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Taxing Once, Taxing Twice, Taxing Joint Tenants (Again) at Death Isn't Nice

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Although the federal gift and estate taxes were unified in 1976, certain property interests continue to be subjected to both taxes. Joint tenancies between the decedent and someone other than her surviving spouse are one example. This article analyzes the federal gift and estate tax consequences of such joint tenancies and proposes taxing the transfer of a joint tenancy interest only once. Doing so would enhance uniformity in the application of the federal transfer tax by including only the decedent’s proportionate share in her gross estate at her death regardless of the form of ownership—tenancy in common or joint tenancy with the right of survivorship. Doing so would also move the federal transfer tax system one step closer to complete unification, a process begun in 1976.

I. INTRODUCTION

Taxpayers often complain about “double taxation,” usually without understanding what “double taxation” really means and usually without justification. In the case of joint tenancies and the federal transfer tax system, however, the complaint of “double taxation” has some legitimacy. Compare the federal transfer tax treatment in the following three scenarios.

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1 With apologies to Maurice Sendak. See, Maurice Sendak, Chicken Soup with Rice: A Book of Months (1962).

2 Professor of Law at Vermont Law School. Over the years, many students have helped with the research for this article. Their hard work has languished in my files until now. I would like to thank them all, including Rebekah Maddox, Kerry Kosla, Derric Saville, Sara Engelhardt, and Sandra Cabrera.
Case 1. Ann and Bob are unmarried. They purchase Blackacre as tenants in common, with each receiving a one-half interest. Ann pays the entire $1,000,000 purchase price. Under the federal transfer tax system, Ann has made a completed gift of $500,000 to Bob. If Ann dies before Bob, only one-half the value of Blackacre is in her gross estate under § 2033.3

Case 2. Carl and Diane are married. They purchase Whiteacre as joint tenants with the right of survivorship. Carl pays the entire $1,000,000 purchase price. Under the federal transfer tax system, Carl has made a completed gift of $500,000 to Diane. If Carl dies before Diane, only one-half the value of Whiteacre, is in his gross estate under § 2040(b).4

Case 3. Emma is Frank’s parent. They purchase Greenacre as joint tenants with the right of survivorship. Emma pays the entire $1,000,000 purchase price. Under the federal transfer tax system, Emma has made a completed gift of $500,000 to Frank. If Emma dies before Frank, the entire value of Greenacre is in her gross estate under § 2040(a) because Emma paid all of the consideration for Greenacre.

3 All citations are to the Internal Revenue Code of 1986 as modified and revised by subsequent tax acts.

4 Both the gift of $500,000 and the value of Carl’s interest at death qualify for the marital deduction. §§ 2056; 2523. The marital deduction, however, does not explain the different tax treatment in § 2040. If the marital deduction is the rationale for giving spousal joint tenancies preferential treatment, then the entire value of the decedent’s interest should be eliminated from his gross estate.
Why is Case 3 different? The answer lies in the histories of both the federal estate tax and property law. Although both have changed significantly since § 2040(a) was initially adopted in 1916, that section has remained relatively unchanged at least with respect to this issue. Concerns about the gift and estate tax of joint tenancy property have been well-documented. While many of the issues have been remedied by legislation, the fundamental structural problem identified by Case 3 has not been addressed. The time has come to eliminate this remnant of the feudal past and treat all three cases posited above the same. Doing so would also move the gift and estate taxes toward complete unification, a process that began in 1976.

This article explores the history of joint tenancy law as well as that of the federal transfer taxes, and posits that there is no need to tax Emma any differently than Ann or Carl. Part II of the article examines the nature and history of joint tenancies and tenancies in common. Part III traces the history of the federal transfer taxes as it relates to the taxation of joint tenancies. Part IV presents the rationale for repeal of § 2040(a).

II. THE NATURE OF CONCURRENT PROPERTY INTERESTS

A. Historical Roots

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Although the roots of co-ownership of property may reach further back in time, the property interest currently recognized as a joint tenancy with the right of survivorship (hereinafter joint tenancy or joint tenants) may be traced to feudal England. After William of Normandy conquered England in the Battle of Hastings in 1066, he needed to preserve his victory. This presented a significant challenge in a country where political power was distributed among land owners who had their own private armies and where land was the primary source of wealth.

Having won the battle, William claimed all the land as spoils of war. When William redistributed the land to the Norman barons who had fought with him, he retained technical legal ownership. As a result, the barons held title “of the king” and, thus, owed specific duties to him. The most important duty was to provide knights who would serve in his army, a process commonly called infeudation. To meet their annual quota of knights, the barons could provide members of their households, including young men of knightly ambition that joined their households, or they could subinfeudate parts of

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6 John V. Orth, Joint Tenancies, in 4 THOMPSON ON REAL PROPERTY § 31.05 at 7 (David A. Thomas ed. 1994) (hereinafter THOMPSON); Henry Sumner Maine, ANCIENT LAW, 127-128 (5th ed. 1873).


8 Id. at 3.

9 Id. at 4.

10 Id. at 3.
their own land to individual knights.\textsuperscript{11} The knights would hold “of the baron” as well as “of the king.”\textsuperscript{12} Knights could further subinfeudate the land.\textsuperscript{13} No matter how many times the land was divided, each land-holder still owed service, goods, or money to the one above him in the chain. Each land-holder always bore the risk that the land would be lost if the knight or baron above him in the chain breached his feudal obligations to the person on the next higher link in the chain.\textsuperscript{14}

This system worked well only until someone died. The decedent could not transfer more than he owned and, given the nature of his ownership which was much like that of a tenant, it was not at all clear that the decedent could in fact transfer any ownership rights at his death. Because of the personal nature of the relationship, the lord was not required to accept the decedent’s heir as his tenant. If he did, he often exacted payment, called a “relief,” for the re-grant of the tenancy to the decedent’s designated beneficiary.\textsuperscript{15} Given the uncertainties of life and the possibilities of death in battle, a knight might exact a promise at the time of the initial grant that his lord would accept the

\begin{itemize}
\item \textsuperscript{11} Id. at 4.
\item \textsuperscript{12} Id. at 4.
\item \textsuperscript{13} Id. at 5.
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id. at 7-8.
\end{itemize}
knight’s heir as the lord’s tenant. This was limited, however, to the eldest surviving son of the knight and, thus, was born the system of primogeniture.\textsuperscript{16}

The viability of this system depended to a great extent on preserving existing land ownership. Subdividing the land would unduly complicate the system, particularly in the second, third, or fourth generation. So if property did pass to two or more persons, the law had to presume that they owned the land as one unit. The right of survivorship among co-owners was necessary to preserve ownership of the estate as one unit. The co-owners could not even compel partition.\textsuperscript{17}

The decline of feudalism did not undermine the presumption that a transfer of property to two or more people created a joint tenancy with the right of survivorship. Instead, the joint tenancy gained strength as a means of avoiding the charges payable to the overlord on succession at death, \textit{i.e.}, the relief. The inability to transfer freely at death, the limitations on the types of future interests that could be created, and the problem of a minor heir could all be avoided by delaying legal succession of land ownership at death. By transferring the land to a group of individuals as joint tenants,

\textsuperscript{16} \textit{Id.} at 8-9.

