Up and Down and Back Again: Troubled Childhood Notwithstanding, Washington's Stand Alone Estate Tax Deserves to be Defended

Christine M. Mumford†

I. INTRODUCTION

Following close on the heels of the Washington State Supreme Court's ruling[1] that Washington must join the majority of American states in adopting the federally sponsored Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA),[2] the Washington Legislature enacted and the Governor signed into law on May 17, 2005, an independent Washington Estate Tax.[3] Passed in both the state house and senate as Engrossed Senate Bill 6096,[4] the new scheme finds a balance between the pre-EGTRRA Washington tax laws and the contemplated EGTRRA conformation following the court's ruling. Because EGTRRA changed federally assessed taxes so dramatically and because Washington had not adopted any EGTRRA provisions, until the court's ruling and

† J.D. candidate 2006, Seattle University School of Law; B.A. English, Whitman College 2003. The author first wishes to thank her parents, Michael and Kimberley, for modeling the value of hard work and for their unending support. Additional thanks go to Tom Gores for suggesting this topic and for so thoroughly answering the author's surely simple-seeming initial questions; to Pamela, for enduring countless months of an apartment cluttered with estate taxes (and a nearly insane roommate); to Bryan, for encouragement to stick with it and assurances of being "smart enough"; and to Sara Longley and her expert team of editors, for providing the thoughtful criticisms and suggestions that brought this piece to publication.

1. Estate of Hemphill v. State, 153 Wash. 2d 544, 105 P.2d 391 (2005) (holding that "[t]he estate tax scheme in Washington as currently written . . . must be administered complementary to federal law"). EGTRRA is the current federal law.

2. H.R. 1836, Pub. L. No. 107-16, 15 Stat. 38. Passed by Congress in 2001, this act made substantial changes to the state death tax credit for all decedents dying after 2001. EGTRRA is codified at I.R.C. § 2001 (2004).

3. Washington State Department of Revenue Special Notice, *available at* http://dor.wa.gov/Docs/Pubs/SpecialNotices/2005/sn_05_NewEstateTaxLaw.pdf (last visited Nov. 13, 2005).

4. E.S.B. 6096, 59th Leg., Reg. Sess. (Wash. 2005).

the enactment of Senate Bill 6096, Washington was assessing estate tax against many estates that owed no federal taxes.

Congress passed EGTRRA in 2001, creating a tax scheme that radically changed the computation of many taxes nationwide. One of the more dramatic changes effected by EGTRRA, at least in terms of the new planning and conformation necessitated, is the repeal of the federal estate tax.[5] Before EGTRRA, federal estate taxes entailed a steep assessment against death-time transfers above a certain exempt amount. Today, EGTRRA provides a declining rate of estate tax, culminating with complete repeal for at-death transfers occurring in the year 2010. In 2010, the laws may revert to their 2001 state[6] because of EGTRRA's sunset clause: all of the EGTRRA provisions will expire in 2011 unless Congress acts. The eventual elimination of estate tax makes the scheme favorable for taxpayers, but because this elimination is not certain to last, it also adds an element of uncertainty to preparation and planning. It is impossible to know whether the repeal will become permanent.[7] Many scholars believe that the tax will disappear permanently and many think it will not,[8] but waiting for the outcome unearths much uncertainty for estate planners.

Even without the added ambiguity of the sunset clause, however, EGTRRA is not a simple scheme. The most troubling effect of the changes for estate planning attorneys is planning for death benefits in a world where tax rates are no longer certain: the grim reaper, we can be sure, does not schedule visits around EGTRRA rate schedules.

Before the court's 2005 decision, Washington's estate tax scheme was far more complex, confusing, and uncertain than it would have been under EGTRRA. Because EGTRRA is a federal scheme, each state's participation is optional. Generally, states assess estate taxes in a way that parallels federal tax collection. At the national level, EGTRRA is more universally applicable than state schemes. Washington's pre-2005 approach, a purely passive scheme, assessed state taxes against the federal rates *as they existed in 2001*. All that Washington did, in simple terms, was refuse to conform to EGTRRA when it passed in 2001, and then fail to enact any subsequent legislation, thereby "freezing" the state tax rates at their 2001 levels. The Washington State Supreme Court, in a nod to those taxpayers who were offended by the state's scheme, called

---

5. *See, e.g.* Joe Smith, *Death and Taxes: Congress Rewrites the Rules*, FORBES.COM, May 30, 2001, *at* http://www.forbes.com/2001/05/30/0530finance.html.

6. I.R.C. § 2001 (2004).

7. *See, e.g.*, JONES DAY, RECENT FEDERAL TAX DEVELOPMENTS THAT AFFECT ESTATE TAXES (2003), *at* http://www1.jonesday.com/pubs/detail.asp?language=English&pubid=892.

8. KATHRYN G. HENKEL, ESTATE PLANNING AND WEALTH PRESERVATION: STRATEGIES AND SOLUTIONS at 1–2 (Student ed. 2003).

the Washington estate tax invalid because it assessed taxes in excess of those collected by the federal government.[9] Faced with either accepting Washington's frozen scheme or ruling that Washington must conform with EGTRRA,[10] the court's choice of the latter was sound, though neither option was ideally suited to address all of Washington's estate-tax related problems—problems concerning funding, the continuation of state resources, and the competing interests of wealth promotion and equitable taxation.

EGTRRA's estate tax provisions seem a good fit for the United States as a whole because nationally, estate taxes lag far behind sources like income tax in their power to raise revenue.[11] Eliminating estate taxes is a decidedly pro-taxpayer move. Estate taxes have long been criticized for harming American small businesses and for discouraging the ingenuity that often backs individual accession to wealth.[12] Taxing estates on death can seem harsh and un-American.[13] The temporary elimination of this tax provides an experimental means of measuring the ramifications of an estate tax-free society: EGTRRA's phase-out of estate taxes will provide law makers data with which to either justify reinstatement or abandonment of the taxes. The program will not be prohibitively expensive to the conforming states, as most states do not depend on estate tax as a significant source of revenue.[14] The repeal is, overall, an inexpensive way to assuage legitimate taxpayer concerns. Washington is unlike "most states," however; without an income tax,[15] it has few sources to fall back on for funding without taxing death-time transfers.

---

9. Estate of Hemphill v. State, 153 Wash. 2d 544, 552, 105 P.2d 391, 395 (2005) (holding that "[a]ny amount of state estate tax not fully absorbed by a current federal credit is an invalid independent tax." The tax Washington was assessing was in excess of federal limits—tax assessed where EGTRRA would have assessed nothing—and was thus invalid).

10. "The estate tax scheme in Washington . . . must be administered complementary to federal law to guarantee that a separate state tax does not burden estates," the court ruled, thereby forcing EGTRRA conformation. *Id.* at 551, 105 P.3d at 394. Of course, this forced fit was circumvented by the legislature's enactment of E.S.B. 6096; *see* discussion *infra* Part II.B.

11. BORIS BITTKER, ELIAS CLARK, & GRAYSON MCCOUGH, FEDERAL ESTATE & GIFT TAXATION 2 (9th ed. 2005).

12. *See, e.g.*,,ERIC MONTAGUE, WASH. POLICY CTR., THE SMALL BUSINESS CLIMATE IN WASHINGTON STATE, Mar. 2002, *available at* http://www.washingtonpolicy.org/SmallBusiness/PBMontagueSmallBusinessClimate.html.

13. Un-American meaning, simply, that it inhibits the entrepreneurial spirit on which the nation is famed to have been founded. The estate tax discourages thrift and hard work and challenges the very fiber of our American being.

14. *See, e.g.*, BITTKER, *supra* note 11, at 2–3.

15. Washington voters did approve an income tax at one time.

In 1932, Washington voters approved an initiative establishing a personal income tax. However, the State Supreme Court ruled this initiative unconstitutional. Since then, the voters have defeated six constitutional amendments enacting a personal income tax. The

Of course, revenue is not the only reason for any tax. Moral implications and historical roots influence this kind of taxation on myriad levels. As Theodore Roosevelt put it in a 1906 message to Congress, "The prime object should be to put a constantly increasing burden on the inheritance of those swollen fortunes which it is certainly of no benefit of this country to perpetuate."[16] Estate tax is often viewed as a means of equalizing wealth, a view supported by a somewhat puritanical disapproval of idleness, a desire to ensure that citizens have worked for and have earned all that they have acquired.

At first it seems intuitive to praise the court for ordering what amounted to an effective ban on estate taxes. It seems, on some level, cruel to tax property that may not have been idly gained but may instead represent a lifetime of work. Though the decedent earner surely does not suffer for the tax, it violates some basic sense of fairness that these earnings are being shaved by government at his death. We must keep in mind, however, that the world of tax revolves not around the individual taxpayer; and what one man wins, another loses. Senate Bill 6096 attempts to address this inequity. More is at stake with the re-uprising of the estate tax than payment in excess of federal requirements. Invalid though it was after EGTRRA was enacted,[17] Washington had assessed an estate tax and had depended on its revenues for decades. Many of Washington's programs, including education and public welfare, had developed a dependency on these arguably ill-gotten gains.

Jumping from here to the steep EGTRRA phase-out would have been a terrible jolt to Washington's finances, and the legislature was right to enact a forward-looking bill. With Senate Bill 6096, the legislature enacted a Washington-specific estate tax that circumvented EGTRRA conformation. The new legislation assesses tax ranging from ten to nineteen percent on estates of more than $1.5 million[18]—thus, on estates that EGTRRA would leave untouched—and is effective immediately.[19] One of the problems with the pre-2005 Washington tax plan was

---

> last proposal in 1973 was defeated 77 percent to 23 percent. Subsequent efforts at enacting a personal income tax have died in the Legislature.

Washington State Department of Revenue, *Personal and Corporate Income Taxes* (Draft Copy 2002) *available at* http://dor.wa.gov/content/statistics/wataxstudy/personal%20_corp_income_tax _8-9-02.pdf.

16. 17 THEODORE ROOSEVELT, WORKS OF THEODORE ROOSEVELT 434 (Hagedorn and Hermann, eds., Scribner's 1926). This address was made to advocate a progressive inheritance tax, but the moral undertones are the same as those that prompted—and still support—the estate tax. The inheritance tax, as will be later explained, is not a viable option for Washington, and is losing footing nationwide.

17. Estate of Hemphill v. State, 153 Wash. 2d 544, 552, 105 P.2d 391, 395 (2005).

18. E.S.B. 6096, 59th Leg., Reg. Sess. (Wash. 2005) at § 3.

19. *Id.* at § 20.

that it taxed estates that had no federal obligations under EGTRRA, but this was mainly a concern of construction. By restructuring the way that taxes are assessed, the bill maintains the positive revenue characteristic of the pre-2005 scheme without its problematic structure.[20] The new tax is permanent, and will not disappear regardless of whether EGTRRA is renewed.[21]

As part of a larger biennial budget,[22] Senate Bill 6096 has been criticized as but another "sneaky" way for Democrats to fund their proposals without imposing a general tax.[23] While elements of easy balancing likely did come into play as this legislation passed, to understand the estate tax we must look beyond party lines and motivations to see the real effect on our citizens. The new law should not be seen as an end to Washington's estate tax problem, but should be respected as a step in the right direction: Washington's independent tax scheme, with maintenance and monitoring, can and will evolve to something that is as good for Washington as EGTRRA is for the nation. A complete phase-out of estate taxes would not be good for Washington's economy, which is why EGTRRA-conforming legislation should not have been and should never be adopted. Senate Bill 6096 gives the state something individualized and tailor-made to serve Washington's current concerns. The scheme needs to remain flexible, however; what works now may not work in the future. Small steps are necessary, and must continue to be taken. The *Hemphill* ruling was the first step, and the legislation was a positive second step. The third step is proactive vigilance by the legislature to preserve the pro-Washington benefits of the estate tax.

The *Hemphill* court correctly identified the rigid tax scheme during 2001–05 as contrary to voter intent and to the law. The legislature's enactment of Senate Bill 6096 was an appropriate response to the ruling but, as *Hemphill* and the pre-2005 structure teach, compatibility with changing times and needs is paramount. Death and taxes may be certain,[24] but the impact of taxes at death is not. The efficacy and workability of the bill is dependent on its applicability to Washington's needs today. As the estate tax under Senate Bill 6096 helps to fund some of

---

20. The nuances of the pre-2005 structure and how E.S.B. 6096 avoided those same pitfalls follows *infra*, Parts II.B., III.C.

21. E.S.B. 6096, 59th Leg., Reg. Sess. (Wash. 2005).

22. Chris McGann, *Gregoire Budget Avoids Big Cuts*, SEATTLE POST-INTELLIGENCER., Mar. 22, 2005, *available at* http://seattlepi.nwsource.com/local/217037_budget22.html.

23. *Id.*

24. Benjamin Franklin wrote in one of his letters, "In this world nothing is certain but death and taxes." THE NEW DICTIONARY OF CULTURAL LITERACY 52 (E.D. Hirsch, Jr. et al. eds., 3rd ed. 2002).

Washington's most pressing issues, such as education,[25] these issues may lessen in urgency, but other funding needs will certainly arise. To best serve the citizens of Washington and to live up to the full potential of Senate Bill 6096, the legislature must commit to periodically reviewing and changing the tax scheme when necessary to match Washington's changing needs.

