possession of the fee. If this

43 Exhibit 5, supra note 13.

44 It will be noted that Mr. Rudick suggests two methods of taxing such a life interest, one being called "simpler" and the other "fairer." The disconcerting factor is that, in the example given in detail, the methods produce quite different results: under one the accessions tax on the first life interest would be $203,000 and on the second life interest $390,000, while under the other method the taxes would be $67,840 and $218,400. Differences of this magnitude indicate that the taxation of life interests is still a troublesome problem under Mr. Rudick's system. While the balance is redressed to a considerable extent by the income tax, this resort to another tax does not increase our confidence in the tenets of the accessions tax and invites the confusion with the income tax that I suggest will occur. I gather that on a final choice Mr. Rudick would prefer the "simpler" method.

45 E.g., SIMONS, PERSONAL INCOME TAXATION c. VI (1938), indicating we could of course have both a transfer tax and inclusion of gratuitous receipts in gross income.

46 This non-coverage of income beneficiaries would not make the cumulative accessions tax co-terminous with the special accessions tax discussed earlier. The former
were to eventuate, the debate about what happened to the forgiven year when we switched to income tax pay-as-you-go would seem mild indeed, since the transition from estate tax to accessions tax would appear to be a real skipping of a generation. For if a father dies today, leaving property in trust for his son for life, remainder to the grandchildren, the father at least pays an estate tax even if the son does not. But if we shifted to an accessions tax that did not reach income beneficiaries, neither father nor son would pay any tax, and the Government would be forced to wait until the grandchildren obtained possession.46

Mr. Rudick, of course, does tax income beneficiaries. But his suggestions for accomplishing this would seem properly to fit only the simple case of the trust to A for life, remainder to B. He does not appear to offer adequate solutions for the trust with discretion in the trustee to distribute to A or accumulate47—or with the discretion to distribute among A, C, and D.48 And if Mr. Rudick does not satisfactorily handle these cases, has he really solved our problems? Moreover, has Mr. Rudick really taken care of our power of appointment difficulties—how is a power in the life beneficiary to invade corpus for others, or a limited power to appoint at death, and so on, to be treated under his accessions tax? 49

There is still a more basic difficulty with Mr. Rudick's method of taxing income interests, even if we assume with him that his method is practicable as respects discretionary and other trusts and that we would still be the only tax in the devolution of property field, and would apply to receipts of outright bequests at the death of a testator, to inter vivos gifts, etc.—i.e., to all receipts except income interests. The latter tax, on the other hand, is supplementary to the traditional transfer taxes and relates only to the situation of a remainderman succeeding to possession of the fee.

46 Perhaps the hiatus could be avoided by continuation of the estate and gift taxes for a period of time. But any such solution would be exceedingly complex and hence its adoption would appear unlikely.

47 If the trustee has discretion to distribute to A and does make some payments, Mr. Rudick suggests that each income payment to the beneficiary be treated as a separate accession, and hence taxed at whatever accessions tax bracket level has been reached at the time of the income payment. This would produce different rates for successive payments (or successive series of payments), the rates increasing as the total payments or accessions increase. If the trust is to accumulate for A's life, remainder to B, Mr. Rudick would postpone accessions tax until A's death.

48 Where the trust is for A, C, and D as joint beneficiaries, but with no discretion in the trustee as to their income shares, Mr. Rudick's formula presumably permits a separate tax on each beneficiary currently collected out of his income share and determined by the value of his share of the corpus, aggregated with his previous accessions.

49 Mr. Rudick states that no tax attaches until a donee actually comes into possession of income or corpus. He does except the case of a life beneficiary who has an unre-
will tolerate the application to an income payment of both an accessions tax and an income tax. It has been pointed out by other critics that Mr. Rudick's proposal does not really alter the present disparity between the tax treatment of outright transfers and transfers in trust. In the general example used in his article, that of a transfer in trust at the husband's death of $1,000,000, income to the wife for life, then to the son for life, remainder to the grandson, the present estate tax would produce $325,000 on the husband's death and no further tax until the grandson died. For this $325,000 estate tax, Mr. Rudick substitutes successive accessions taxes of $208,000 on the widow, $390,000 on the son and $325,000 on the grandson, or a total of $923,000 over a period of 46 years between the husband's death and the son's death. However, this total of $923,000 is merely the equivalent of $325,000 plus 4% interest on $325,000 for 46 years. In other words, instead of collecting $325,000 at the death of the husband, Mr. Rudick would collect the $325,000 at the death of the son and, through the intervening accessions taxes on the widow and the son, collect 4% interest on the $325,000 thus retained by the family for the period from the husband's death until the son's death. His method consequently does not produce any increased payment over present law in the case of a trust transfer skipping a generation. If our

<table>
<thead>
<tr>
<th>Interest taxed</th>
<th>Amount of Accessions Tax</th>
<th>Present Value of Accessions Tax at Husband's Death</th>
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<tbody>
<tr>
<td>Widow</td>
<td>$208,000</td>
<td>$151,500</td>
</tr>
<tr>
<td>Son</td>
<td>$390,000</td>
<td>120,000</td>
</tr>
<tr>
<td>Grandson</td>
<td>$325,000</td>
<td>53,500</td>
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The present value at the time of the husband's death of the accession taxes later paid is computed with a 4% interest rate. Since Mr. Rudick assumed a 32-1/2% accessions tax rate, which is the same as his effective 32-1/2% estate tax rate on $1,000,000, and since he assumed a 4% return on the $1,000,000 trust corpus, the total of his annual accessions taxes on widow and son is computed as 32-1/2% times 4% times $1,000,000 times 46 years. This sum plus the 32-1/2% accessions tax on $1,000,000 at the son's death must therefore necessarily produce the equivalence stated in the text.
Concern is to remedy the defect in present law in these situations, the Rudick accessions tax could not therefore be recommended as an acceptable tax.

Many of us who possess doubts about the wisdom and success of the Rudick cumulative accessions tax also entertain the feeling that adoption of the supplementary special accessions tax as a solution for the life interest "skipping a generation" problem might in time lead naturally to adoption of the Rudick accession tax. For this reason, as well as the others mentioned earlier under such supplementary special accessions tax, it would seem preferable in attacking the life interest problem to proceed along the British approach as more in keeping with existing concepts. Only if this approach leads to a blank wall should we turn to the supplementary special accessions tax.

We may conclude where we began. The President has properly stressed that there are "serious weaknesses" in the present estate and gift taxes. The Congress should fully study these weaknesses with the goal of strengthening the taxes so that they may occupy their rightful place in the federal tax system. The first major step, in terms of urgency, is a structural overhauling of these taxes through the adoption of an integrated transfer tax and the revision of the marital deduction area. This overhauling would eliminate obvious existing defects and thus permit the transfer taxes to become technically capable of bearing a heavier share of the tax load. The second step would therefore be a consideration of the increased revenue yield that should properly be obtained from such a transfer tax. This second step would involve consideration of the liquidity problem and the determination of whether it warrants some remedial steps as a corollary to an increased revenue yield from this source. Accomplishment of these two steps would alone be a signal legislative achievement. Our transfer taxes would thereby become adequate sources of revenue in relation to the entire tax system, and structurally sound from the technical standpoint as respects their traditional area of coverage. The third major step is the consideration of whether that traditional area should be expanded to include the life interest field. This is the most difficult of the three steps. It involves a determination of whether we propose to make fully effective the policy, probably itself not yet agreed to by all, of using the transfer taxes to check excessive accumulations of wealth. It also involves the necessity of finding acceptable solutions for problems of real technical difficulty. But it is a step that must be taken by a nation desiring an effective and modern tax system.