\textsuperscript{17} THOMPSON \textit{supra} note 6, § 31.05 at 7; see also William B. Stoebuck & Dale A. Whitman, \textsc{The Law of Property}, § 5.2 at 177 (3d ed. 2000) (hereinafter Stoebuck); John V. Orth, \textsc{Joint Tenancy Law}, 5 Green Bag 2d 173 (2002).
succession was avoided until the last of the joint tenants finally died. Joint tenancy, thus, separated equitable ownership (“for the use of”) from legal ownership.\textsuperscript{18}

Change came, although not rapidly. The Statute of Uses in 1535\textsuperscript{19} transformed equitable estates into legal estates and eliminated the need for the presumption in favor of joint tenancies. Statutes adopted in 1539\textsuperscript{20} and 1540\textsuperscript{21} allowed the partition of land, including joint tenancies. The Statute of Wills in 1540\textsuperscript{22} allowed direct succession of property at death, providing a legal alternative to joint tenancies. Finally, the Statute of Tenures in 1660 abolished feudal dues.\textsuperscript{23}

The presumption in favor of joint tenancies continued, but it could be avoided through careful drafting of deeds. Seeking lawyers’ advice was not common in the newly independent American states, however, because there were far fewer lawyers and because land holdings were much smaller than those in England.\textsuperscript{24} Moreover, by the time of the

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\textsuperscript{18} \textsc{THOMPSON, supra note 6, § 31.05 at 7-8.} \\
\textsuperscript{19} 27 Hen. 8, c. 10 (1535). \\
\textsuperscript{20} 31 Hen. 8, c. 1 (1539). \\
\textsuperscript{21} 32 Hen. 8, c. 32 (1540). \\
\textsuperscript{22} 32 Hen. 8, c. 1 (1540). \\
\textsuperscript{23} 12 Car. 2, c. 24 (1660). \\
\textsuperscript{24} \textsc{THOMPSON supra note 6, § 31.05 at 8; John V. Orth, Joint Tenancy Law, 5 Green Bag 2d 173 (2002).}
\end{flushright}
American Revolution there was a far different culture in the United States than in England and a tendency to reject established English rules.\textsuperscript{25}

All states abolished the presumption in favor of joint tenancies either by abolishing the right of survivorship or by reversing the presumption.\textsuperscript{26} All states currently allow the creation of joint tenancies with the right of survivorship or the equivalent as long as appropriate and explicit language is used.\textsuperscript{27} All states also allow a joint tenant to sever the joint tenancy without the consent of the other joint tenant.\textsuperscript{28}

B. Joint Tenancy with the Right of Survivorship

A joint tenancy has traditionally been distinguished by the co-existence of four unities: (1) the unity of interest,\textsuperscript{29} (2) the unity of title, (3) the unity of time, and (4) the

\begin{footnotes}
\textsuperscript{25} Id.

\textsuperscript{26} THOMPSON supra note 6, § 31.03 at 6; Stoebuck, supra note 17, § 5.2 at 178; John G. Sprankling, UNDERSTANDING PROPERTY LAW, § 10.02[A][2] at 129, §10.02[B][2] at 131 (2d ed. 2008) (hereinafter Sprankling); John V. Orth, The Perils of Joint Tenancies, 44 Real Prop. Tr. & Est. L. J. 427 (2009); 20 Am. Jur. 2d Cotenancy and Joint Ownership, § 15 (2010).

\textsuperscript{27} Jeffrey A. Schoenblum, 2010 MUTLISTATE GUIDE TO ESTATE PLANNING, Table 5.0, Part I at page 5-4 (2009); see, also, Stoebuck, supra note 17, § 5.3 at 185; 20 Am. Jur. 2d Cotenancy and Joint Ownership, §§ 15, 16, 19 (2010).

\textsuperscript{28} THOMPSON supra note 6, § 31.08(b) at 56; Stoebuck, supra note 17, § 5.4 at 189; Sprankling, supra note 26, § 10.04[A][1] at 141; 20 Am. Jur. 2d Cotenancy and Joint Ownership, § 24 (2010).

\textsuperscript{29} The unity of interest required that each joint tenant own an equal share of the property. If there were two joint tenants, each owned one-half. If there were three, each owned one-third. And so on. Today some jurisdictions permit joint tenants to hold unequal shares. See infra note 40. There may be more than two joint tenants. For the sake

unity of possession.\(^{30}\) “[I]n other words, joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.”\(^{31}\) If one of the unities was absent, the property was held as tenants in common.

The formalism of the four unities has disappeared in most American jurisdictions.\(^{32}\) As a result, an individual can convey property to herself and another as joint tenants without the assistance of a straw man.\(^{33}\) In addition, the joint tenancy can be severed by an action for partition, by a conveyance during life to another, or by any action that destroys one of the four unities.\(^{34}\) A joint tenant may also be able to convert

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\(^{30}\) THOMPSON \textit{supra} note 6, § 31.06(b) at 15; Stoebuck, \textit{supra} note 17, § 5.2 at 177, § 5.3 at 183; 20 Am.Jur. 2d \textit{Cotenancy and Joint Ownership} §5 (2010).

\(^{31}\) 2 William Blackstone, Commentaries 180 (1766) \textit{quoted in} THOMPSON \textit{supra} note 6, § 31.06(c) at 17.


\(^{33}\) At the common law, such a conveyance would have created a tenancy in common because the unities of time and title would not have existed. THOMPSON \textit{supra} note 6, § 31.06(c) at 17; Stoebuck, \textit{supra} note 17, § 5.3 at 187; Sprankling, \textit{supra} note 26, § 10.02[B][2] at 131.

\(^{34}\) THOMPSON \textit{supra} note 6, § 31.08 at 53; 20 Am. Jur. 2d \textit{Cotenancy and Joint Ownership} §§ 24, 36 (2010).
the joint tenancy into a tenancy in common simply by conveying the property from herself to herself and the other joint tenant at any time during life.\textsuperscript{35}

Because states have reversed the common law presumption that favored the creation of joint tenancies, a deed, will, or other conveyance must explicitly state that the individuals own the property “jointly,” “as joint tenants,” “as joint tenants with the right of survivorship,” or some other similar language indicating an intent to create a joint tenancy.\textsuperscript{36} If the decedent died without a will and her four children inherited the property, they held title as tenants in common not as joint tenants.

Each joint tenant owns an undivided interest in the entire property, and she has a right to her proportionate share of any income generated by the property. She is responsible for the taxes on that income as well as real property taxes, insurance, and maintenance of the joint tenancy property. If one joint tenant does not pay her share of taxes, insurance and maintenance, the other joint tenant must do so but may claim contribution from the defaulting joint tenant.\textsuperscript{37}

\textsuperscript{35} THOMPSON \textit{supra} note 6, § 31.08 at 53; Stoeckel, \textit{supra} note 17, § 5.4 at 192; Sprankling, \textit{supra} note 26, § 10.04[A][1] at 142; Wendy Evans Lehmann, Annotation, \textit{Severance or Termination of Joint Tenancy by Conveyance of Divided Interest Directly to Self}, 7 A.L.R. 4\textsuperscript{th} 1268 (1981); 20 Am. Jur. 2d \textit{Cotenancy and Joint Ownership}, §§ 23, 24 (2010).

\textsuperscript{36} THOMPSON \textit{supra} note 6, § 31.06(d) at 24; Stoeckel, \textit{supra} note 17, § 5.3 at 185; Sprankling, \textit{supra} note 26, § 10.02[B][2] at 131; 20 Am. Jur. 2d \textit{Cotenancy and Joint Ownership}, §§ 15, 16, 19 (2010).