This Comment evaluates the history of Washington's estate tax from the pre-2005 frozen scheme, through the Supreme Court's analysis and mandate in *Estate of Hemphill v. State*,[26] and up to the legislation enacted in May 2005. Part II provides a background on EGTRRA and evaluates the extent of its changes nationwide. Part III critically reviews Washington's estate tax history, and examines both the seminal Initiative 402 and the legislative history supporting the shift away from federal conformation. Part IV analyzes how the court's 2005 ruling provided the catalyst for legislative change, and provides a summary of *Hemphill* and the arguments presented therein. Part V argues that Senate Bill 6096 is a sound step towards dealing with the inevitable fiscal issues resulting both from Washington's pre-2005 scheme and from the choice Washington had to make in light of *Hemphill*. Part VI evaluates the ramifications and problems that the change to EGTRRA would have inflicted and that Senate Bill 6096 specifically avoids, and encourages the legislature to treat the bill as but one step of an ongoing process of proactive taxation. Part VII concludes the Comment with the point that the newly enacted stand-alone tax is the best way to square the interests of all parties involved and notes that, although it may not be an appropriate permanent fix, Senate Bill 6096 is a positive step for our state and the legislature should be encouraged to continue improving upon it.

II. THE ECONOMIC GROWTH AND TAX RELIEF RECONCILIATION ACT OF 2001 (EGTRRA) MADE SUBSTANTIAL CHANGES TO THE STATE DEATH TAX CREDIT AND PROMPTED LEGISLATIVE RESPONSE

Traditionally, five credits were allowed against the tax computed under section 2001 of the Internal Revenue Code, now home to EGTRRA—credits that are deducted before computing the total amount of estate tax due on a particular estate. These credits were (1) the unified credit;[27] (2) the credit for state taxes paid with respect to property in-

25. E.S.B. 6096, 59th Leg., Reg. Sess. (Wash. 2005) (specifically mentioning "funding for education" in its preamble).

26. 153 Wash. 2d 544, 105 P.3d 391 (2005).

27. I.R.C. § 2010 (2004).

cluded in the decedent's gross estate;[28] (3) the credit for federal gift taxes paid on pre-1977 transfers of property included in the gross estate;[29] (4) the credit for federal estate taxes paid with respect to property transferred to the current decedent by another decedent who died within ten years before or two years after the current decedent's death;[30] and (5) the credit for taxes paid to a foreign country with respect to property situated in that country and included in the decedent's gross estate.[31] After the taxable estate has been determined by making the appropriate deductions against the gross estate, credits serve as a final reduction to determine the amount upon which the executor must actually pay taxes.

Enacted by Congress in 1924, the credit for state estate, inheritance, legacy, and succession taxes emerged in response to claims that such taxes were properly the province of the states, as well as to reduce interstate competition for wealthy decedents.[32] Codified at section 2011 of the Internal Revenue Code, the state credit allowed executors to reduce the federal estate tax due by the amount already paid in state estate taxes to the state of decedent's domicile, up to a certain amount.[33] Soon after the enactment of this credit, many states responded by implementing "pick-up" or "sponge" taxes such that the federal credit "paid" the state tax for wealthy taxpayers.[34] Under a pick-up scheme, all a state needs to do is

---

28. I.R.C. § 2011 (2004). This credit is often called the "death tax credit" in reference to the amount of credit allowed under the federal tax plan for estate taxes already paid at the state level. The death tax credit is a function of the dual federal and state estate tax systems. The term "death tax" is well-known in the field of tax law; searches for "death tax" on both the Washington State Department of Revenue Web site and the United States Treasury Department Web site yield myriad relevant citing references. For use of the term "death tax" generally, *see* JIM SAXON, JOINT ECONOMIC COMMITTEE, UNITED STATES CONGRESS, THE ECONOMICS OF THE ESTATE TAX: AN UPDATE 3, *available at* http://www.ustreas.gov/offices/economic-policy/round_table_documents/JEC_Economics_Estate_Tax_Update.pdf (last visited Mar. 16, 2006) ("The estate tax, *also known as a death tax*, is simply a tax imposed on wealth transfers made at the holder's death.") (emphasis added).

29. I.R.C. § 2012 (2004).

30. I.R.C. § 2013 (2004).

31. I.R.C. § 2014 (2004).

32. *See* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, REPORT ON COORDINATION OF STATE AND FEDERAL INHERITANCE, ESTATE AND GIFT TAXES 32–35 (1961) [hereinafter ADVISORY COMMISSION].

33. The amount of the state death tax credit is based on the decedent's "adjusted taxable estate" which, as per I.R.C. § 2011(b)(3), is the taxable estate reduced by $60,000. The credit is allowed only for taxes that are actually paid, and must be claimed within four years of filing the federal return. I.R.C. § 2011(c).

34. BITTKER, *supra* note 11, at 553. In essence, sponge-tax schemes provide that the amount of tax that is due to the state is the amount that may be excluded under the federal credit system. *See* ADVISORY COMMISSION, *supra* note 32.

construct its tax statutes so that the state collects only what is collected federally.[35]

The 2001 enactment of EGTRRA changed estate and inheritance taxes nationwide by phasing out the federal credit for state taxes, and replacing it with a deduction for decedents dying after December 31, 2001.[36] EGTRRA changed the application of state tax credits, which means that, to avoid confusion and unnecessary complexity, states that do not conform to EGTRRA must adapt their statutory estate tax provisions to account for the changes. Ultimately, EGTRRA eliminated the ability of states to impose estate taxes that do not increase the combined federal and state tax burden on estates,[37] in a sense abandoning states without conforming schemes. A precise and predictable plan, EGTRRA escorts conforming states through to sunset, while non-conforming states are left without federal assistance. States like Washington that, prior to EGTRRA, constructed their tax schemes to mirror federal rates were left without a functional plan once EGTRRA took effect.[38] EGTRRA could perhaps best be called a "phase-out" plan for estate taxes generally: the state credits are slowly dwindling to zero, while the overall exemptions are on the rise. For example, for decedents dying in 2002, EGTRRA reduced the state death tax credit by twenty-five percent; for decedents dying in 2003, the credit was only half the original amount; in 2004 it was reduced by seventy-five percent; in 2005, it was eliminated altogether.[39] For decedents dying after December 31, 2004, the credit is replaced with a deduction under section 2058 of the Internal Revenue Code against the federal gross estate tax for any estate, inheritances, legacy, or succession taxes actually paid to any state.[40] EGTRRA also changed the face of federal estate taxes by increasing the amount that can be transferred tax-free

35. William S. Forsberg & Darren M. Wallace, *Planning for Property Interests in More Than One State After the Demise of the State Death Tax Credit*, 18-OCT PROB. & PROP. 46 (2004). Florida is an example of a pick-up state: its law automatically updates its state estate tax laws when any change is made to the federal estate tax laws. Because Florida's statute is set to automatically adopt federal changes, EGTRRA was automatically incorporated into the state estate tax, including the phase-out of the federal state death tax credit. The same did not happen in Washington because Washington's statute did not purport to adopt the federal tax including all adjustments, but rather aligned with the federal tax as of a specific date. This means that, in order for Washington to update to the federal plan, positive legislative action is necessary. *See* discussion of pick-up schemes, *infra* Part II.A.

36. Joel Michael, The Minnesota Estate Tax after the 2001 Federal Tax Act 4 (Policy Brief of the Minn. H.R. Research Dep't, St. Paul. MN) (Jan. 2003), *available at* http://www.house.leg.state.mn.us/hrd/pubs/estatetx.pdf (last visited Nov. 8, 2005).

37. *Id.*

38. *See* 16A Am. Jur. 2d *Constitutional Law* § 300 (2005); *see also* discussion of the limitations on states' power to simply adopt federal schemes, *infra* part III.C.

39. I.R.C. § 2011(b)(2)(B) (2004).

40. I.R.C. § 2058 (2004).

(the "tax-free exclusion") on a corresponding scale: it was increased to $1,000,000 for 2002–2003, to $1,500,000 for 2004–2005, and increased again to $2,000,000 for 2006–2008 with a cap of $3,500,000 in 2009.[41]

EGTRRA provides a straightforward plan for federal taxes, but where state schemes differ, individual estate plans are often subject to both state and federal taxation. Not all states have adopted the new federal changes;[42] the wake of EGTRRA left a rapidly changing federal code and fifty states scurrying to adapt. Before EGTRRA, many state-level estate taxes were designed to equal the federal credit provided under section 2011 of the Internal Revenue Code.[43] If a state completely tied its estate tax to the federal credit provided under EGTRRA, that tax disappeared in 2005 absent legislative action.[44] However, because EGTRRA is a markedly different scheme from the previous tax code, state tax plans that simply tie to the federal tax scheme generally do not automatically adopt EGTRRA without specific conforming legislation.[45] Not all states have chosen to respond to EGTRRA, and those that have have done so with varying speed.

Today, a wide variety of different tax schemes exist from coast to coast.[46] The reason for this disparity varies from state to state. For example, some states may not want to change the way they collect taxes prior to EGTRRA. Perhaps some states believe that they can create a more favorable tax scheme than EGTRRA. Maybe some states are, like Dave Barry, reluctant to adopt anything called EGTRRA, "which sounds like

---

41. I.R.C. § 2010(c) (2004). This means that, in 2009, a decedent can bequeath $3.5 million without tax, so long as this does not exceed the amount of tax due. In other words, it is a credit against taxes—it will reduce the overall tax due, but is not designed to create refunds. If, in 2009, the only estate tax due was $3.5 million, a taxpayer could apply the credit and owe no taxes. If, however, the estate was worth more—$9 million, say—you could transfer $3.5 million tax-free, making your taxable estate only $5.5 million. Savvy taxpayers with large estates often try to reduce their estate during life through inter vivos gifts and charitable contributions in order to tailor their estate to the amount of exclusion on death. Of course, because the amount of exclusion changes every year and it is difficult, in most cases, to predict with certainty when death will occur, planning usually reduces decedents' tax owed, but does not always succeed in eliminating it.

42. *See, e.g.*, Forsberg & Wallace, *supra* note 35 (writing that at least twelve states have estate tax schemes wholly independent of EGTRRA).

43. *Id.* at 46.

44. I.R.C. § 2011(b)(2)(B) (2004).

45. *See* 16A Am. Jur. 2d *Constitutional Law* § 300 (2005); *see also* discussion of the limitations on states' power to simply adopt federal schemes, *infra* part III.C.

46. As described in Forsberg & Wallace, *supra* note 35, there are several broad categories of tax plans in effect across the nation. Additionally, within each general category of non-EGTRRA conforming schemes, individual states have adopted their own amendments and modifications. Because of the inherently changing nature of tax codes, a precise current summary of all 50 states' current tax schemes is neither practical nor useful long-term. For a concise summary of all tax schemes in effect in 2002, *see* the Financial Planning Association's State Conformity Matrix, *available at* http://www.fpanet.org/member/govt_relation/federal/taxes/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=18901 (last visited Mar. 16, 2006) [hereinafter Conformity Matrix].

the name of a giant radioactive chicken that destroys Tokyo."[47] In any case, the divergence between the states has resulted in confusion and complexity for estate planners.

In light of the changes effectuated by EGTRRA, it is no longer feasible for states to remain passive—legislatures must respond. States that choose to ignore EGTRRA and its changes expose themselves to judicial review and may, like Washington, end up with a court-ordered mandate for change.[48] States enact tax changes in different ways, presumably reflecting their different goals. In lieu of adopting EGTRRA, the Washington legislature created its own, more carefully tailored system of estate taxation—a stand-alone tax—through the enactment of Senate Bill 6096. For Washington, EGTRRA represents a call to action, and Senate Bill 6096's imposition of a stand-alone tax is Washington's well-supported response.

A. EGTRRA Forced State Legislatures to Respond

The court's ruling in *Hemphill* forced Washington to act sooner or later; even had the state maintained its passive stance and accepted the court's decree, the eventual implementation of EGTRRA would have required legislative action to compensate for EGTRRA's impact on Washington's fiscal health. The elimination of state estate tax credits, while financially supporting EGTRRA's sweeping deductions, poses a grave problem for states that have traditionally followed the federal scheme. EGTRRA leaves it up to the individual states to determine if the elimination of state credits will result in tax reductions or offsetting increases in state estate or other death taxes.[49] In other words, if adopted, EGTRRA would completely break the bank of states' estate tax collections, leaving them either to make do without the revenue from the credit or come up with alternate ways to raise funds.

State estate tax plans essentially fall into two schemes: pick-up taxes and stand-alone taxes. Pick-up taxes are those that depend on or are hooked into the federal system, while stand-alone taxes are independent of the federal system altogether.[50] Pick-up taxes are designed to collect

---

47. Dave Barry, *EGTRRA, EGTRRA, Read All About it! Tax Writers Marooned on an Island!*, THE WASH. POST, Apr. 13, 2003, at W13, *available at* http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A60121-2003Apr8&notFound=true.

48. Estate of Hemphill v. State, 153 Wash. 2d 544, 552, 105 P.3d 391, 395 (2005) (holding that Wash. Rev. Code § 83.100.030, Washington's estate tax, was internally inconsistent and ordering a refund of all estate taxes collected by the Washington Department of Revenue since January 1, 2002).

49. Michael, *supra* note 36, at 10–11.

50. Forsberg & Wallace, *supra* note 35, at 46–47.

the maximum amount eligible for the federal credit.[51] The main attractions to this plan are its simplicity and convenience: the pick-up tax automatically adjusts itself to the federal tax structure, requiring no more than a few words of compliance in the state's statutes.[52] As of October 2004, thirty-seven states were pick-up states, twenty-eight of which adopted the federal scheme entirely.[53] These states passed laws that automatically update their estate tax laws when a change is made to the federal laws.[54] Simply put, these states adopted EGTRRA as their own. *Hemphill* slated Washington to become the twenty-ninth of these conforming states.