\textsuperscript{37} This right of contribution is limited to normal maintenance and not to improvements. THOMPSON \textit{supra} note 6, § 31.07(b) at 45; Stoeckel, \textit{supra} note 17, § 5.9
At death, the decedent’s interest disappears and the survivor becomes the sole owner, holding the property in fee simple. The first joint tenant to die cannot transfer her interest by will or by intestacy; complete ownership of the property vests in the surviving joint tenant because of the nature of the survivorship feature, *i.e.*, by operation of law.\(^{38}\) There is not an actual transfer from the decedent to the surviving joint tenant at the time of death because their interests arose at the time of the initial conveyance to them as joint tenants.

The right of survivorship is the only feature that distinguishes a joint tenancy from a tenancy in common.\(^{39}\) Both require unity of possession. The unities of time and title have all but vanished from American jurisprudence. And the unity of interest, *i.e.*, that all joint tenants must have an equal share is also disappearing.\(^{40}\)

C. Tenancy in Common

\(^{38}\) THOMPSON *supra* note 6, § 31.02 at 3; Stoebuck, *supra* note 17, § 5.3 at 183; Sprankling, *supra* note 26, § 10.04[A][1] at 131; 20 Am. Jur. 2d *Cotenancy and Joint Ownership*, § 7 (2010).

\(^{39}\) The right of survivorship may once again be under attack. See John V. Orth, *The Perils of Joint Tenancies*, 44 Real Prop. Tr. & Est. L. J. 427 (2009).

\(^{40}\) See, e.g., Vt. Stat. Ann. tit. 27 § 2(b) (2010); Conn. Gen. Stat. § 47-14(a) (2010); see also Estate of Lasater, 54 P.3d 511 (Kan. App. 2002); LeFeber v. Johnson, 209 P. 3d 1254 (Mont. 2009); see generally, THOMPSON *supra* note 6, at § 31.06(a) (Supp. 2010).
Tenants in common share only one unity—that of possession.\textsuperscript{41} Because of the unity of possession, each tenant in common owns an undivided interest in the entire property. Because unity of interest is not required, shares need not be equal although in the absence of a specific designation, equality is presumed.\textsuperscript{42}

A tenant in common has an undivided interest in the property. She is entitled to her proportionate share of any income generated by the property. She is responsible for the taxes on that income as well as real property taxes, insurance, and maintenance of the joint tenancy property. If one tenant does not pay her share of taxes, insurance and maintenance, the other tenant must do so but may claim contribution from the defaulting tenant in common.\textsuperscript{43}

There is no right of survivorship in a tenancy in common and, therefore, each owner can transfer her interest during life or at death by her will or by intestacy.\textsuperscript{44} As a

\textsuperscript{41} THOMPSON supra note 6, \textit{Tenancies in Common}, § 32.06 at 87; Stoebuck, \textit{supra} note 17, § 5.2 at 177; Sprankling, \textit{supra} note 26, § 10.02[A][1] at 128; 20 Am. Jur. 2d \textit{Cotenancy and Joint Ownership}, § 32 (2010).

\textsuperscript{42} \textit{Id}.

\textsuperscript{43} This right of contribution is limited to normal maintenance and not to improvements. THOMPSON \textit{supra} note 6, \textit{Tenancies in Common}, § 32.07(b) at 105; 20 Am. Jur. 2d \textit{Cotenancy and Joint Ownership}, §§ 46, 47, 48, 53 (2010).

\textsuperscript{44} THOMPSON \textit{supra} note 6, \textit{Tenancies in Common}, § 32.07 at 99; Stoebuck, \textit{supra} note 17, § 5.2 at 176, 179; Sprankling, \textit{supra} note 26, § 10.02[A][1] at 129; 20 Am. Jur. 2d \textit{Cotenancy and Joint Ownership}, § 32 (2010).
result, the interest will be part of the decedent’s probate estate and subject to the claims of the decedent’s creditors.

D. Resurgence of the Joint Tenancy

Although the common law presumption in favor of joint tenancy has been reversed, joint tenancy has regained its popularity as a basic estate planning device.\textsuperscript{45} It avoids the costs, publicity, and delays of the probate process as well as the need for a will. It protects the surviving joint tenant from claims by the decedent’s creditors that have not been reduced to judgment and attached to the property prior to decedent’s death. In jurisdictions that limit the surviving spouse’s elective share to probate property, transferring property into joint tenancy with someone other than one’s spouse might avoid that claim. A joint tenancy with the right of survivorship might also prevent will contests based on claims of lack of due execution, lack of mental capacity, and undue influence, fraud, or duress. Finally, owning property in joint tenancy also avoids the need for ancillary probate if the decedent owns real property in a jurisdiction in which she is not domiciled at the time of her death.

Owning property in joint tenancy reinforces the partnership theory of marriage, civil unions, or domestic partner arrangements. It also provides an unmarried couple with an easy estate plan that is less likely to be challenged at death than a will.

\textsuperscript{45} See Norman F. Dacey, HOW TO AVOID PROBATE, 10 (1965); John V. Orth, Joint Tenancy Law, 5 Green Bag 2d (2002).
Parents also create joint tenancies to avoid the probate process. In Case 3, where Emma is the parent and Frank is the child, problems arise if Emma changes her mind. Does the initial conveyance transfer a current interest in property to Frank? Or does lack of intent to make a present transfer defeat Frank’s claim to his share of the property during life? If a parent takes title to property as joint tenants with a child, there is a presumption that the parent intended to convey a present interest in the property and the child, therefore, has a current ownership interest in the property.\textsuperscript{46} That presumption, however, can be overcome although courts often require clear and convincing evidence to do so.\textsuperscript{47} Two recent cases in Vermont illustrate this.


In Brousseau v. Brousseau, the Vermont Supreme Court reversed summary judgment in favor of the child, allowing the mother to introduce evidence that a deed creating a joint tenancy with the child was merely “an estate planning device” and not a conveyance of a present interest in the real property in issue. In Gregoire v. Gregoire, the same court imposed a resulting trust in favor of parents who had taken title to property with their son as joint tenants with the right of survivorship. In that case the son had paid none of the consideration for the purchase or maintenance of the property, and he never reported any of the income from the property on his income tax return. Again, the parents testified that they had put their son’s name on the deed “as an estate planning device” and had not intended to convey any interest in the property to their son during their lives.

As the court in Brousseau noted, there are two requirements for a gift: (1) donative intent and (2) delivery. One without the other is insufficient. In Brousseau and Gregoire, the court looked behind the formal documents to determine if the parents had donative intent at the time they signed the deeds. In the absence of that intent, the joint tenancy deed became simply a testamentary document. In both cases, the parents sought to prevent their children from asserting ownership rights in the property during their

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lives. It is not at all clear how the court would have decided the cases if other heirs had challenged the joint tenancy after the parents had died.

With the abandonment of the formalities of the four unities, a joint tenancy becomes virtually the same as a tenancy in common. The willingness of courts to look beyond title to the transferor’s intent moves joint tenancy ownership even closer to a tenancy in common. The issue then becomes whether or not to treat these forms of co-ownership the same for purposes of the federal estate tax.

III. HISTORY OF THE FEDERAL GIFT AND ESTATE TAXES

A. The Initial Stage: 1916 to 1940

The modern estate tax was enacted in 1916 and included in the gross estate all property interests “real or personal, tangible or intangible, wherever situated . . . [t]o the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.”50 From the beginning, courts interpreted this provision narrowly, for example, holding that it did not include property transferred pursuant to the exercise of a general power of appointment.51 As a result, there needed to be specific statutory provisions governing other property interests.


51 United States v. Field, 255 U.S. 257 (1921). Because the property was held in trust, it was not part of the probate estate and, thus, not subject to the claims of creditors.
Moreover, there was no gift tax in 1916, so to prevent avoidance of the estate tax Congress included in the gross estate lifetime transfers that were testamentary in character, *i.e.*, transfers “in contemplation of or intended to take effect in possession or enjoyment at or after . . . death.”