The other nine pick-up states have estate tax laws that are tied to federal law, but only when adopted as of a certain date or point in time. These states do not automatically modify their estate tax laws when there is a change in federal law; instead, affirmative state legislative action is required to adopt federal changes.[55] Before *Hemphill*, Washington was in this group. These states are in the unique position of being able to "wait and see." Each time the federal law changes, the state has the opportunity to consider whether the changes are consistent with its fiscal policy and, if so, determine whether the federal changes should be adopted in whole or in part.[56]

Finally, thirteen states, including Washington under Senate Bill 6096, have independent or "stand alone," estate tax systems that are not tied to the federal estate tax.[57] A stand alone tax is a state tax scheme that stands completely independent of any federal code. Ten of these thirteen states have instituted an inheritance tax in place of estate taxes. The other three, including Washington, have completely stand-alone estate taxes.[58]

B. Senate Bill 6096 Makes a Stand-Alone State out of Washington

Washington initially took a passive approach to collecting an estate tax before 2005. It did not create its own scheme by imposing a stand alone tax, but neither did it adopt what the federal government recom-

---

51. BITTKER, *supra* note 11, at 553.

52. *Id.*

53. Forsberg & Wallace, *supra* note 35, at 47.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* At the time of writing, these states include Arkansas, Kansas, Maryland, Minnesota. New Jersey, New York, North Dakota, Oklahoma, Oregon, Rhode Island, Vermont, and Virginia. *See, e.g.*, Conformity Matrix, *supra* note 46 and internal state links therein.

58. Forsberg & Wallace, *supra* note 35, at 47.

mended in EGTRRA.[59] Before the Washington State Supreme Court ruled that Washington's tax scheme was invalid,[60] Washington's estate tax was tied to the Federal Tax Code that existed as of January 1, 2001.[61] It was therefore a pick-up by choice state in that it embraced an estate tax that was "based on federal law as of a fixed date."[62] Similarly, the Washington Department of Revenue referred to the Washington tax structure as a pick-up tax for the simple reason that it consisted of the maximum amount of state tax credit that was allowed to a taxpayer's estate under federal estate tax law.[63]

Throughout the legal proceedings leading up to the *Hemphill* decision, the estates countered the State's reasoning by arguing that, because the legislature had repeatedly failed to pass conforming amendments in the 2002, 2003, and 2004 legislative sessions, Washington now had a stand-alone tax well before any stand-alone scheme had been affirmatively created.[64] The State argued that, though its tax was facially tied to a dated federal scheme, it operated independently and was thus functionally a stand-alone tax.[65] The Washington Supreme Court was quick to dismiss this argument, holding that the legislature's repeated failure to pass amendments that would conform the Washington scheme to the federal scheme under EGTRRA did not create a stand-alone tax.[66]

Though perhaps inadvertent, Washington's insistence on a stand-alone scheme highlights its past indifference to EGTRRA and the changing world of estate tax law outside state lines. Before 2005, Washington embraced that which the Federal Government had long left behind, yielding only when so forced by the state's highest judicial authority. Senate Bill 6096 thus represents more than just a tax revival: it is also a revival of an involved legislature. Washington needed this wake-up call.

59. *See* Estate of Hemphill v. State, 153 Wash. 2d 544, 548, 105 P.3d 391, 393 (2005). Rather than enacting a tax scheme that adjusted itself over time to stay in conformance with EGTRRA, Washington's legislature simply referenced the new federal law.

60. *Id.* at 552, 105 P.2d at 395 (holding that "[a]ny amount of state estate tax not fully absorbed by a current federal credit is an invalid independent tax").

61. *Id.* at 548, 105 P.2d at 393 ("In 2001, the legislature enacted revisions to chapter 83.100 RCW that referenced the Internal Revenue Code as 'the United States Internal Revenue Code of 1986, as amended or renumbered as of January 1, 2001.'").

62. *Id.* at 548 n.5, 105 P.2d at 393 n.5.

63. Washington State Department of Revenue, *Washington Estate Tax Options* 1 (Mar. 2002), *available at* http://dor.wa.gov/content/statistics/WAtaxstudy/Tax%20Study%20-%20Estate%20Tax%20Brief_.pdf [hereinafter *Wash. Estate Tax Options*].

64. Brief of Respondent at 25, *Hemphill*, 153 Wash. 2d 544, 105 P.3d 391 (No.74974-4).

65. *Id.*

66. *Hemphill*, 153 Wash. 2d at 550, 105 P.3d at 394.

III. EVALUATING THE HISTORICAL AND LEGISLATIVE ROOTS OF WASHINGTON'S VARIED APPROACHES TO ESTATE TAX SUPPORTS A LEGISLATIVE SHIFT AWAY FROM EGTRRA

The legislative history behind Washington's various approaches to its estate tax demonstrates reliance on, and close linkage to, the federal taxation system, until EGTRRA. Washington's pre-*Hemphill* estate tax statutes mirrored the federal collection scheme, providing specifically that Washington estates would not be taxed more than they were federally.[67] Prior to the introduction of EGTRRA by Congress, Washington's scheme was practical and efficient. EGTRRA changed the federal code dramatically, however, and Washington's adherence clause no longer adhered—as written, it complied with federal taxes as they were before EGTRRA.[68] EGTRRA's rates changed after 2001, but Washington still taxed as the federal plan would have were it still 2001. From a general standpoint, there was nothing fundamentally wrong with Washington's adherence to the so-called "frozen" pick-up scheme of pre-2005. A handful of other states have enacted such schemes successfully.[69] Washington's scheme directly conflicts with what has been mandated by the citizens, so trouble predictably surfaces.

In 1981, citizens of the State of Washington adopted Initiative 402, unambiguously establishing that Washington's estate tax must be exactly the amount that the federal estate tax law would permit to be offset.[70] In 2001, this amount was the state tax credit eliminated by EGTRRA.[71] Initiative 402 promised citizens that they would never be taxed by the state more than they were taxed by the federal government. The voters who enacted it intended that only estates liable for federal estate taxes would be subject to tax, irrespective of the tax scheme in place.[72] Initiative 402 was the kink in Washington's pre-2005 system. Though there was nothing constitutionally wrong with Washington's failure to adopt EGTRRA,

---

67. WASH. REV. CODE § 83.100.050(1)(b) (2002) reads, "No Washington return need be filed if no federal return is required"; WASH, REV. CODE § 83.100.030 (2002) provided explicitly that the Washington Estate Tax was "[a] tax in an amount equal to the federal credit . . . ."

68. WASH. REV. CODE § 83.100.020(15) (2002) provided that estate tax is to be assessed against the "United States Internal Revenue Code of 1986, as amended or renumbered as of January 1, 2001."

69. *See* Michael, *supra* note 36. These states include Minnesota and Rhode Island, among others described *supra* note 56.

70. Voter Initiative 402 is codified at WASH. REV. CODE § 83.100 (2006). Voters approved this initiative by an affirmative vote of more than sixty-seven percent on November 3, 1981, thereby repealing all existing statutes relating to inheritance taxation and gift taxation by the State of Washington. Ch.7, Wash. Sess. Laws (1981). In this sense, the initiative cleared the slate of Washington estate taxes, starting afresh in 1981. *See also* discussion *infra* Part III.A.

71. WASH. REV. CODE § 83.100.020(3) (2006).

72. *See* Estate of Turner v. Dep't of Revenue, 106 Wash. 2d 649, 724 P.2d 1013 (1986).

Washington's scheme deserved the court's serious scrutiny in the face of voter intent evinced by Initiative 402.

Before the court's 2005 decision and before the new scheme introduced in Senate Bill 6096, Washington taxed its citizens according to an antiquated scheme linked to the federal code as it existed in 2001. Not only did this violate voter intent, it also ran contrary to the state's pattern of legislative conformation. Washington's history, from the 1981 Initiative 402 to an evaluation of legislative intent and action from its enactment to 2001 and the dawn of EGTRRA, demonstrates support for the legislature's shift away from EGTRRA with Senate Bill 6096.

A. Initiative 402 Limited Estate Taxes Due on Washington Estates to the Amount of Federal Credit Allowed

Initiative 402, codified as Washington's Estate and Transfer Act in title 83, chapter 100 of the Washington Revised Code, established that "a tax in an amount equal to the federal credit is imposed on the transfer of property of every resident."[73] Basically, the act provided that taxpayers would never be liable to the state unless they were liable to the federal government. Voters passed Initiative 402 with the understanding that they were abolishing any stand-alone taxes in Washington.[74] The first page of the Initiative defined "federal credit" as "the maximum amount of the credit for estate death taxes allowed by Section 2011 for the decedent's net estate,"[75] and the Estate and Transfer Act accordingly provided that no Washington return need be filed if no federal return was required.[76] Until EGTRRA, the intent and the tax were parallel.

---

73. WASH. REV. CODE § 83.100.030(1) (1988). Though E.S.B. 6096 extensively amended Wash. Rev. Code § 83.100, this particular section remains in its original form; however, other provisions and changes have been made to clarify that other taxes may be collected by the state, as well. As written, § 83.100.030(1) provides only that a tax in the amount of the federal credit will be collected; it does not exclude the collection of additional taxes. For E.S.B. 6096's amendments to this portion of the statute, *see infra* note 76.

74. Official Voter's Pamphlet (1981); WASH. REV. CODE § 83.100.900 (2005). The required voter's pamphlet contained an explanatory statement by the Attorney General, describing the effect of the then-proposed Initiative 402: "This initiative would repeal the state's existing inheritance and gift tax laws and would substitute, in their stead, a tax on the transfer of the net estate of a resident decedent . . . Only estates liable for federal estate tax would be subject to tax under the initiative, and the amount of the tax would be limited to the credit allowable against the federal tax." However, E.S.B. 6096 obviates this problem; *see* discussion *infra* Part V.

75. Official Voter's Pamphlet at 11 (1981) (quoting WASH. REV. CODE § 83.100.020(3) (2005)). WASH. REV. CODE § 83.100.020(12) (2005) defined "Section 2011" as "Section 2011 of the United States Internal Revenue Code of 1954, as amended or renumbered."

76. WASH. REV. CODE § 83.100.050 (1988). This section has been amended by E.S.B. 6096 to read as follows: "If no federal return is required to be filed, a taxpayer shall file with the department on or before the date a federal return would have been required to be filed, including any extension of time for filing under subsection (5) of this section, a Washington return for the tax due under this chapter." E.S.B. 6096, 59th Leg., Reg. Sess. (Wash. 2005) at § 5(b).

It is well established that language in an initiative is to be given the interpretation which an average, informed voter would give the words.[77] At issue with Initiative 402 was the precise meaning of "in an amount equal to the federal credit."[78] The voters presumably interpreted this to mean any amount of federal credit ever assessed—which has wide implications with the dawn of EGTRRA—but the State read it as the amount specifically provided in section 2011 of the Internal Revenue Code.[79] Though there is an argument to be made for legislative intent, when it comes to nuanced definitions and technical terms, courts defer to the definition the average informed voter would give the language, based on the belief that the legislature's intent, whatever it may be, is not at the forefront of the voters' minds.[80]

The Initiative's title, to which the voters issued a resounding "Yes,"[81] read, "[s]hall inheritance and gift taxes be abolished, and state death taxes be restricted to the federal estate tax credit allowed?"[82] Such language facially supports EGTRRA conformation. Further, the required Voter's Pamphlet statement, drafted by the Attorney General, detailed the effect of Initiative 402 as follows:

> This initiative would repeal the state's existing inheritance and gift tax laws and would substitute, in their stead, a tax on the transfer of the net estate of a resident decedent and on the transfer of certain in-state property of a non-resident decedent. Only estates liable for federal estate tax would be subject to tax under the initiative and the amount of the tax would be limited to the credit allowable against the federal tax.[83]

Voters enact laws to effectuate what they perceive the language to mean. Any alternative definitions ascribed to the language would call into question the very legitimacy of the positive vote. Though repealing clauses or provisos, such as Initiative 402 and its repeal of the state estate tax, must be strictly construed and must not be held to embrace anything which is not fairly within their terms,[84] voter intent to limit the state es-

---

77. *In re* Hitchman, 100 Wash. 2d 464, 469, 670 P.2d 655, 658 (1983).

78. *See* Estate of Turner v. Dep't of Revenue, 106 Wash. 2d 649, 651, 724 P.2d 1013, 1014 (1986).

79. *Id.* at 652–53, 724 P.2d at 1014–15 ("The Department contends that Washington's estate tax is imposed on the transfer of the net estate . . . in an amount equal to the credit for state death taxes allowed by I.R.C. § 2011 (1982) without reference to any other federal credits or reductions in federal tax liability.").

80. *Hitchman*, 100 Wash. 2d at 469, 600 P.2d at 658.

81. Initiative 402 passed by an affirmative vote of more than sixty-seven percent. Ch.7, Wash. Sess. Laws (1981).

82. Official Voter's Pamphlet (1981).

83. *Id.*

84. State v. Brady, 415, 118 S.W. 128, 129 (Tex. 1909).

tate tax to the allowable federal credit falls "within the terms" of this initiative. The ballot and pamphlet language clearly intimated that an affirmative vote would eliminate all estate taxes above the federal level. The language contained no ambiguities, but even if it had, ambiguities in taxing statutes are construed most strongly against the government and in favor of the taxpayer.[85] Where the voter interpretation is reasonable and supported by the legislative text, it must be afforded deference.[86]

It was unquestionably the intent of the voters to ensure that state estate taxes were never higher than those which were federally mandated. Washington, however, did a poor job of translating that intent into workable reality once EGTRRA came into effect.

B. The Legislative History of the Estate and Transfer Act Parallels All Federal Legislation Until 2001

The legislative history of the Estate and Transfer Act deferred to the Federal Tax Code, preserving voter intent and linking the state and federal schemes—until EGTRRA. Every federal change was ratified into the state scheme with this one monumental exception.[87]

The Estate and Transfer Act of 1988 first amended the original language of Initiative 402 in title 83, chapter 100 of the Washington Revised Code. The Act substantially revised and updated the definitions contained in chapter 100, section 020.[88] Although the Act contained several new provisions and updates, it preserved the language of Initiative 402 upon which Washington voters originally built their expectations and intentions. The new legislation continued to refer to the Internal Revenue Code "as amended or renumbered,"[89] wording identical to that found in the Initiative. Sections 3(1) and 6(1)(b) similarly repeated verbatim language from Iniative 402: section 3(1) repeated the initiative's provision that "a tax in an amount equal to the federal credit is imposed . . . ." and section 6(1)(b) used the initiative's language to state that "no Washington return need be filed if no return is required."[90]

Had the Washington legislature desired to repeal Initiative 402 or to change its provisions in any way, it had the opportunity to do so in 1988.

85. Dep't of Revenue v. Hoppe, 82 Wash. 2d 549, 552, 512 P.2d 1094, 1096 (1973).

86. *In re* Hitchman, 100 Wash. 2d 464, 469, 670 P.2d 655, 658 (1983).

87. *See* WASH. REV. CODE § 83.100 (2006).

88. Laws of Wash. 1988, chapter 64 §§ 1–20. Indeed, E.S.B. 6096 further amended § 83.100.020 (2005) to support the stand-alone tax. *See* E.S.B. 6096, 59th Leg., Reg. Sess. (Wash. 2005) at §2.

89. *See* WASH. REV. CODE § 83.100.020 (2002), the definition section of § 83.100; *cf.* WASH. REV. CODE § 83.100.020 (1986) (the 2002 version clearly updates and modifies the 1986 version of the same section).

90. Laws of Wash. 1988, ch. 64, §§ (3)(1), (6)(1)(b).

The 1988 provisions made many changes; however, because no changes were made to the language of the 1981 initiative, it is a logical reading of legislative intent to conclude that the legislature intended to preserve the voters' intent, and that the verbatim quotations were used because they were in the best interest of the state and its citizens.

In the years following the 1988 Estate and Transfer Act, the legislature updated the provisions regularly to keep up with the ever-changing Federal Tax Code. The next amendment, adopted in 1990, added one subsection tying Washington taxes to the Federal Tax Code at the time of enactment, but, notably, changed nothing of substance.[91] From 1993 to 2005, the definitions section of the Estate and Transfer Act remained in essentially the same form except for the date specified in subsection (15). The amendments in 1993, 1994, 1998, and 1999 all changed the effective date of Internal Revenue Code conformation, but little else.[92] Though the legislature's reasons for inaction are not facially evident, concerns of efficiency, fiscal frugality, and ease of process may have been among its motives. Importantly, if EGTRRA sunsets, the federal scheme will revert to the 2001 rates to which Washington is tied. In essence, Washington may have been able to wait EGTRRA out.

The year 2001 brought with it the last pre-Senate Bill 6096 amendment the legislature made to section 020 of the Estate and Transfer Act; following in the footsteps of its predecessors, this amendment made no dramatic changes. It replaced "renumbered <u>on</u>" with "renumbered <u>as of</u>," and replaced "[January 1, 1999]" with "[January 1, 2001]."[93] Under these provisions, Washington was bound to the floor of a fast-sinking ship. The court's mandate was at least partially grounded on the paradox

91. Laws of Wash. 1990, ch. 224, §1 (S.B. 6391). The 1990 amendments added subsection (15) to the definition section, which provided that "references in this chapter to the United States internal revenue code of 1986, to a chapter of the code, and to regulations are to the code, chapters, and regulations in effect on the effective date of this act [June 7, 1990]."

92. Laws of Wash. 1993, ch. 73, § 9. The 1993 amendment removed all references in the definitions to the Internal Revenue Code of 1986 "as amended or renumbered," and in their place left several references to the "Internal Revenue Code." It also amended subsection (15) to read "'Internal Revenue Code' means the United States Internal Revenue Code of 1986, as amended or renumbered on the effective date of this act [July 25, 1993]." The 1994 amendment revised only subsection (15) by replacing *July 25, 1993* with *January 1, 1995*. The 1998 amendment revised subsection (15) by qualifying that 'The Internal Revenue Code means, for purposes of this chapter and RCW 83.110.010 . . . ." and by replacing *January 1, 1995* with *January 1, 1998*. The 1999 amendments revised only subsection 15 by replacing *January 1, 1998* with *January 1, 1999*. *See also* Laws of Washington 1994, ch. 221, § 70; Laws of Washington 1998, ch. 292, § 401; Laws of Washington 1999, ch. 358, § 19. E.S.B. 6096 changes the effective date from 2001 to 2005, but provides, among other things, that the federal taxable estate is to be determined without regard to the termination of the federal estate tax under I.R.C. § 2210 "or any other provision of law." E.S.B. 6096, 59th Leg., Reg. Sess. (Wash. 2005) at § 2(14).

93. Laws of Wash. 2001, ch. 320, § 15.

that, despite these date conformations, no amendments had changed Initiative 402's promise to keep Washington estate taxes at or below the federal level. Senate Bill 6096 made this change,[94] remedying the date discrepancy by updating and rewording the statutory language.

C. Because It Failed to Pass Conforming Legislation, Washington's Taxes were Frozen at 2001 Levels

It is a well-established rule that a state legislature cannot adopt "future" federal schemes without specific legislation. Therefore, Washington was estopped from passing statutes stipulating compliance with "The Internal Revenue Code of 1986, as amended or renumbered at any point in the future" without taking special precautions.[95] While the legislature may enact statutes adopting existing federal rules, regulations, or statutes, legislation that attempts to adopt future federal provisions has been held to be "an unconstitutional delegation of legislative power and thus void."[96]

In the absence of specific compliance, Washington's pre-2005 tax scheme was inexorably tied to "The United States Internal Revenue Code of 1986, as amended or renumbered as of January 1, 2001."[97] Because Washington's estate tax statutes related back to the pre-EGTRRA Internal Revenue Code, a fair number of Washington estates were required to file state estate tax returns even though they had no federal obligations under EGTRRA.[98] This clearly conflicted with the intent of Initiative 402.

The Washington State Supreme Court held that "the statute cannot be so ambiguous as to say, '[n]o Washington return need be filed if no return is required,' while also referencing an old federal code that requires Washington returns when no federal return is filed."[99] By eliminating the dual standard, Senate Bill 6096 eliminated this problem, and the Washington estate tax's legislative past set the table well for the new

---

94. E.S.B. 6096 changes the statute to read *2005* instead of *2001*. E.S.B. 6096, 59th Leg., Reg. Sess. (Wash. 1005) at § 2(12).

95. 16A Am. Jur. 2d *Constitutional Law* § 300 (2005): "it is generally held that the adoption, by or under authority of a state statute, of prospective federal legislation, or federal administrative rules thereafter to be passed, constitutes an unconstitutional delegation of legislative power." *See also* Diversified Inv. Partnership v. Dep't of Soc. & Health Servs., 113 Wash. 2d 19, 775 P.2d 947 (1989) (holding that, in Washington, the legislature may not constitutionally attempt to adopt future federal law by statute).

96. State v. Dougall, 89 Wash. 2d 118, 122–23, 570 P.2d 135, 138 (1977).

97. Ch. 320, §15 Wash. Sess. Laws (2001).

98. Mark W. Roberts, 2003–2004 Washington Probate and Trust Law Update, Address before the 2004 Real Property, Probate & Trust Section Midyear Mtg. and Seminar (June 4, 2004).

99. Estate of Hemphill v. State, 153 Wash. 2d 544, 552 105 P.3d 391, 395 (2005).

stand-alone tax. Though Washington needed a judicial push out of the 2001 tax law, that push was a well supported one.

IV. THE WASHINGTON STATE SUPREME COURT'S RULING IN *HEMPHILL V. STATE OF WASHINGTON* WAS A USEFUL FIRST STEP IN PROMOTING TAX CHANGE IN WASHINGTON

The court's decision in *Hemphill* provided the catalyst for legislative change, resulting in Senate Bill 6096. When the court decided *Hemphill*, it chose one of two presented options. In response, the Washington legislature created its own third route, ending its pre-2005 passive approach to taxation and creating a scheme born not of default or court order, but of analysis and careful study of what the state needed. The arguments backing the *Hemphill* decision illuminated problems with Washington's prior plan, many of which Senate Bill 6096 seems to implicitly remedy. The parties' arguments in *Hemphill* illustrate that the time was right for affirmative progress, setting the stage for the passage of Senate Bill 6096. With this new legislation, the door is open for the legislature to become more proactive and involved in taxation issues.

A. Engrossed Senate Bill 6096 Built on the Hemphill Legacy and Created a Tax Scheme to Serve the Washington of 2005 and the Future

Senate Bill 6096 and the resulting stand-alone tax was the legislature's direct response to the Washington Supreme Court's ruling in *Hemphill* that the state must change its tax scheme. The first section of the bill acknowledged the ruling, but noted that "the legislature finds that the revenue loss resulting from the *Hemphill* decision will severely affect the legislature's ability to fund programs vital to the peace, health, safety, and support of the citizens of this state."[100] Moreover, the section clarified that "the legislature intends to address the adverse fiscal impact of the *Hemphill* decision and provide funding for education by creating a stand-alone state estate tax."[101] In furtherance of this goal, the bill updated and amended title 83, section 100 of the Revised Code of Washington, and imposed a tax ranging from ten percent to nineteen percent on estates worth more than \$1.5 million through 2005 and on estates worth more than \$2 million for 2006 and beyond.[102] It calculates tax owed using the "Washington Taxable Estate," which is statutorily defined as the federal taxable estate determined without regard to the de-

100. E.S.B. 6096, 59th Leg., Reg. Sess. (Wash. 2005) at § 1.
101. *Id.*
102. *Id.* at § 3.

duction for state estate, inheritance, legacy, or succession taxes[103] but is, however, subject to several other state-specific deductions and provisions.[104] For example, a deduction is available for farmland and any tangible personal property used primarily for farming purposes;[105] apportionment is allowed for estate property located outside of Washington;[106] a personal representative may choose to make a different qualified terminable interest property election on the Washington return than on the federal estate tax return;[107] and the generation skipping transfer tax has been eliminated for the estates of decedents whose date of death is May 17, 2005 or later.[108] These provisions are important, but temporary reflection of the needs of Washington at the time of enactment. Senate Bill 6096 implemented the court's expression of needed progress in a more tailored fashion but, as Washington grows, the bill's fit must be maintained. The legislature should continue the legacy of Senate Bill 6096 by committing to gauge the needs of the people and ensure that its policies continue to serve those needs. This commitment could come as an evaluation at set intervals, such as every five or ten years, or could be something that each new governor must put at the forefront of his or her agenda. This Comment does not argue that a new tax scheme be imposed with every passing government, but it does urge a commitment to maintain a scheme that is, today, very pro-Washington. If the goals and energy driving Senate Bill 6096 are not maintained, Washington will again find itself subject to a scheme as stagnant as that rejected in *Hemphill.*

The court's *Hemphill* decision alleviated the plight of three classes of estates with the holding that Washington's taxation according to 2001 standards and statutes was invalid.[109] In 2002, three distinct subclasses of taxpayers filed suit against the State of Washington, seeking refunds of

---

103. *Id.* at § 2(13), (14). Under the I.R.C., the taxable estate and the gross estate are not the same. The gross estate is all the property described in I.R.C. §§ 2033–2042. Certain expenses and costs are subtracted ("deducted") from the gross estate to come up with the taxable estate. These deductions are individually addressed at I.R.C. §§ 2053–2057. A deduction is also provided for estate taxes already paid to the decedent's state of domicile under I.R.C. § 2058. Thus, to calculate the Washington Taxable Estate, all deductions are applied except those provided in I.R.C. § 2058.

104. *See* discussion *infra* Part V.

105. E.S.B. 6096, 59th Leg., Reg. Sess. (Wash. 2005) at § 4.

106. *Id.* at § 3(2)(b). Apportionment is a means of allocating the burden of a fixed amount of taxes due. The federal estate tax must ordinarily be paid out of the residuary estate. If the residue is insufficient, the practical result is that specific devises, legacies, and other interests will, by necessity, be tapped. EGTRRA does not change this. By allowing apportionment of estate taxes for property located outside of Washington, the legislature, arguably, has alleviated the burden that would have been borne by the heirs and devisees under the federal plan. The Washington apportionment provision is a statutory fractional calculation.

107. E.S.B. 6096, 59th Leg., Reg. Sess. (Wash. 2005) at § 2(7).

108. *Id.* at § 2.

109. Estate of Hemphill v. State, 153 Wash. 2d 544, 552, 105 P.3d 391, 395 (2005).

estate taxes paid.[110] Each class was represented by the estate of a decedent who died after December 2001, and was assessed state, but not federal estate tax, or was assessed state tax in excess of federal taxes.[111] The estate representatives argued that the way Washington imposed a state-only tax was wrongful, that it violated the language and intent of Initiative 402, and that it constituted an unlawful deprivation of property.[112]

The first subclass included those estates where a federal return was filed, a state tax credit was issued, and a Washington tax was assessed in excess of that credit.[113] The second subclass comprised estates wherein the net value of the estate was low enough to exempt it from federal estate tax, but not so low as to exempt it from Washington's estate tax scheme.[114] The third subclass was made up of those estates for which a federal return was filed and, due to other deductions, no federal tax was actually owed, but Washington nonetheless assessed its own estate tax.[115] The court granted certification of the classes in April 2003, as follows:

> **Class A:** The estates of all Washington residents where the deceased died after December 31, 2001, where the total assets of the estate exceed $1,000,000 and where the estate has paid to the Washington Department of Revenue a Washington estate tax in excess of the credit for state death taxes on its federal return.
>
> **Class B:** The estates of all Washington residents where the deceased died after December 31, 2001, where the total assets of the estate exceed $700,000 and are less than $1,000,000 and no federal

110. Brief of Appellant at 11–12, *Hemphill*, 2005 Wash. LEXIS 89 (Feb. 3, 2005) (No.74974-4).

111. *Id.* Although E.S.B. 6096 yields facially similar results—estates that may not owe federal estate tax may still owe Washington estate tax—the bill avoids reliance on pre-EGTRRA tax schemes and is not affected by the court's invalidation of this extraction.