The 1916 act also specifically included joint tenancy property:

“To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may have been shown to have originally belong to such other person and never to have belonged to the decedent.”

This language created a presumption that the first joint tenant to die created the joint tenancy and paid all the consideration. The burden of proving otherwise fell on the decedent’s estate and the surviving joint tenant. Keeping detailed records memorializing who paid exactly how much of the consideration for acquisition of the property was essential. Determining what counted as a consideration was also important.

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52 1916 Act, §202(b); 39 Stat. 756, 777-778.

53 *Id.* at §202(c), 39 Stat. 756, 777-778.

Although Congress has amended and refined the joint tenancy provision, it has not changed the basic structure or the focus on consideration. The Revenue Act of 1921 added two clauses. The first provided that any money or property paid by the surviving joint tenant that had been gifted to that individual by the decedent would not count as consideration for purposes of the estate tax. The second provided that if the property was acquired by the decedent and survivor from a third party as a gift or devise, then only one-half of the interest would be in the decedent’s gross estate.\(^5\) The Revenue Act of 1924 further modified the final phrase to provide for inclusion in the gross estate of only

\(^5\) Revenue Act of 1921, § 402(d), 42 Stat. 227, 278, 67\(^{th}\) Cong. 1\(^{st}\) Sess., ch. 136 (1921).

“To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money’s worth: Provided, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money’s worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: Provided further, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so acquired by the decedent and any other person as joint tenants and their interest are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof.”

the decedent’s fractional interest to reflect the fact that the decedent’s interest might be less than one-half.\textsuperscript{56}

Decedents who had transferred property into joint tenancy prior to the Revenue Act of 1916 challenged the constitutionality of imposing an estate tax on the full value of that property. In \textit{Knox v. McElligott},\textsuperscript{57} the Supreme Court agreed, relying on its opinion in \textit{Shwab v. Doyle},\textsuperscript{58} which had challenged the constitutionality of the provision subjecting transfers in contemplation of death to the estate tax. The Court simply held that “a statute should not be given retroactive operation, unless its words make that imperative and this cannot be said of the words of the Act of September 8, 1916.”\textsuperscript{59}

Congress took the hint and added explicit language making the estate tax provisions applicable to “transfers, trusts, estates, interests, rights, powers, and relinquishment of powers . . . whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.”\textsuperscript{60} The Supreme Court then held

\begin{footnotesize}
56 Revenue Act of 1924, § 302 (e), 43 Stat. 253, 304-305, 68\textsuperscript{th} Cong. 1\textsuperscript{st} Sess., ch. 234 (1924). The statutory language then became: “then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.”

57 258 U.S. 546, 42 S. Ct. 396 (1922).

58 258 U.S. 529, 42 S. Ct. 391 (1922).

59 \textit{Id.} at 537.

60 Revenue Act of 1924, § 302(h), 43 Stat. 253, 305, 68\textsuperscript{th} Cong. 1\textsuperscript{st} Sess., ch. 234 (1924).
\end{footnotesize}
that the application of the estate tax to joint tenancies created before the effective date of the 1916 Act was constitutional.\textsuperscript{61}

"‘The question here, then, is, not whether there has been, in the strict sense of that word, a ‘transfer’ of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights. * * *"

"‘At his (the co-tenant's) death, however, and because of it, she (the survivor), for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the ‘generating source’ of important and definite accessions to the property rights of the other. These circumstances, together with the fact, the existence of which the statute

requires, that no part of the property originally had belonged to the wife, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax.”

In 1926, Congress amended the predecessor of § 2033 to include “all property, real or personal, tangible or intangible, wherever situated to the extent of the interest therein of the decedent at the time of his death.” This broadened the scope of that section, freeing it from its previous connection to the decedent’s probate property. Despite this, the Supreme Court again refused to give the section a broad and expansive reading. As a result, there continued to be a need for a separate provision to include joint tenancy interests in the decedent’s gross estate, and no changes were made to the subsection that governed joint tenancy property.

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63 Revenue Act of 1926, § 302(a), 69th Cong. 1st Sess., ch. 27, 44 Stat. 9, 70 (1926).

64 Helvering v. Safe Deposit & Trust Co., 316 U.S. 56 (1942). The Court held that the amended section did not bring property subject to an unexercised general power of appointment into the power-holder’s gross estate.
Congress enacted the first gift tax in 1924,\textsuperscript{65} repealed it in 1926,\textsuperscript{66} and re-enacted it in 1932.\textsuperscript{67} The primary purpose of the gift tax was to prevent avoidance of the estate tax. The gift tax was a separate tax, with its own rate schedule, and its own exemption amount. The gift tax rates were approximately 75 percent of the estate tax rates. The lower gift tax rates, the separate exemption amount, and the gift tax annual exclusion together created an incentive to make lifetime transfers.

There were some attempts by the courts\textsuperscript{68} to coordinate the two taxes. The gift tax and the estate tax were considered to be \textit{in pari materia} (upon the same subject matter) and language in one tax was given the same meaning in the other.\textsuperscript{69} More importantly, courts tried to subject transfers to tax only once. In Burnet v. Guggenheim, for example,

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{65} Revenue Act of 1924, §§ 319-324, 68\textsuperscript{th} Cong. 1\textsuperscript{st} Sess., ch. 234, 43 Stat. 253, 313-316, P.L. 68-176, ch. 234 (1924).
\item \textsuperscript{66} Revenue Act of 1926, §§ 1200(a), 69\textsuperscript{th} Cong. 1\textsuperscript{st} Sess., ch. 27, 44 Stat. 9, 1226 (1926).
\item \textsuperscript{67} Revenue Act of 1932, §§ 501-532, 72\textsuperscript{nd} Cong. 1\textsuperscript{st} Sess., ch. 209, 47 Stat. 169, 245-259 (1932).
\item \textsuperscript{68} Smith v. Shaughnessy, 318 U.S. 176 (1943); Sanford’s Estate v. Commissioner, 308 U.S. 39 (1939); Lockard v. United States, 166 F.2d 409 (1\textsuperscript{st} Cir. 1948); Higgins v. Commissioner, 129 F.2d 237 (1\textsuperscript{st} Cir. 1942); Helvering v. Robinette, 129 F. 2d 832 (3\textsuperscript{rd} Cir. 1942); Commissioner v. Prouty, 115 F.2d 331 (1\textsuperscript{st} Cir. 1940); Hesslein v. Hoey, 91 F.2d 954 (2\textsuperscript{nd} Cir. 1937); Brown v. Deputy, 30 F. Supp. 860 (D. Del. 1940).
\item \textsuperscript{69} See, e.g., Merrill v. Fahs, 324 U.S. 308, Burnet v. Guggenheim, 288 U.S. 280 (1933).
\end{enumerate}
\end{footnotesize}
the court held that the release of a power to revoke a transfer in trust was a completed gift subject to the gift tax, stating that

“Congress did not mean that the tax should be paid twice, or partly at one time and partly at another. If a revocable deed of trust is a present transfer by gift, there is not another transfer when the power is extinguished. If there is not a present transfer upon the delivery of the revocable deed, then there is such a transfer upon the extinguishment of the power. There must be a choice, and a consistent choice between the one date and the other. . . . The tax upon gifts is closely related both in structure and in purpose to the tax upon those transfers that take effect at death. What is paid upon the one is in certain circumstances a credit to be applied in reduction of what will be due upon the other.”