112. *Id.*

113. *Id.* at 8–9. This class is represented by the estate of Wylie M. Hemphill. Mr. Hemphill died on February 2, 2002, leaving behind an estate valued at $3,534,727. His estate, which exceeded the then $1,000,000 federal tax exemption, filed a federal return after his death. His estate received a credit for state death taxes in the sum of $94,345. Washington State's Department of Revenue assessed Mr, Hemphill's estate taxes in the amount of $125,793, which exceeded the federally-stipulated credit by $31,448.

114. *Id.* at 9. This class is represented by the estate of Wyoma G. Shea. Mrs. Shea died on February 11, 2002, leaving a $817,615 estate—well under the then $1,000,000 federal exemption—so the estate was not required to file a federal return, and was accordingly not allowed any credit on a federal return. Irrespective of this fact, the Washington State Department of Revenue assessed estate taxes of $22,908.

115. *Id.* This class is represented by the estate of Morgan J. O'Brien. Mr. O'Brien died on June 28, 2002, leaving an estate valued at $2,490,118. The estate filed a federal return, but largely because of the unlimited marital deduction, it did not actually owe any federal tax, and thus was not allowed (nor did it need) any credit for state death taxes on the federal return. The Washington State Department of Revenue assessed $33,200 in estate tax against Mr. O'Brien's estate.

return is required and where estate taxes have been paid to the Washington Department of Revenue.

Class C: The estates of all Washington residents where the deceased died after December 31, 2001, where the estate is required to file a federal estate return but does not receive any credit for state death taxes on that return and where estate taxes have been paid to the Washington Department of Revenue.[116]

On October 29, 2003, the parties filed cross-motions for summary judgment, and on December 19, 2003, the superior court granted the State's motion, dismissing the estates' claims in a written decision.[117] On January 12, 2004, the plaintiffs filed a Notice of Appeal of the December 19th ruling with the Washington State Supreme Court, and on January 13th they filed a "statement of grounds for direct review by Supreme Court."[118] The appeal was granted, and oral arguments were heard before the Supreme Court on September 30, 2004.[119] The court returned a unanimous opinion in favor of the estates on February 3, 2005, finding Washington's tax scheme "invalid" and ordering the Department of Revenue to refund all estate taxes collected since January 1, 2002.[120]

From the estate planner's perspective, the holding vastly simplified planning for Washington clients. From the taxpayer's perspective, the holding meant that Washington was moving away from a complex and antiquated scheme, towards something more in line with the national norm. A court is limited to choosing between the two sides, and given the two options presented in this case, the court chose wisely. Ruling for the State would have meant condoning the State's tax scheme, which was rife with problems.

Unlike the court, the legislature is not so confined in its decision-making. Senate Bill 6096 correctly identified the larger problems and noted that to remedy them, the future of estate tax in Washington should not be limited to the better of two extremes. The estates and the State in *Hemphill* presented extreme perspectives. The choice of one was a necessary intermediate step; however, a more tailored middle ground in line with Senate Bill 6096 is the best way to satisfy all interests for the long term.

---

116. Class Action Litigation Information for Estate of Hemphill v. State, *available at* http://www.estatetaxeswashington.com (last visited Oct. 25, 2005).

117. Brief of Appellants, *supra* note 110, at 10.

118. Class Action Litigation Information for Estate of Hemphill v. State, *available at* http://www.estatetaxeswashington.com (last visited Oct. 25, 2005).

119. *See* Estate of Hemphill v. State, 153 Wash. 2d 544, 105 P.3d 391 (2005).

120. *Id.* at 552, 105 P.3d at 395.

B. The Estates Argued that the State Must Completely Adopt EGTRRA

The estates identified and the court relied on two cases supporting Initiative 402's modern applicability, which demanded reconciliation of state and federal estate tax rates. The estates highlighted *Estate of Turner v. Department of Revenue* to illustrate their argument for conformation.[121] In *Turner*, the court held that Washington residents, in enacting Initiative 402, intended to impose a state estate tax only if and when an estate tax was payable to the United States.[122] The *Turner* court reasoned that Washington's estate tax, being a pick-up tax, was not intended to operate independently of the federal scheme.[123] Even though the legislature has amended the Estate and Transfer Act many times since 1986, the estates nevertheless argued that the holding of *Turner* was still binding because the statute the court relied on was not materially different than it was in 1986.[124] The estates emphasized that the legislature's updates to the Initiative had changed only dates and minor conforming details, and that there had been no material or substantive changes in the 23 years previous.[125] By this logic, *Turner* was equally as applicable when *Hemphill* was decided as it was in 1986. The court noted specific agreement on this point.[126]

C. The State Highlighted Ways in which the Frozen Scheme was Both Permissible and Advantageous

The State of Washington, in turn, unsuccessfully argued that the plain language of Washington's estate tax statutes compelled the Washington State Department of Revenue to apply the tax in accordance with the Internal Revenue Code as it stood in 2001.[127] Relying largely on the prohibition of futuristic statutory provisions,[128] the State maintained that the construction of section 030(1) of the Estate and Transfer Act necessarily referred to the federal credit and Internal Revenue Code as they

---

121. 106 Wash. 2d 649, 654, 724 P.2d 1013, 1015 (1986); Brief of Appellant, *supra* note 110 at 14.

122. 106 Wash. 2d at 654, 724 P.2d at 1015. The *Turner* estate filed a federal return, but it had reduced its federal tax liability to zero using another federal credit, and it thus received no state death tax credit. Washington State's Department of Revenue assessed a tax on the estate. In response, the estate sued for a refund, relying, in part, on the language of Initiative 402. The court awarded the refund, pointing to the importance of the voter's pamphlet. E.S.B. 6096, however, amended § 83.100.050. *See* E.S.B. 6096, 59th Leg., Reg. Sess. (Wash. 2005) at § 5.

123. *Turner*, 106 Wash. 2d at 657, 724 P.2d at 1017.

124. Brief of Appellant, *supra* note 105, at 4–5. Of course, E.S.B. 6096 established Washington's post-2005 tax as a stand-alone tax.

125. *Id.*

126. Estate of Hemphill v. State, 153 Wash. 2d 544, 550, 105 P.3d 391, 394 (2005).

127. Brief of Respondent, *supra* note 64, at 3.

128. 16A Am. Jur. 2d *Constitutional Law* § 300 (2005), *supra* note 95.

existed at the time of enactment, January 1, 2001. That section, the State argued, established that tax owed must be equal to the "federal credit"; it noted that the definition of "federal credit" in section 020 of the Act is "the maximum amount of the credit for state taxes allowed by section 2011 of the Internal Revenue Code."[129]

The State applied this logic to the language of Initiative 402, arguing that "in an amount equal to the federal credit" cannot constitutionally mean "any amount of the federal credit ever"; rather, the language is restricted to "the maximum amount of the credit for state taxes allowed by section 2011 of the Internal Revenue Code."[130]

In an attempt to distinguish *Turner*, the State asserted that "because the legislature failed to pass 'conforming' amendments . . . Washington now has a stand-alone tax" and that "this statutory difference means that the *Turner* Court's decision is not controlling here."[131] The court pointedly rejected this argument, noting that if the court were to adopt the State's position that section 020 of the Estate and Transfer Act calculated taxes based on a certain date, when the federal estate tax is completely abolished in 2010 the Department of Revenue will necessarily have to collect all of its state estate taxes as a separate and independent tax.[132] Such collection and calculation, the court reasoned, was contrary to the *Turner* decision, to section 030 of the Act, and to recognized voter intent.[133]

Senate Bill 6096 updated the Estate and Transfer Act by changing the definition of federal credit[134] to get around *Turner*. *Turner* depended on a pick-up tax, and is unenforceable against the new stand-alone scheme. As the court noted, until specific and active requirements were outlined and effectuated, the State could not assess a tax. The court made the outline, and the state then effectuated it without opting for EGTRRA.

---

129. Brief of Respondent, *supra* note 64, at 6.

130. *Id.* The state put forth a similar argument for the estates' contention that Initiative 402 prohibited a state tax from exceeding the federal estate tax. The provision in WASH. REV. CODE § 83.100.020 that "no Washington return need be filed if no federal return is required," the State argued, could not mean the federal return as it would be currently calculated, because the legislation as written in 1981 and passed through to 2001 could not have foreseen the changes caused by EGTRRA.

131. *Id.* at 25. Interestingly, before the enactment of E.S.B. 6096, Washington's Department of Revenue referred to Washington's estate tax as a pick-up tax notwithstanding the continued failed conforming legislation because, at the heart of it, it consisted of the maximum amount of credit that had been allowed to the taxpayer's estate under the federal estate tax law for state death taxes. *See* pick-up tax discussion, *supra* Part II.A.

132. Estate of Hemphill v. State, 153 Wash. 2d 554, 550, 105 P.3d 391, 394 (2005).

133. *Id.*

134. *See supra* note 76.

No longer behind the scenes, the state legislature has finally given our estate tax system the attention it deserves. Taxes are necessary, but taxing without direction can harm more than it might help. Without a clear grasp of why taxes are assessed and without a narrow construction of how that tax integrates with modern society, taxes lose their efficacy, as Washington discovered. Senate Bill 6096 provides Washington-specific policy language that EGTRRA could not provide. The legislature must commit to ongoing maintenance in order to continue providing Washington citizens benefits beyond the present day.

V. SENATE BILL 6096 IS A SOUND SECOND STEP AS THE STATE ATTEMPTS TO SQUARE THE BEST INTERESTS AND INTENTIONS OF THE VOTERS WITH THE FISCAL RAMIFICATIONS OF THE REPEAL

Concededly, the *Hemphill* holding was a victory for tax planners and payers. Senate Bill 6096, however, was a necessary next step. Writing for a unanimous court, Justice Johnson pointedly stated that Washington acted impermissibly by exacting taxes as it did; while the *way* in which the state taxed was wrong, the court did not find that the state was barred from taxing estates in every instance.[135] "The estate tax scheme in Washington, *as currently written* . . . must be administered complementary to federal laws to guarantee that a separate state tax does not burden estates."[136] This logic begs the question of whether the state could avoid mirroring the federal provisions if the provisions were differently written. Surely, the state could; this is exactly what Senate Bill 6096 does in aligning Washington with the other independent estate tax states.

The new stand-alone tax works around the court's invalidation of the pre-2005 tax scheme, heavily relying on voter intent as expressed through Initiative 402. The time is right for reassessment. The voters who expressed their intent in 1981 may have changed their views or left the state, and many new voters have since moved to Washington. As a result, voter intent as measured in 1981 may not reflect the intent of 2005 voters. Although Initiative 402 demands conformation, such conformation would mean that at least until 2010, if Congress were to renew EGTRRA, many taxpayers would pay no estate tax whatsoever, which was not the intent of the voters.[137] Voters clearly intended to be taxed.

135. *See Hemphill*, 153 Wash. 2d at 551, 105 P.3d at 394.

136. *Id.* (emphasis added).

137. Ch. 7 Wash. Sess. Laws 21–27 (1981). The Initiative sets out to impose a Washington estate tax limited to the amount of the credit for state death taxes allowed on the estate's federal return. This implicitly assumes that there will be a federal tax levied; the initiative was designed to simplify the Washington estate taxes by paralleling their rates to the federal rates. If the Initiative had contemplated eliminating the tax entirely, there would certainly have been an easier way. Addi-

The legislature, in order to conform to that expressed intent, must act according to the intent of the voters at the time Initiative 402 was passed, not the possibly different voter intent in 2005.

Justice Johnson wrote, "By taking no action, the legislature has created an internal conflict within the statute,"[138] but Senate Bill 6096 circumvented this conflict by simply creating a new scheme. The court opened the door to this legislation by establishing that "*until or unless* the legislature revises RCW 83.100.030 to specifically and expressly create a stand-alone estate or an inheritance tax, RCW 83.100.030 remains as a pick-up tax" which must comport with EGTRRA.[139] The Washington State Department of Revenue echoed this sentiment, stating that "[EGTRRA conformation] will effectively phase out Washington's estate tax, *pending further action by Congress*."[140] State lawmakers complied.

Now that the Washington Legislature has accepted the challenge of creating a new scheme, the key to the scheme's longevity will be in keeping the system efficient and fair. Senate Bill 6096's stand-alone plan was the best of the viable possibilities presented in *Hemphill*'s wake, but the lesson learned is that tax law must be constantly monitored and updated. Consistent with this reasoning, several other schemes warrant evaluation.

Before the 2005 legislation but after the *Hemphill* decision, the Washington State Department of Revenue proposed several potential courses of action for the state, including partial EGTRRA rejection and the imposition of an inheritance tax.[141] Neither of these proposals is sounder than Senate Bill 6096. First, the bill's stand-alone scheme is far superior to partial EGTRRA rejection, because retaining parts of EGTRRA would avoid little of the confusion Washington citizens felt under the frozen pre-2005 plan.[142] EGTRRA is riddled with uncertainty and financial fallouts; adopting its provisions would be a step backward for the state.

---

tionally, EGTRRA was not even contemplated in 1981; for all the legislators knew then, the federal tax would continue indefinitely.

138. *Hemphill*, 153 Wash. 2d at 551, 105 P.3d at 395.

139. *Id.* (emphasis added).

140. Wash. State Dep't of Revenue, *Estate and Transfer Tax* 201 (2005), *available at* http://dor.wa.gov/docs/reports/2005/Tax_Reference_2005/51estate.pdf [hereinafter *Estate and Transfer Tax*] (last visited Nov. 13, 2005).

141. *Wash. Estate Tax Options*, *supra* note 63.

142. The pre-2005 plan was confusing because it was rigid in the face of a rapidly moving federal plan. Binding the tax plan to a section of EGTRRA gives rise to the same risk, but in the inverse; the danger here is that Washington's tax scheme could be tied to EGTRRA when EGTRRA no longer exists (if, indeed, it sunsets). Even without a sunset, though, tying the state scheme to a highly changeable federal plan would require an immense monitoring effort.

Second, as tempting as it may be for legislators to impose a different standard scheme to replace estate taxes, such as an inheritance tax, the consequences of such a passive plan[143] would similarly do little to forestall the confusion experienced pre-2005. Though some analysts advocated for the adoption of an inheritance tax in lieu of EGTRRA,[144] the legislature correctly chose against it in 2005 and should hold that view.

Though estate and inheritance taxes both ultimately tax the estate, the methods and modes of taxation are different in several important respects. An estate tax is one that is imposed on the right to transfer property at death; the tax is levied on the estate, not on the heir receiving it.[145] In contrast, an inheritance tax is levied on the right to receive property, and the tax is paid directly by the beneficiary.[146] A supplemental inheritance tax scheme would replace the estate tax after it phases out.[147]

Inheritance tax is not a foreign concept to Washington, but it is not favored; Washington had an inheritance tax until 1981, when the citizens voted to repeal it.[148] Adopted in 1901, the inheritance tax was one of the first state taxes established in Washington, and was applied according to three classes of beneficiaries depending on their relationship to the decedent.[149] The initial tax rates ranged from one to twelve percent.[150] There was relatively little change in the inheritance tax until 1979, when the Legislature enacted a comprehensive revision of the tax which voters ultimately repealed with Initiative 402,[151] the very same initiative that caused such problems for the pre-2005 estate tax.

Reinstituting an inheritance tax would likely be unpopular with voters. The repeal of the inheritance tax was unambiguous, leaving none of the interpretive holes that remained regarding estate taxes. Addition-

---

143. Referring to the inheritance tax as "passive" is appropriate because it would be easy to institute without reference to the real needs of the state. E.S.B. 6096, on the other hand, makes an effort to assess the ramifications and precise issues it targets. E.S.B. 6096 is not a standard, general scheme but rather is highly specialized. However, this does not preclude the possibility that legislators could create a more interactive inheritance tax.

144. Michael, *supra* note 36, at 31.

145. *Wash. Estate Tax Options*, *supra* note 63, at 5.

146. *Id.*

147. Michael, *supra* note 36, at 32. States that have considered this option are attracted by the policy incentives of adopting an inheritance tax: an inheritance tax would retain something like the current method of collecting and administering the estate tax (that is, from the administrator of the estate) but would allow for tax variance depending on the closeness of the beneficiary's relationship to the decedent and the amount of the bequest an individual recipient receives. The Washington State Department of Revenue maintains, however, that an estate tax is superior to an inheritance tax because the state would secure payment from the personal representative rather than from the possible numerous heirs. *See Wash. Estate Tax Options*, *supra* note 63, at 5.

148. *See, e.g.*, Estate of Hemphill v. State, 153 Wash. 2d 544, 547, 105 P.3d 391, 392 (2005).

149. *Estate and Transfer Tax*, *supra* note 140, at 201.

150. *Id.*

151. *Id.*; *see also* discussion of Initiative 402, *supra* Part III.A.

ally, the imposition of an inheritance tax would not address Washington's needs as well as would a new scheme such as Senate Bill 6096. Although an inheritance tax would retain something of Washington's pre-2005 method of administering and collecting estate tax, such a tax would also greatly increase the complexity and costs associated with compliance and administration.[152] Moreover, with an inheritance tax, estates that are exempt from federal tax will be required to file and pay state tax; in many respects, it is *more complicated* than the estate tax, especially for estates that are also subject to federal tax.[153]

Implementing an inheritance tax goes against the nationwide trend[154] and would be unpopular. The state legislature correctly recognized that the last thing that Washington needed was another loathed tax plan. Furthermore, most policy experts argue that either an estate tax or income taxation of bequests is preferable to an inheritance tax from an equity perspective.[155]

VI. SENATE BILL 6096 SPECIFICALLY TARGETS THE QUESTIONS AND PROBLEMS LEFT UNANSWERED BY THE COURT'S CHOICE OF EVILS WITHOUT RESORTING TO AN UNFAVORABLE SCHEME

With Senate Bill 6096, the legislature took a lesson from *Hemphill* and set out to restore balance with a tax that is better for Washington than either EGTRRA or an inheritance tax.[156] Washington has demonstrated that anything as financially damaging as an estate tax repeal is not favorable.[157] Had the legislature allowed the courts to impose EGTRRA upon it, not only would it have had to immediately create a refund

152. Michael, *supra* note 36, at 32.

153. *Id.*

154. *Id.* Interestingly, though, inheritance taxes are the most common estate tax structures in other states with stand-alone taxes: of the thirteen stand-alone states, ten have inheritance taxes. However, among all fifty states, less than a quarter embrace inheritance taxes. *See id.*

155. *Id.* An inheritance tax varies tax liability based on the number of recipients of bequests from estates and possibly their relationship to the decedent, but does not take into account the resources or incomes of the recipients. Both the estate tax and the tax on individual income are more narrowly targeted taxes that better satisfy equity norms. Again, though, Washington does not impose an income tax, and will not likely introduce one for purposes of remedying the estate tax problem. *See, e.g.*, Marilyn P. Watkins, *Reforming Washington's Tax System: Where do we go from here?* Economic Opportunity Institute Policy Memo 7 (2005), *available at* http://www.eoionline.org/Taxes/ReformingWATaxSystem2005.pdf (last visited Nov. 13, 2005). This policy memo argues for the design of a new income tax system for Washington, and while such may indeed be favorable, it would take a lot more than an estate tax upset to prompt such a major change. There are no current plans to impose a Washington State income tax.

156. As discussed *supra* Part V and note 143, the inheritance tax is a passive plan, and would be unfavorable for Washington based both on administrative concerns and on pronounced policy objections.

157. This is reiterated in E.S.B. 6096's introductory section. *See* discussion *supra* Part IV.

budget, but it also would have had to prepare itself for at least five years of rapidly declining estate tax revenue. While this would have benefited large estate holders, it would have hurt not only the state and its already fragile fiscal structure, but also the state's myriad charities that depend on donations falling under the charitable deduction exemption from the estate tax.[158] Senate Bill 6096 is the better choice for today's Washington when compared side-by-side with EGTRRA. Promoting state financial security and preserving the vitality of Washington's charitable organizations are two tangible measures of how Senate Bill 6096 will benefit Washington. Senate Bill 6096 was a necessary next step but, as this section illustrates, it may not be completely problem free, and certainly should not be regarded as the last word in the Washington estate tax discussion. Evaluating the new tax must be done with an eye towards periodic reevaluation to maintain the protections that the tax plan now provides.

A. The Financial Implications of EGTRRA Conformation would have put the State in Serious Financial Trouble

As good as EGTRRA would have been for Washington's wealthier taxpayers, the financial ramifications of complete conformation would have had serious effects on the state. Between the 2001 passage of EGTRRA and the 2005 enactment of Senate Bill 6096, the Washington legislature passed up every opportunity to update the Estate and Transfer Act to incorporate the current Internal Revenue Code as amended by EGTRRA.[159] In 2002 and 2003, seven bills were proposed in either the house or the senate, but all failed; three of these bills were re-introduced in 2004, but failed again without so much as a committee hearing.[160] Al-

---

158. *See* I.R.C. § 2055 (2004).

159. Brief of Respondent, *supra* note 64 at 11. *See also* discussion of the legislature updating WASH. REV. CODE every year until 2001, *supra* Part III.B.

160. Brief of Respondent, *supra* note 64, at 16. In 2002, House Bill (H.B.) 2958 died in the House Finance Committee. It was entitled "an Act relating to eliminating Washington estate taxes on estates with no federal tax liability," and would have added a section to the Revised Code of Washington so stating. H.B. 2958, 57th Leg. at § 1 (Wash. 2002). H.B. 2958 would have changed Washington law by relieving any estate in Washington of estate tax it otherwise would owe only if the estate owed no federal estate tax under the I.R.C. as amended by EGTRRA. *Id.* Also in 2002, E.S.B. 6785 was proposed to partially conform Washington law to EGTRRA in many of the same ways as H.B. 2958; the Senate Ways and Means Committee recommended a substitute bill. S.J., 57th Leg. at 662 (Wash. 2002). The substitute bill would have amended the Revised Code of Washington instead of adding to it. On the senate floor, a senator motioned to alter the language of E.S.B. 6785 to fully conform Washington law to EGTRRA, but the motion failed on a 24-25 vote and died thereafter in the Senate. *Id.* Third in 2002, E.S.B. 6762 was proposed; it was identical to the motion on E.S.B. 6785. Senate Bill 6762, 57th Leg. at § 2 (Wash. 2002). E.S.B. 6762 died in the Senate Ways and Means Committee without a hearing. *Id.* at 177, 1463. Fourth in 2002, H.B. 2897 was proposed as an identical companion bill to E.S.B. 6762. H.J., 57th Leg. at 264 (Wash. 2002). The bill was referred

though the estate tax affected only a fraction of Washington estates, each of those estates generated tens of thousands of tax dollars that would have been lost under EGTRRA.[161] Thus, freezing the estate tax was a financial boon for the state.

Senate Bill 6096 makes up for this lost boon in a way that both satisfies the court and provides for Washington. Though the state has struggled under an antiquated and confusing tax scheme since EGTRRA changed the practical application of the estate tax in 2001, Washington is not in a financial position to follow the federal tax scheme and eliminate estate taxes altogether. Senate Bill 6096 is a necessary middle ground and, though it does not give taxpayers the same benefits as EGTRRA, it does alleviate the impact that EGTRRA would have had on Washington's budget.

The court-ordered refund alone could cost the state $150 million, and, had the legislators chosen to adopt EGTRRA, the total loss that would have befallen Washington between 2005 and 2007 could have exceeded $430 million.[162] At a news conference held on the morning of the court's decision, Governor Gregoire stated that, "There is no question . . . that we have made a difficult budget much, much more difficult."[163]

The real glory for the estates in *Hemphill* came through the court-ordered issuance of estate tax refunds,[164] contributing to Washington's immediate budget problem. The refunds extend not only to the estates that formally joined the classes, but also to any estate that paid estate

---

to the House Finance Committee, where it died without a hearing. *Id.* at 2175. Then in 2003, E.S.B. 5186, entitled "An act relating to updating state law to conform to changes in federal estate tax," was proposed; it was identical to E.S.B. 6762 from the 2002 session. S.J., 58th Leg. at 82, 1919 (Wash. 2003). E.S.B. 5186 died in the Senate Ways and Means Committee without a hearing. Second in 2003, H.B. 1402 was a companion bill to E.S.B. 5186; it died in the House Finance Committee without a hearing. H.J., 58th Leg. at 107, 3025 (Wash. 2003). Third in 2003, E.S.B. 5418, titled identically to E.S.B. 5186, died in the Senate Ways and Means Committee without a hearing. S.B. 5418, 58th Leg at 116, 1929 (Wash. 2003).

In 2004, all three 2003 bills were reintroduced, but none received a committee hearing and all died without consideration in their respective houses of origin. For a detailed analysis of the circumstances surrounding each bill, *see* Brief of Respondents, *supra* note 64, at 16–23.

161. The estate tax only impacts estates valued at less than $1.5 million for decedents dying May 17, 2005, to December 31, 2005, and $2 million for decedents dying on or after January 1, 2006. Wash. State Dep't of Revenue, Special Notice, *supra* note 3. Among these estates, the rate of taxation is sliding: for an estate that is at least $1 million, the initial tax amount is $100,000; for an estate of $2 million, the initial tax amount is $240,000. The trend continues, culminating with an initial tax amount of $1,440,000 for estates valued at $9 million and above. "Initial tax amount" means the amount to be collected before any deductions are applied. *Id.*

162. Rachel La Corte, *State Supreme Court Throws out Estate Tax*, NEWS TRIB. (Tacoma, WA), Feb. 3, 2005, *available at* http://www.katu.com/news/story.asp?ID=74662.

163. *Id.*

164. Estate of Hemphill v. State, 153 Wash. 2d 544, 551, 105 P.3d 391, 394 (2005) ("Appellants are due a refund of the estate taxes collected by the Department since January 1, 2002.").

taxes above the federal level under EGTRRA on or before January 1, 2003.[165] The financial impact of issuing the refund checks to those estates is potentially a major problem for the fiscal future of the state; state officials project that Washington owes about $152 million in tax refunds.[166] The statute of limitations for all refunds will be three years after the date of original payment.[167] Because estate taxes were due nine months after death, the statute of limitations expired for the first group of refund claimants in September of 2005.[168] Refund claims may conceivably be filed until October 2008 for the estates of decedents who died on or before February 2, 2005, as long as the decedents' estates timely filed their tax returns. The ease of obtaining a refund and the sheer number of eligible estates make the damage done by refunds alone substantial. *Hemphill* class action members are automatically issued refunds, and any others who believe that they are entitled to a refund may petition for payment simply by writing to the Washington State Department of Revenue anytime within three years of the original tax payment.[169]

Washington issues refunds for overpayment of taxes pursuant to section 130 of the Estate and Transfer Act.[170] Before the enactment of Senate Bill 6096, the statute stated, in relevant part, that "whenever the department determines that a person required to file the federal return has overpaid the tax due under this chapter, the department shall refund the amount of the overpayment."[171] Though no known challenges arose, it is unclear whether this language actually authorized refunds in the manner ordered by the court. Many of the estates claiming refunds are doing so because they were assessed a tax by the State *where no federal tax would have been due.* In the *Hemphill* case, the Shea estate and Class C was

---

165. Wash. State Dep't of Revenue, *Tax Topics* (2005), *at* http://dor.wa.gov/content/home/taxtopics/estatetax.aspx?viewas=text. [hereinafter *Tax Topics*]. Note that the refunds are issued not because the tax was more than the federal scheme, but because the way Washington was collecting those taxes above the federal level under the pre-2005 Wash. Rev. Code was invalid. Non-class action members may petition the Department for a refund if before May 17, 2005, they paid a state estate tax when no federal tax was due.