In Sanford’s Estate v. Commissioner, the court held that the relinquishment of the power to designate new beneficiaries was a completed gift subject to tax, noting:

“In ascertaining the correct construction of the statutes taxing gifts, it is necessary to read them in the light of the closely related provisions of the revenue laws taxing transfers at death . . . . An important, if not the main purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing gifts of

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property inter vivos which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death.”  

Complete coordination of the gift and estate taxes, however, did not occur and some transfers were taxed both as a completed gift and later as part of the gross estate. Joint tenancy interests are one example; certain retained interests are another. This lack of coordination did not result in double taxation because section 402 of the Revenue Act of 1932 created a credit against the estate tax for any gift tax paid.  

B. A Digression: 1940-1954  

Although the gift and estate tax treatment of joint tenancy property remained relatively constant during this period, Congress did enact significant changes to both the income and transfer tax systems. These changes were prompted by the ability of married couples in community property jurisdictions to split their income. This provided a significant income tax savings because the income tax rates were steeply progressive, and each individual was required to report his or her own income. A couple in a community property jurisdiction also enjoyed an advantage at death. When the first spouse died, only one-half the value of the community property was in his or her gross estate for federal estate tax purposes. Not so in common law property jurisdictions. In those jurisdictions,  

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71 Sanford’s Estate v. Commissioner, 308, U.S. 39, 42- 44.  


March 4, 2011
title determined whether or not the property would be in the decedent’s gross estate even if the surviving spouse had a statutory right to a portion of that property.\textsuperscript{74}

Congress first attempted to redress the balance between common law property jurisdictions and community property jurisdictions in 1942 by including community property in the decedent’s gross estate.\textsuperscript{75} That did not resolve the problem, so in 1948 Congress repealed that provision and tried again. The 1948 act allowed a married couple to file a joint income tax return, effectively splitting their income.\textsuperscript{76} It also included a marital deduction, allowing property to pass free of tax from one spouse to another.\textsuperscript{77} The

\begin{enumerate}
\item \textsuperscript{74} § 2034. This section was first enacted in 1918. Revenue Act of 1918, § 402(b), 40 Stat. 1057, 1096, 65\textsuperscript{th} Cong. 2\textsuperscript{nd} Sess., ch. 18 (1918).
\item \textsuperscript{75} Revenue Act of 1942, § 402, P.L. 77-153, 77\textsuperscript{th} Cong. 2\textsuperscript{nd} Sess., ch. 619. 56 Stat. 798, 941-942 (1942). Section 811(e) relating to joint tenancy interests was amending by adding the following new paragraph:

“(2) Community Interest.–To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent’s power of testamentary disposition.”

\item \textsuperscript{76} Revenue Act of 1948, § 103, 80\textsuperscript{th} Cong. 2\textsuperscript{nd} Sess., ch. 168, 62 Stat. 110, 111 (1948).
\item \textsuperscript{77} Revenue Act of 1948, § 361, 80\textsuperscript{th} Cong. 2\textsuperscript{nd} Sess., ch. 168, 62 Stat. 110, 117 (1948).
\end{enumerate}
marital deduction was limited to fifty percent of the value of the adjusted gross estate, which was the gross estate minus the deductions now found in § 2053.\textsuperscript{78} If decedent left his property in trust for his surviving spouse, the property qualified for the marital deduction only if the surviving spouse had the right to all the income payable at least annually and the power to appoint the trust property to herself during her life or her estate at her death.\textsuperscript{79} This was a close equivalent to a community property interest and, so, the new marital deduction did not apply to community property.\textsuperscript{80} The 1948 also enacted a gift tax marital deduction as well as the predecessor of § 2513, which allowed a husband and wife to split all their gifts.\textsuperscript{81} Gift-splitting allowed a married couple to treat a gift made by the husband as if it had been made one-half by the husband and one-half by the wife. The primary purpose of gift-splitting was to allow both spouses to take full advantage of the gift tax annual exclusion.

The 1948 revisions did not alter the gift and estate tax rules governing joint tenancies although these revisions did diminish the impact of those taxes. The creation of a joint tenancy between spouses was no longer subject to the gift tax because of the marital deduction. When the first spouse died, the survivor still had the burden of proving

\textsuperscript{78} Id. at 119.

\textsuperscript{79} Id. at 118. The requirement is now codified in § 2056(b)(5).

\textsuperscript{80} Id. at 119.

\textsuperscript{81} Revenue Act of 1948, § 374, 80\textsuperscript{th} Cong. 2\textsuperscript{nd} Sess., ch. 168, 62 Stat. 110, 127 (1948).
her contribution. While the amount included in the decedent’s gross estate would qualify for the estate tax marital deduction, that deduction was limited to one-half the value of the adjusted gross estate. So the surviving spouse still had a strong incentive to diminish the amount included in the decedent’s gross estate in order to diminish the amount of estate tax due.

The 1954 Act recodified the Internal Revenue Code and included five new rules that affected joint tenancies. First, § 2053(c)(2) provided that although the value of joint tenancy property was included in the gross estate, that value could not be offset by funeral or administrative expenses or by debts, claims, or taxes except when the debts and expenses were paid before the due date for filing the estate tax return.\(^82\) Second, § 2053(b) was added to allow the deduction of expenses associated with joint tenancy property and other property not subject to claims. The expenses had to be paid within the three year period of assessment after the filing date of the estate tax return.\(^83\) Third, § 1014 was amended to allow the surviving joint tenant a stepped-up basis for the value of joint tenancy property that was included in the decedent’s gross estate.\(^84\) Fourth, the deduction for property previously taxed within five years of the decedent’s death was

\(^{82}\) The Internal Revenue Code of 1954 § 2053, 68A Stat. 1, 289, 83\(^{rd}\) Cong. 2\(^{nd}\) Sess., ch. 11 (1954).

\(^{83}\) Id.

\(^{84}\) 68A Stat. at 297-298.
converted into a credit, *i.e.*, § 2013, and made applicable to joint tenancy property.\(^{85}\)

Fifth, § 2515 was added to allow spouses to acquire or convey to themselves real property as joint tenants with the right of survivorship or as tenants by the entirety without paying gift tax.\(^{86}\) The gift tax would be imposed only if the joint tenancy or

\(^{85}\) *Id.* at 375-376.

\(^{86}\) *Id.* at 409. The new section provided:

Section 2515 Tenancies by the Entirety.

(a) Creation.–The creation of a tenancy by the entirety in real property, either by one spouse alone or by both spouses, and additions to the value thereof in the form of improvements, reductions in the indebtedness thereon, or otherwise, shall not be deemed transfers of property for purposes of this chapter, regardless of the proportion of the consideration furnished by each spouse, unless the donor elects to have such creation of a tenancy by the entirety treated as a transfer, as provided in subsection (c).

(b) Termination.–In the case of the termination of a tenancy by the entirety, other than by reason of the death of a spouse, the creation of which, or additions to which, were not deemed to be transfers by reason of subsection (a), a spouse shall be deemed to have made a gift to the extent that the proportion of the total consideration furnished by such spouse multiplied by the proceeds of such termination (whether in form of cash, property, or interests in property) exceeds the value of such proceeds of termination received by such spouse.

(c) Exercise of Election.–The election provided by subsection (a) shall be exercised by including such creation of a tenancy by the entirety or additions made to the value thereof as a transfer by gift, to the extent such transfer constitutes a gift, determined without regard to this section, in the gift tax return of the donor for the calendar year in which such tenancy by the entirety was created or additions made to the value thereof, filed within the time prescribed by law, irrespective of whether or not the gift exceeds the exclusion provided by section 2503(b).
tenancy by the entirety was terminated by an event other than death. The couple could elect to treat the acquisition or conveyance as a gift. If they did so, they were then required to report every addition or improvement as a gift. The new section only applied to a married couple and only to real property. The adoption of § 2515 began to shift transfer tax consequences of joint tenancies away from reliance on state property law. Most married couples did not believe that purchasing property as joint tenants was a gift; the new section simply codified that belief.  