166. Andrew Garber, *$152 million Refund Likely After High Court Tosses State's Estate Tax*, SEATTLE TIMES, Feb. 4, 2005, *available at* http://seattletimes.nwsource.com/html/localnews/2002170386_estatetax04m.html.

167. *Tax Topics*, *supra* note 165; WASH. REV. CODE § 4.16.080 (2005).

168. Payment of the Washington Estate and Transfer Tax is due nine months from the date of death. *See* Washington Estate And Transfer Tax Return Form, *available at* http://dor.wa.gov/Docs/forms/Misc/WAEstateTransfTxRtrn_E.pdf (last visited Mar. 16, 2006). Washington's nine-month provision is mirrored on the federal provision. *See* Treas. Reg. § 20.6081-1(e), codified at I.R.C. §§ 6075(a), 6151(a) (2001).

169. *Tax Topics*, *supra* note 165.

170. WASH. REV. CODE § 83.100.130 (2004): Refund for overpayment—Requirements.

171. WASH. REV. CODE § 83.100.130(1) (2004).

illustrative of this concept.[172] Class C comprised estates that have never been required to file federal returns, so they cannot possibly fit the narrow language of section 130 of the Estate and Transfer Act. Senate Bill 6096 amends section 130 to read as follows:

> If, upon receipt of an application by a taxpayer for a refund, or upon examination of the returns or records of any taxpayer, the department determines that within the statutory period for the assessment of taxes, penalties, or interest prescribed by section 14 of this act a person required to file the Washington return under RCW 83.100.050 has overpaid the tax due under this chapter the department shall refund the amount of the overpayment, together with interest as provided in subsection (2) of this section.[173]

This amendment represents an extreme limitation, but succeeds in making the Washington estate tax state-specific: no longer are Washington taxes or refunds dependent on the Federal code.

Surrendered refunds were but one of the legislature's motivations for enacting Senate Bill 6096: the forgone revenue dictated by EGTRRA would have been devastating. Until 2005, the estate tax itself was a substantial source of revenue for Washington.[174] Nationally, estate taxes lag far behind the income tax in the power to raise revenue, and it is well-known that estate taxes generate a minute fraction of federal collections.[175] EGTRRA plays well to this tune. To the extent that Congress looks to taxes when seeking to balance the budget or generate revenue, income and excise taxes are far preferred over estate taxes; most state governments also look elsewhere.[176] In comparison, Washington is remarkably conservative on the taxation front, taxing neither income nor inheritance. While estate taxes seem trivial from a national perspective, in Washington they represent one of but a few sources of tax revenue.[177]

The State needs this revenue to fund necessary projects and programs and, as the estate tax is one of the easiest to pay, the policy arguments in support of keeping an estate tax are strong. The enactment of Senate Bill 6096 represents an acknowledgement that the state can no longer hide its fiscal problems behind an estate tax scheme. With the bill,

---

172. Brief for Appellant, *supra* note 105 at 9; *see also* note 109. Mrs. Shea's estate was not required to file a federal return, and was accordingly not allowed any credit on a federal return; however, the estate was issued a refund by the February 2005 holding.

173. WASH. REV. CODE § 83.100.130(1) (as amended 2005).

174. *See* Watkins, *supra* 155, at 11.

175. BITTKER, *supra* note 11, at 2.

176. *Id.*

177. Watkins, *supra* note 155, at 3: Washington draws revenue from (1) a sales and use tax; (2) the B&O tax; (3) property taxes; and (4) the estate and other specialized taxes (alcohol, cigarettes and the like).

the legislature sought to minimize the financial strains that EGTRRA would have necessarily placed on Washington.[178] The steps taken are small compared to EGTRRA nationally but, as the bill acknowledges, it would be irresponsible to abruptly discard the tax structure upon which Washington has been based, regardless of whether that structure was illegal.

Though the argument exists that Washington isn't really losing anything because the lost revenue was money gained through illegal means, the practical reality indicates the contrary. It is no secret that Washington's tax system is in trouble,[179] and any loss of funds, whether from an illegal source or not, is profound and deserves consideration.

Washington depends on its scant revenue sources to fund services essential to the health and well-being of all residents, though spending limits cap the amounts that can be allocated to any specific program. Initiative 601, passed by Washington voters in 1993, established state spending limits based on population growth and inflation averaged over a three-year period.[180] According to this scale, spending can grow by up to 3.03% in fiscal year 2005 and up to 2.62% in 2006.[181] Demand for state services grows at a faster rate than does population plus inflation.[182] The current 601 limit is leading to the under-funding of both critical education and health services.[183] Cutting anything, even something as narrow as the estate tax, can only contribute to shortfall. To illustrate, Washington's 2003–05 general fund budget totals about $23 billion. Because public schools account for 43.7% of this spending, decreasing this fund, even minimally, could have serious repercussions.[184] Instead, proceeds collected from the estate tax created by Senate Bill 6096 will help support

---

178. Were Washington to conform to EGTRRA, the Washington State Department of Revenue predicts negative state revenue impacts as follows: for fiscal year 2005, $76,628,000; for fiscal year 2006, $101,782,000; for fiscal year 2007, $110,372,000. *Wash. Estate Tax Options*, *supra* note 63, at 3.

179. *See generally* Watkins, *supra* note 155; *see also* Marilyn P. Watkins, *It's Not Just the Recession: The Budget Crisis and Washington State's Structural Deficit*, Economic Opportunity Institute Blueprint, July 2003, *at* http://www.eoionline.org/Taxes/StructuralDeficit.pdf [hereinafter Blueprint].

180. Wash. Laws of 1992, ch. 2 is the Washington Taxpayer Protection Act, enacted as Initiative 601 by affirmative vote on Nov. 2, 1993. *See, e.g.*, Walker v. Munro, 124 Wash. 2d 402, 405, 879 P.2d 920, 922 (1994). This initiative sets limits on all future enactments related to spending, taxation, and fees.

181. Watkins, *supra* note 155, at 12.

182. *Id.*

183. *Id.* The spending scale under 601 is problematic in its own right, and nothing is likely to change its deficiencies, save a complete taxation overhaul. Such action is not probable and is far beyond the scope of this Comment. The initiative is introduced here only to demonstrate one way in which the loss of the estate taxes really does matter for the state and its programs.

184. *Id.* at 3.

one million children in Washington public schools and more than 224,000 students in state colleges and universities.[185] When Governor Gregoire signed the bill she pledged to dedicate $25 million in new funding for the Learning Assistance Program for struggling high school students.[186] Because Senate Bill 6096 was signed in conjunction with the Governor's biennial operating budget,[187] only a portion of these millions will come from estate tax revenues, but the underlying concept remains applicable to all sources from which this result derives. Estate taxes perpetuate the cycle that originally produced the estate.

B. More than a "Sneaky Budget Trick": The Estate Tax is a Supported Step for Today's Washington

Though much of the Governor's larger 2005 budget bill[188] remains prone to attack, the estate tax is one piece that should be defended. The reach of the estate tax makes it more than mere fundraising for Democratic priorities.[189] Though the tax does, in a utilitarian sense, fund Democratic tax proposals without imposing a general tax,[190] it does much more at a much smaller societal cost than is visible at first glance. Washington's overall tax system, including sales, business, property, and all others, has failed in past years to produce public revenue at a rate matching growing need.[191] When the economy is good, people make money, and that money accumulates into a passable estate: this kind of succession is cyclical and complicated and requires balance to remain in working order. The estate tax is one way of maintaining the stability of this system, though caution is necessary to avoid tipping too far in either di-

185. News Release, Office of Governor Christine Gregoire, Governor Gregoire Signs State's Two-Year, $26 Billion Budget to make Education and Health Care Better, May 17, 2005, http://www.governor.wa.gov/news/news-view.asp?pressRelease=88&newsType=1 [hereinafter Governor's News Release].

186. *Id.*

187. *Id.*

188. E.S.S.B. 6090, 59th Leg., Reg. Sess. (Wash. 2005).

189. McGann, *supra* note 22.

190. Chris McGann, *Legislature Ready to Reinstate Estate Tax*, SEATTLE POST-INTELLIGENCER., Apr. 4, 2005, *available at* http://seattlepi.nwsource.com/local/218660_estate04.html.

191. Blueprint, *supra* note 179, at 7. According to a study by the Washington Office of Financial Management, the State has been falling perilously short in terms of matching revenue and growth. The Office estimates that without constantly raising rates or expanding the tax base, future state revenue will only grow at about eighty-five percent of the rate that personal income and the overall economy are expected to grow. This gap, it is predicted, will grow wider with each year that passes.

rection. As the closeness of the bill's passage suggests,[192] the plan is not a perfect one, and arguments are strong on both sides.

Estate taxes are an easy method of alleviating some of the tensions faced in the state budget because they occupy such a narrow sector, yet still have the potential to raise great capital. In 2003 alone, Washington collected $122 million in estate taxes.[193] In the face of a $1.5 billion deficit, restoration of the estate tax will generate $385 million,[194] and the tax is projected to apply to only 250 estates per year.[195] Estate taxes are tempting taxes to maintain because they affect only the very wealthy and occur only once a person has died.[196] The tax does not touch the decedent, personally, but only affects the extent to which he or she can leave amassed fortunes to his or her heirs. Moreover, the number of estates with fortunes to pass is small: the tax applies to fewer than the top two percent of estates,[197] and among these, it is progressive.[198]

Estate taxes have thrived largely because of their progressivism. Children of wealthy parents, the principal beneficiaries of taxable estates, tend to have higher incomes, and thus tend to leave taxable estates of their own; the pattern repeats itself, leaving those with little or no saved fortune untouched by estate tax for generations.[199]

Taxation is a fundamental, necessary, and sovereign power of government.[200] Our Anglo-American political and legal traditions hold that everyone who receives the general benefits of government should pay his or her fair share of the costs to maintain the government.[201] Determining

---

192. E.S.B. 6096 passed in the Senate 25-21 with 3 excused and 0 not voting; it barely passed the House 50-48, 0 excused and 0 not voting. *See* S. Roll Call, 59th Leg., Reg. Sess. (Wash. Apr. 19, 2005).

193. Watkins, *supra* note 155, at 11.

194. McGann, *supra* note 22.

195. McGann, *supra* note 190.

196. Gail Marks Jarvis, *Dad Wants Higher Taxes For Bill Gates*, ST. PAUL PIONEER PRESS, Oct. 28, 2003, at C1.

197. Michael, *supra* note 36, at 23 (citing Joint Committee on Taxation, *Present Law and Background on Federal Tax Provisions Relating to Retirement Savings Incentives, Health and Long-Term Care, and Estate and Gift Taxes* (June 15, 1999)). Note also, however, that the unlimited marital deduction tends to understate the number of estates subject to tax, since the deduction frequently is used to defer the tax on the estate of the first spouse to die.

198. *Id.* at 23.

199. *See generally* David Joulfaian, *The Federal Estate and Gift Tax: Description, Profile of Taxpayers, and Economic Consequences*, 80 OTA PAPERS (U.S. Dep't of the Treas.), *available at* http://www.ustreas.gov/offices/tax-policy/library/ota80.pdf (last visited Mar. 16, 2006) (roughly thirty-five percent of the recipients of the largest taxable estates were in the highest income strata, while less than 1% of the smallest taxable estates were).

200. Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 GONZ. L. REV. 335, 337 (citing Lawrence v. State Tax Comm'n of Miss., 286 U.S. 276, 279 (1932)).

201. *Id.* (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT 380 (Cambridge University Press 1970)).

the "fair share" is where the analysis gets interesting. With a view towards equity, much turns on use of government programs and dependence on government benefits. While the wealthy depend on the smooth running of the court system, the schools, the police, and myriad others to get ahead, the poor rely on the efficiency of the same systems for subsistence and for survival. To a certain extent, too, the wealthy benefit from the support the poor receive. In its simplest sense, a state system is not working if not all citizens are provided for, and an economy does not promote growth—even for the wealthy—if the poor are neglected. The policy argument also arises that, because the wealthy can pay, they should; they have a civic duty of sorts, and a tax on the wealthiest estates is a positive way to redistribute benefits.[202]

The Washington legislature has opted to tax the wealthy. As a sounder variation of the pre-2005 Washington plan, Senate Bill 6096 is in some respects a way to afford those who have prospered in Washington a means of giving back.[203] "Those who are rich in Washington state are rich because we have a great state," Governor Gregoire said, noting that it is our economy that has allowed them to prosper: "[T]hey have probably had educational benefits here or their employees have had the educational benefits here. Why not have them pay for education for the children of our state?"[204] Though certainly the reasoning and the dynamics of taxing the wealthy are more complex than supporting state-sponsored educational programs, Governor Gregoire's plan is at least a short-term fix for what certainly would have been a much bigger problem under EGTRRA.