In 1976, Congress unified the estate and gift taxes by creating one rate structure and one unified exemption amount in the form of a credit. It increased the estate tax marital deduction to the greater of $250,000 or 50 percent of the adjusted gross estate and the gift tax marital deduction to $100,000. It provided that the value of joint interests of spouses would be treated as one-half for purposes of the § 2515 election. And it created a new rule for spousal joint tenancies in § 2040(b), taxing only one-half the value of the property no matter who paid what portion of the consideration.

(d) Certain Joint Tenancies Included.–For purposes of this section, the term “tenancy by the entirety” includes a joint tenancy between husband and wife with right of survivorship.


There were two rationales for the new spousal joint tenancy rule. First, Congress recognized that the existing rules were “unnecessarily complex and may result in the same properties being subject to both the gift and estate taxes.” 92 Congress noted that the credit for gift taxes paid mitigated this problem to some extent, but noted that the problem “occurs because the gift tax consequences of joint ownership flow from legal interests created under local law while the estate tax consequences are determined by the decedent’s relative contribution to the purchase price.” 93 Second, Congress recognized that “it is often difficult, as between spouses, to determine the degree to which each spouse is responsible for the acquisition and improvement of their jointly owned property.” 94

These same rationales apply to all joint tenancy property. The record keeping and tracing requirements of § 2040(a) are at least as burdensome, if not more so, in non-spousal joint tenancies. Joint tenancy is used widely in estate planning to avoid the

89 Id. at § 2002, 90 Stat. 1520, 1854-1856.

90 Id.

91 Id. at § 2002, 90 Stat. 1520, 1855.


93 Id.

94 Id.
probate process. Parents frequently use the device to transfer property to their children. So do domestic partners, particularly in jurisdictions that do not recognize same-sex marriages. There is no less a burden on the child or the domestic partner than there is on the spouse. In fact, the burden may be greater because the child or domestic partner may have less access to the decedent’s records than a spouse. Nonetheless, Congress did not carry its own reasoning to the logical conclusion, i.e., making the rule of § 2040(b) applicable to all joint tenancies.95

The adoption of § 2040(b) marked a significant shift away from reliance on state property law as the basis for estate taxation. It treated all spousal joint tenancies and tenancies by the entirety the same even if spouses in some jurisdictions could unilaterally sever the property interest but spouses in other jurisdictions could not. And it valued all spousal joint tenancies and tenancies by the entirety the same, i.e., including only one-half the value in the decedent’s gross estate, regardless of how that interest would have been valued under state law.

In 1978, Congress added a new subsection (c) to § 2040 that reduced the value of real or tangible personal property used as a farm or for farming purposes or any other

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95 Nor did Congress consider how the unification of the rate structure and the exemption amounts affected other transfer tax provisions. The retained interest sections—§§ 2035 through 2038—were designed to ensure that a decedent did not avoid the estate tax through lifetime transfers. Like § 2040, the retained interest sections had been adopted at a time when there was no gift tax. And, like § 2040, the gift and estate tax rules governing these interests have never been fully unified.
trade or business in a decedent’s gross estate. The reduction was based on the surviving
spouse’s material participation in the farming or other business and could not be used to
reduce the value of the property in the decedent’s gross estate below 50 percent.

At the same time Congress added § 2515A. This new section applied only to the
creation of joint tenancies in personal property by a married couple and provided that the
value of the interest of each spouse would be one-half. This eliminated the need for
actuarial computations of value and, once again, moved the transfer tax consequences
away from reliance on state law.

The Economic Recovery Tax Act of 1981 (ERTA) continued the movement away
from reliance on state property law to determine estate tax consequences, at least with
respect to the taxation of joint tenancy interests. It expanded § 2040(b) to apply to all
spousal joint tenancies, not just those that had been created by the decedent, his spouse,
or both. Because only one-half the value of a spousal joint tenancy was in the gross
estate of the first spouse to die, there was no longer a need for §2040(c), § 2040(d), §
2515, and § 2515A, and Congress repealed those sections.

96 Revenue Act of 1978 § 511(a), 92 Stat. 2763, 2881, P.L. 95-600 § 511(a), 95th

97 Revenue Act of 1978 § 702(k), 92 Stat. 2763, 2932, P.L. 95-600 § 702(k), 95th


99 Id.
ERTA is, perhaps, more notable for removing the monetary limits on the gift tax and estate tax marital deductions and for introducing the concept of qualified terminable interest property as a new exception to the terminable interest rule. Although less notable, Congress also took a significant step toward further unification of the gift and estate taxes by repealing the rule that all gifts made within three years of death would be brought back into the gross estate. As a result, only transfers of certain retained interests and life insurance made within the three years preceding death are brought back into the gross estate. Congress did not, however, even consider the possibility of unifying the gift and estate tax treatment of joint tenancy interests.

100 Id. at § 403(a), (b), (d), 95 Stat. 172, 301-304.

ERTA also increased the amount of the gift tax annual exclusion to $10,000 and indexed it for inflation; it also increased the amount of the unified credit, allowing a decedent to transfer $600,000 of property before paying any tax; and it lowered the top effective rate of tax from 70 percent to 50 percent. Id. at §§ 401, 402, 441, 95. Stat. 172, 299-300, 319.

101 Id. at § 424, 95 Stat. 172, 317.

The provision taxing gifts in contemplation of death has had a long and colorful history. See W. Leslie Peat, The Constitutionality of New Section 2035: Is There Any Room for Doubt, 33 Tax L. Rev. 287 (1978). Once Congress unified the gift and estate taxes by applying the same rate schedule and one exemption amount to both taxes, there was no possibility of tax avoidance by making gifts shortly before death.

102 § 2035(a).
No further changes have been made to § 2040 despite the significant attention that was given to the estate tax in 2001\textsuperscript{103} and 2010.\textsuperscript{104} The major thrust of those tax acts was to increase the applicable exemption amount first to $3.5 million and then to $5 million and reduce the maximum tax rate first to 45 percent and then to 35 percent. The 2010 act did add a provision that allows the unused applicable exemption amount of a deceased spouse to transfer to the surviving spouse.\textsuperscript{105} This provision greatly simplifies estate planning for many married couples and adds further reinforcement to the concept of the married couple as one economic unit.

The 2001 and 2010 revisions are scheduled to sunset on December 31, 2012.\textsuperscript{106} As a result, Congress will need to reconsider the fate of the transfer tax system. This presents a perfect opportunity to complete the unification of the estate and gift tax provisions and to further simplify the estate tax provisions.

IV. A PROPOSAL FOR COMPLETE UNIFICATION

A. Current Transfer Tax Treatment of Co-Ownership


\textsuperscript{104} Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, §§301-304, P.L. 111-312, 111\textsuperscript{th} Cong. 2\textsuperscript{nd} Sess., 124 Stat. 3296, 3300-3304 (2010).

\textsuperscript{105} Id. at § 303, 124 Stat. 3296, 3303.

1. Gift Tax

The gift tax is imposed on the transfer of property without adequate and full consideration in money or money’s worth. A gift is taxed only when the donor has given up dominion and control over the property, that is, when the donor can no longer change beneficial ownership of the property.

The creation of a joint tenancy is a gift if one joint tenant pays the entire, or a disproportionate amount of, the purchase price. The value of the gift depends on the rights of the joint tenants. If either can sever the joint tenancy unilaterally, then their interests are of equal value. If they cannot do that, the value of their interests depends on their relative ages.

The creation of a tenancy in common is also a gift if one of the tenants in common pays the entire, or a disproportionate amount of, the purchase price. Each tenant in common can alienate her interest without the consent of the other tenant in common. As a result, the value of their interests depends solely on their proportionate interest in the property.

2. Estate Tax

The gross estate includes all property that is owned by the decedent or over which the decedent has substantial control, including property owned outright by the decedent.

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107 §§ 2501, 2512(b).

such as an interest as a tenant in common.\textsuperscript{109} If the decedent owns property as a tenant in common, only his proportionate interest is in his gross estate when he dies. It would not matter whether he provided all of the consideration, only some of the consideration, or none of the consideration. In all three situations only his fractional interest is included in his gross estate.

Property owned as joint tenants with the right of survivorship is also included in the decedent’s gross estate. If the joint tenants are married and one died, only one-half of the value of the property would be in his gross estate.\textsuperscript{110} It would not matter whether he provided all of the consideration, only some of the consideration, or none of the consideration. In all three situations only his one-half interest is included in his gross estate.

The result is different, however, if the joint tenants are not married. Then the rule is that the full value of the property is in the estate of the first to die less that portion attributable to contributions by the surviving joint tenant.\textsuperscript{111} Section 2040(a) creates a presumption that the first joint tenant to die provided all of the consideration. The burden is on the estate and the surviving joint tenant to prove otherwise.

\textsuperscript{109} § 2033.

\textsuperscript{110} § 2040(b).

\textsuperscript{111} § 2040(a).
If the first joint tenant to die had provided all the consideration, the full value of the property would be in his gross estate even though the transfer of a one-half interest to the survivor had been taxed as a completed gift. If the survivor provided some of the consideration, the decedent’s estate would have the burden of proving that. This requires that the decedent and the survivor keep detailed and accurate records. If both contributed particularly if payments were made over a long period of time, this burden may be great. It is compounded if the joint tenants own multiple properties together or have owned a series of properties together.

The case of Estate of Fratini v. Commissioner\textsuperscript{112} illustrates the problem. Decedent lived with Marion Friedeberg for 18 years immediately before his death, but they never married. Decedent owned four parcels of real property that he transferred into joint tenancy with Ms. Friedeberg. In addition, they acquired three other parcels of real property, three bank accounts, and a certificate of deposit as joint tenants. The IRS claimed that the full value of all the properties was in decedent’s gross estate under § 2040(a).

Ms. Friedeberg claimed that she had contributed both money and services as contributions to the purchase price of the various properties. She produced records of her income from various sources of the 18-year period she lived with decedent, the acquisition costs and mortgages of the various properties, as well as transfers into and out

\textsuperscript{112} 76 T.C.M. (CCH) 342 (1998).
of the joint bank accounts and purchases of various certificates of deposition. Based on her testimony, the court determined that she had contributed one-half of the total purchase price of the three properties acquired after she met decedent.\textsuperscript{113} The court also held that she had contributed services worth approximately 20 percent toward the acquisition of two other properties. The court, however, rejected her claim that she had performed substantial services with respect to the final two pieces of real property.\textsuperscript{114} In reaching its decision, the court acknowledged that Ms. Friedeberg had not proven the exact amount of her contribution to each and every piece of joint tenancy property. It applied the rule, enunciated in \textit{Cohan v. Commissioner},\textsuperscript{115} that allows taxpayers to approximate amounts when those amounts are not definitely determinable.\textsuperscript{116}

What is remarkable about the \textit{Fratini} case is not the number of properties held in joint tenancy or the number of transfers, but that Ms. Friedeberg was able to produce records of the transfers, the costs of the various properties, her sources of income, and her services. Not all taxpayers would have retained such detailed records or have been able to satisfy even the relaxed standard of proof required by \textit{Cohan}.

\section*{B. Proposal}

\begin{itemize}
\item \textsuperscript{113} \textit{Id.} at 348.
\item \textsuperscript{114} \textit{Id.} at 349.
\item \textsuperscript{115} 39 F.2d 540 (2d Cir. 1930).
\item \textsuperscript{116} 76 T.C.M. (CCH) at 349.
\end{itemize}
In a unified transfer tax system, there is no justification for requiring the surviving joint tenant, such as Ms. Friedeberg, to prove, often long after the fact, exactly how much she contributed to the purchase price of property held as joint tenants with the right of survivorship. Section 2040(a) should be repealed and §2040(b) expanded to apply to all joint tenancies. As a result, only the value of the decedent’s fractional share of joint tenancy property, i.e., the interest that shifts from the decedent to the survivor at the time of death, would be included in his gross estate. The complexity and burden of determining the nature and extent of the survivor’s contribution outweighs any revenue generated by § 2040(a). Moreover, the survivor’s interest, to the extent it was acquired gratuitously from the decedent, has already been subjected to the gift tax. The result would be uniformity and consistency in the estate taxation of all concurrent ownership interests.

This is neither a new nor a radical idea. In 1947, less than two dozen years after the estate tax was first enacted, the Treasury Department proposed that the gift tax and the estate be unified into one coordinated transfer tax system and correlated with the income tax.\textsuperscript{117} Under this proposal only the transferor’s proportionate interest in joint tenancy property would be included in his gross estate regardless of who contributed

what portion of the consideration toward the purchase price.\textsuperscript{118} Although Congress did revise the Internal Revenue Code in 1948 and 1954, making a number of changes to the gift and estate taxation of joint tenancy property, it made no effort to unify the gift and estate tax treatment of such property.

The Treasury issued another study in 1969\textsuperscript{119} again proposing full unification of the gift and estate taxes. The rationale was threefold. First, there was no reason to tax transfers twice. If transfers were taxed on a cumulative basis over a lifetime under the same rate schedule and with a unified exemption amount, then there was no need to tax the transfer again by including the full value of joint tenancy property in the gross estate. Second, including the full value of joint tenancy property in the gross estate was not fair. It treated that joint tenancy property interest differently than property held as tenants in common without any justification. Third, the record-keeping and tracing requirements of § 2040(a) added unnecessary complexity to both taxpayer’s compliance and government enforcement of the estate tax.

Also in 1969, the American Law Institute (ALI) published a set of recommendations to simplify the gift and estate taxes.\textsuperscript{120} The ALI recommended that

\begin{itemize}
    \item \textsuperscript{118} Id. at 167.
    \item \textsuperscript{119} Treasury Department, Tax Reform Studies and Proposals, (Joint Publication, House Committee on Ways and Means and Senate Committee on Finance, 91\textsuperscript{st} Cong. 1\textsuperscript{st} Sess. 1969) 363 (U.S. Gov’t Printing Office, 1969).
    \item \textsuperscript{120} Federal Estate and Gift Taxation: Recommendations Adopted by the American Law Institute and Reporters’ Studies (1969).
\end{itemize}
transfers be taxed only once although it did not go as far as recommending adoption of a unified transfer tax system with one rate schedule and one unified exemption amount. The ALI made two recommendations concerning jointly owned property. First, it recommended that when a donor makes a gift at the time a joint ownership is recreated, the value of that gift should be the fractional interest given to the other person. This rule would apply whether or not the right of survivorship was destructible unilaterally or only with the consent of the joint owner. This rule would apply under either a dual transfer tax system or a unified transfer tax system. Second, the ALI recommended that the value transferred at death be only the decedent's fractional interest, except where there was no gift at the time the joint interest was created.