Critics of the new stand-alone tax point to the perceived use of the estate tax to cover up other holes in the budget that the Governor promised to repair,[205] and many have pronounced concern that the estate tax, as part of the larger budget, is "just [a] Band-Aid . . . to get through the immediate problem."[206] Initiative 728, for example, is one of the beneficiaries of the estate tax revenues: passed to reduce school class sizes, the initiative remains woefully unfunded.[207] Skeptics see the estate tax as a

202. *See generally* Hamlin C. King, *Taking it With Them: The Dynamics of Changing a State Income Tax Residence*, 24 AKRON L. REV. 321, 337–38 (1990) (discussing broadly different reasons and motivations for assessing tax on certain groups).

203. McGann, *supra* note 22.

204. *Id.*

205. *See, e.g.*, *id.*

206. *Id.*

207. McGann, *supra* note 190.

sneaky way of breaking a promise not to raise general taxes while continuing to fund all pledged projects.[208]

These views may be justified for the budget bill overall, but as they relate to the estate tax, they ignore the bigger issues. Although Senate Bill 6096 arguably does not get to the root of the state's financial troubles, had Washington simply responded to the court by adopting EGTRRA, we would not have even broken the soil. The immediate benefits of the new estate tax will serve certain projects financially, but the estate tax system is about far more than just funding.

C. Senate Bill 6096 May Save Washington's Charities

The wealthy targeted by estate taxes have, in the past, been some of the most generous contributors to Washington's communities, and for people with a great deal of personal wealth, the tax laws often play an influential role.[209] Senate Bill 6096 contemplates this reality and provides incentives to donate. In Washington, charitable donations have traditionally been deductible against a taxpayer's estate tax owed.[210] With every reduction under EGTRRA, Washington charities would likely have experienced substantial reductions in donations as more and more wealthy would-be donors were no longer faced with the choice between giving money to a charity or surrendering it to the state. As EGTRRA continues to reduce federal taxes due, the charitable deduction loss nationwide is estimated at least $9.56 billion annually.[211] This amount is nearly equivalent to the total grants made by the largest 110 foundations in the United States.[212] While it is possible that without an estate tax wealthy people would have more disposable income which they could more generously contribute to charities, it is also foreseeable that individuals would choose against giving to charity when the choice is between the charity and their grandchildren, for example, rather than between the charity and the federal government.[213] Washington's charities risk suffering without the estate tax or an alternate incentivizing deduction plan.

---

208. By narrowly focusing E.S.B. 6096, the legislature avoided a broad tax increase, which Democrats promised during campaigns not to levy. Many were not fooled by the targeted increase: "There are two things that you can depend on in Washington," state Republican Party Chairman Chris Vance is reported to have said; "the rain will always return, and Democratic governors will always break their campaign promise not to raise taxes." McGann, *supra* note 22.

209. Minn. Council of Non-profits, *The Case for Reforming the Estate Tax, available at* http://www.mncn.org/estatetax.htm (last visited Mar. 16, 2006).

210. *Estate and Transfer Tax*, *supra* note 140 (listing "transfers for public, charitable, and religious uses" as recognized estate tax deductions in Washington).

211. *Id.*

212. Jarvis, *supra* note 196.

213. *See generally* ROBERT MCCLELLAND AND PAMELA GREENE, CONGRESSIONAL BUDGET OFFICE, THE ESTATE TAX AND CHARITABLE GIVING (John Skeen, ed.) (2004) *available at*

Senate Bill 6096 balances competing interests well. As the state moves forward from the 2005 *Hemphill* decision and subsequent legislation, it must carefully evaluate what each party has lost, and must strive to mitigate the competing interests that remain long term.

D. The Creation of the Washington-Specific Estate Tax Scheme will most Effectively Reconcile the Needs of the Taxpayers with the Needs of the State

Senate Bill 6096 gives the government a tangible way of balancing the interests of the taxpayers and those of the Department of Revenue. The bill mitigates the loss of state funds and charitable donations, the flight of the wealthy, and other relevant concerns. The future utility of this scheme, however, requires that the tax not become static. Problems of funding, retention of domiciliaries, and charitable survival depend on our current economic climate. In order to continue meeting Washington's current and future financial needs, the goals and results of Senate Bill 6096 must be analyzed and its provisions tailored to forward-looking goals.

Problems with domiciliaries represent one very temporal issue for Washington. Few taxpayers are likely pleased that the legislature has effectively taken the peoples' victory in the courts and used it as a stepping stone to the implementation of new taxes. One of the major concerns of the pre-2005 Washington scheme was the fear that taxpayers would notice that they were paying what their counterparts in conforming states were not.

1. Washington Taxpayers will Likely Protest Taxes Above Those Assessed Federally

The state's garnishment above the rates set by the court may test taxpayers' loyalty to Washington. Many believe that the foundation of a stable economy is the ability of small business people to reinvest in their businesses and to create jobs.[214] Small businesses, it is said, will be profoundly affected by the new scheme.[215] It seems unnecessarily harsh for these families to be penalized for their success. For example, businesses that are worth multiple millions of dollars in hard assets but that do not generate much cash may have trouble affording the tax. On paper, the estate with business included falls within the taxable range, but there are

---

http://www.cbo.gov/showdoc.cfm?index=5650&sequence=0&from=0#anchor. *See also* Dave Hage, *Q&A: William Gates, Sr. on the Estate Tax*, MINN. STAR TRIB., Oct. 26, 2003, *available at* http://www.responsiblewealth.org/press/rwnews/2003/Gates_QA_Minneapolis_StarT.html.

214. McGann, *supra* note 190.

215. *Id.*

no liquid assets, and the heirs may have to sell the business to afford the tax.[216] These issues, though serious, preexisted under the 2005 system. The 2005 legislation maintains that the tax is triggered when an individual owns assets, including business assets, located within the state's boundaries,[217] but amends the definition of terms in the Estate and Transfer Act to read that, for Washington residents only, intangible assets such as cash, stock, and limited partnership and LLC interests are considered to be located "within the state."[218] Real and tangible personal property held in a business entity such as a limited partnership is considered intangible, and thus is not subject to Washington tax *for a non-resident.*[219] This means that some small businesses must leave the state in order to stay within the family. As happened under the pre-2005 plan, many may question the price of staying.

2. In Creating a New Scheme, Washington Must Actively Mitigate the Possibility of Domicile-Switching Citizens

Except for real property physically situated in another state, the death state's rules and taxes take precedence for tax purposes.[220] The threat of business relocation applies with equal force. Just as in any year predating 2005, a Washington resident could have moved to a conforming state, established domicile there, died the next day and owed no Washington estate taxes at all save on Washington real property, motivated citizens can do the same today. Though it is largely unclear how many Washington residents will take measures as drastic as changing domicile in old age to avoid taxation, the probability grows in proportion to the rising EGTRRA exemption. This threat could reemerge as an unwanted side effect of Senate Bill 6096.

---

216. Though there are no statistics to demonstrate exactly how often this happens, the large number of small businesses in Washington make this a tangible risk. According to the Washington Policy Center, Washington has, irrespective of the new estate tax, one of the most difficult business climates in the nation, with twenty-two percent of businesses failing each year. Though certainly the climate is a combination of multiple factors, taxes do pose a significant burden. Small businesses especially are generally less able to come up with liquid assets; for most, their value is in the entity itself. *See, e.g.*, MONTAGUE, *supra* note 12 (discussing, in detail, the ramifications of many governmental policies and initiatives on state small businesses).

217. E.S.B. 6096, 59th Leg., Reg. Sess. (Wash. 2005) at § 3; Kristi Mathisen, *Washington Residents Face State Estate Tax Again*, PUGET SOUND BUS. J., June 17, 2005, *available at* http://seattle.bizjournals.com/seattle/stories/2005/06/20/smallb4.html.

218. E.S.B. 6096, 59th Leg., Reg. Sess. (Wash. 2005) at § 3.

219. E.S.B. 6096, 59th Leg., Reg. Sess. (Wash. 2005) at § 2(6).

220. *See* King, *supra* note 202. The death state is defined as the state of domicile at death. Domicile, unlike residency, is determined for estate tax purposes not by the decedent's mere physical location, but by intent: thus, to effectuate change of domicile, the decedent must have relocated with the intent to remain. Domicile requires an intention to make the new place of residence a permanent home. *See id.* at 330–31.

Unfortunately for Washington, "sun belt" states like Nevada and Florida, which are already attractive to retirees, fully conform to EGTRRA provisions.[221] Washington residents who do not own property in these states may take Washington's new tax as a tip to enter the vacation-home market. In the years leading up to 2005, the risk was great that residents would pack their bags for estate tax-favorable climes; change of domicile is not difficult to effectuate.[222] The possibility of losing the wealthiest sector of taxpayers was a major pitfall of the pre-2005 Washington scheme, and could easily become so again.

If Washington's biggest tax contributors move their assets out of the state before death, a disproportionate burden falls on the remaining taxpayers. The less well-off taxpayers will remain in Washington, either because they have no tax-motivated reason to leave or because they simply cannot afford to relocate. These people pay far less tax, and frequently generate a need for state and local services to help sustain them.[223] Without the revenue from estates that have left Washington, the state will have to strategize new ways of funding the needs of the elderly who remain, and this almost inevitably means more taxes, in other forms, on every other citizen. This will likely impact *all* state residents, not just a small percentage. As sound as were the legislature's motivations for change, Washington must continue to be "competitive" with other states, which involves a delicate balance between serving the financial needs of the state and keeping the citizens interested in staying.

Senate Bill 6096 amends the Revised Code of Washington to allow minimal deductions for property owned by a closely-held corporation[224] and passing by a familial chain of control.[225] It avoids, and Washington must continue to avoid, a scenario wherein "state and local tax policy . . . runs off the ants, while the grasshoppers stay put."[226]

Though Washington may not be able to entice its wealthiest citizens to stay, legislators should look for ways to mitigate this risk. Washington's legislature could, like Ohio, adopt a middle approach; conscious of the value of maintaining in-state assets but discouraged by the number of citizens changing domicile and claiming non-residence, the Ohio De-

---

221. Michael, *supra* note 36, at 25.

222. All one need do to change domicile is abandon one's current domicile with the intent to establish domicile elsewhere. *See, e.g.*, King, *supra* note 202 (discussing the possibility of domicile-switching citizens and the ease with which such moves could thwart estate taxes); *see also* Texas v. Florida, 306 U.S. 398 (1939), for a discussion of what it takes to establish domicile and the intricacies of determining which of several residences constitutes, for tax purposes, the domicile.

223. King, *supra* note 202, at 322.

224. E.S.B. 6096, 59th Leg., Reg. Sess. (Wash. 2005) at § 4(6).

225. E.S.B. 6096, 59th Leg., Reg. Sess. (Wash. 2005) at § 4(3), (5).

226. King, *supra* note 202, at 322.

partment of Taxation has enacted a "Residence Program" under which the state tolerates the departure of *some* income generated within its borders to nonresidents, without tax burden.[227] Such an approach works best for mitigating the damage caused by citizens who still wish to reap in-state benefits while simultaneously claiming non-residence. Senate Bill 6096 could use some fine tuning on this issue.

When weighing the preservation of financial integrity for both the state and the myriad charitable organizations funded primarily through tax write-offs, and when seeking to reflect voter intent, it becomes clear that a stand-alone tax like Senate Bill 6096 is the easiest and best way to fairly address all concerns. Reconciliation of such diametrically opposed interests will be hard to maintain, however, especially when legislation as unpopular as estate taxes are on the table. Just the same, Washington now knows that inaction is no way forward.

VII. CONCLUSION

Washington's new stand-alone estate tax represents positive movement in promoting the future well-being of Washington, its charities, and its citizenry. Estates affect more than just taxation, for the intergenerational passage of wealth stratifies our society socio-economically. Though the provisions and amendments of Senate Bill 6096 do not create a perfect solution, the bill's enactment was far more favorable than the complete adoption of EGTRRA.

Prior to 2005, State legislators notoriously failed to enact any estate tax reform despite the state's precarious ties to an outdated federal plan. The Washington State Supreme Court took the first step by ruling that this system was "inconsistent with the recognized intent of the voter initiative."[228] The legislature took the second step in recognizing that, while EGTRRA may best suit the nation as a whole, Washington is not, at present, prepared to adopt it. Indeed, a complete adoption of EGTRRA could cause more damage over the long term than did the invalid pre-2005 scheme. Many people find it offensive that citizens must pay a tax to pass property at death, but these citizens would be equally if not more offended if the state's service initiatives, public projects, and schools continued to decline, and if charities dwindled and poverty rose because of inefficient revenue collection. Estate taxes alone would not independ-

---

227. *Id.* at 322–23. Under this program, the Ohio Department of Taxation "will review the tax returns of all those who have filed Ohio income tax returns for wages earned in Ohio and list an out-of-state address on those returns." Although clearly Washington could not mirror the approach, having no income tax, it could surely emulate the result—namely, turn up the heat on those who "appear to be thumbing their noses at [in-state] taxation by claiming non-residence."

228. Estate of Hemphill v. State, 153 Wash. 2d 544, 550, 103 P.3d 391, 394 (2005).

ently cause such catastrophes, but the role that Washington has so long assigned to the estate tax must be recognized when looking forward. With an eye to promoting Washington's prosperous future, the third necessary step is management: estate taxes and their governing statutes must be updated and revisited in order to ensure continued favorability. Regardless of what scheme the government chooses, active involvement is necessary. By whatever means, the ends of a healthy and fiscally sound Washington must be realized.

The *Hemphill* court handed the state the keys to reform, and the legislature, through Senate Bill 6096, turned the lock. Though the bill may have opened the door, the state has only begun its work. This Comment urges Washington not to consider its estate tax problem solved. The court's new scheme is a step in the right direction, but its future success depends upon an active legislature.