The ALI found the existing rules governing the gift and estate taxation of joint tenancies to be complex, confusing, and inconsistent. The tracing requirement demanded detailed record-keeping, and there was frequent litigation concerning what was, or was not, sufficient consideration. The uncertainties in the law made planning difficult. The 1976 Treasury Proposals echoed the ALI study, emphasizing the general premise that

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121 Recommendation 1, page 5 and 11 to 15.

122 Recommendation 2, page 5 and 11 to 15.

At the time the ALI adopted these recommendations, the gift and estate taxes had not been unified. In addition, § 2515 allowed a donor to elect whether or not to treat the creation of a joint tenancy as a gift.
transfers should be subject to tax only once, reiterating the difficulties of tracing, and promoting the advantages of simplification.\textsuperscript{123}

The Treasury proposals and the ALI recommendations also proposed that other property interests, including retained interests, be subject to the transfer tax only once–either as a completed gift or as part of the decedent’s gross estate. The retained interest provisions have been the subject of ABA proposals\textsuperscript{124} and other commentary.\textsuperscript{125} Despite the attention that has been lavished on the transfer taxes in the last decade, there has been no serious attempt to complete the unification of the transfer taxes by adopting these suggestions.

\textsuperscript{123} Treasury Department, Background Materials on Federal Estate and Gift Taxation (House Committee on Ways and Means, 94\textsuperscript{th} Cong. 2\textsuperscript{nd} Sess. 1976) 508 (U.S. Gov’t Printing Office, 1976).


A more recent study by the American Bar Associations Section on Real Property, Probate, and Trust Law also suggests the possibility of repealing § 2040(a) and, instead, applying § 2040(b) to all joint tenancy property. Because of perceived widespread noncompliance with the gift tax, i.e., joint tenants do no report either the creation of the joint tenancy or subsequent contributions as gifts, the report proposes other alternatives such as treating the creation of a joint tenancy as an incomplete gift for gift tax purposes or allowing taxpayers to elect gift tax or estate tax treatment of 100 percent of the value of jointly owned property. The report does not endorse any particular alternative, but notes the advantages and disadvantages of each.

Congress will be revisiting the transfer taxes within the next two years and should take this opportunity to bring simplification and coherence to the transfer tax system by repealing § 2040(a) and unifying the gift and estate taxation of joint tenancies.

C. Rationale

The quality of a system of taxation is measured by its ability to raise revenue, fairness, economic neutrality, and administrative feasibility. Each of these yardsticks supports the unification of the gift and estate tax treatment of joint tenancies.

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127 Id. at 236-237.

128 Id. at 237-240.
1. Raising Revenue

The primary purpose of any tax is to raise revenue. Eliminating the contribution test in § 2040(a) does not undermine the ability of the transfer taxes to raise revenue. The gift and estate taxes raise relatively little revenue, and the increases in the applicable exemption amount in 2001 and 2010 have diminished the importance of these taxes in generating revenue.

More importantly, the interest of the surviving joint tenant has already been subjected to the gift tax. Since the 1976 unification of the rate structure and exemption amounts, the gift tax has functioned as a prepayment of the estate tax. There is simply no need to tax that transfer again at death. Although joint tenancy functions as a will substitute for many, the difference is that property passing under the decedent’s will has never been subjected to the gift tax. The surviving joint tenant’s interest, on the other hand, has been taxed already as a gift.

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129 For FY 2009, the federal estate, gift, and generation-skipping transfer taxes raised $23,428,772,000. This amounted to 1.2 of the net revenue collections for that year. Internal Revenue Service, Statistics of Income, Table 1. Internal Revenue Collections and Refunds, by Type of Tax, Fiscal Years 2008 and 2009 at http://www.irs.gov/taxstats/article/0.id=171960.00.html. With the increase of the applicable exemption amounts from $3.5 million to $5 million, the amount and percentage of revenue collected from these taxes will undoubtedly decrease.


The § 2001(c) calculation of the estate tax allows the decedent’s estate to subtract the amount of any gift tax paid. This not a sufficient justification for including the surviving joint tenant’s interest in the gross estate. First, it subjects any appreciation in the value of that interest to the estate tax. The appreciation in value of other gifts, with the exception of certain retained interests, is not subject to the estate tax. This undermines horizontal equity as explained below. Second, it ignores the fact that the government has had the benefit of the gift tax paid. The value to the government from this payment offsets any appreciation in value of the property. Third, it requires the decedent and surviving joint tenant to keep detailed records to prove the survivor’s contribution.

2. Fairness

Another measure of a tax system is fairness, and one dimension of fairness is horizontal equity, i.e., treating similarly situated taxpayers in a similar manner. Including more than the decedent’s proportionate share of the joint tenancy property in his gross estate violates horizontal equity in three respects.

First, it subjects any appreciation in the value of the surviving joint tenant’s interest between the time of the gift and the time of death to the estate tax. With the exception of certain retained interests, no other completed gifts are brought back into

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132 If the decedent makes a transfer and retains an interest that would bring the transferred property back into her gross estate under §§ 2036, 2037, or 2038 and then decedent transfers the retained interest within three years of her death, the full date of death value of the property will be in her gross estate under § 2035(a). These interests should not be subjected to tax again either, but that issue is beyond the scope of this article.
the gross estate. In fact, Congress has recognized that this is not necessary and has revised § 2035(a) so that even “death-bed gifts,” i.e., those made within three years of death, are not brought back into the gross estate.

Second, the existing rule violates horizontal equity by treating non-spousal joint tenancies differently from spousal joint tenancies. The justification for including only the fractional interest of the decedent in a spousal joint tenancy is the difficulty of determining which joint tenant contributed what consideration. That difficulty exists in all joint tenancies. If anything, the record-keeping problem may be more acute in non-spousal joint tenancies of domestic partners, parents and children, siblings, and business partners. A married couple is no longer subject to this burden, and other joint tenants should not be either.

Third, the existing rule violates horizontal equity by treating non-spousal joint tenancies differently from tenancies in common. Admittedly a joint tenant does have different property rights than a tenant in common. The primary, and perhaps only, difference is the right of survivorship. That is, a tenant in common is able to transfer his interest at death through his will or by intestacy. A joint tenant does not have this right; his interest transfers automatically at death to the surviving joint tenant. As a result, the interest passes from the decedent to the survivor without resort to the probate process. In addition to avoiding the cost, delay, and publicity of probate, the surviving joint tenant avoids having the property subject to claims of the decedent’s creditors in the probate process.
These differences do not justify the complexities of § 2040(a). The same difference exists with spousal joint tenancies but those tenancies are not subjected to the consideration furnished rule. In addition, the decedent’s creditors could attach his interest in the joint tenancy property prior to death. Moreover, the ability to exert control over the property interest is the essence of when property is subject to the estate tax.\textsuperscript{133} The decedent has given up control over the survivor’s interest in joint tenancy property when he made the gift. Because he has relinquished control, the gift is completed.\textsuperscript{134} In both a tenancy in common and a joint tenancy, the decedent has retained control only over his proportionate interest.

Perhaps most importantly, either joint tenant can convert the joint tenancy into a tenancy in common at any time during his life. If that happens, there is no additional gift tax as long as each tenant receives his or her proportionate interest. Once the joint tenancy has been converted into a tenancy in common, only the decedent’s interest is included in his gross estate. As a result, joint tenancy ownership becomes a trap for the unwary and unsophisticated taxpayer.

3. Economic Neutrality

The third measure of a good tax system is economic neutrality. This means that taxpayers should not make decisions based solely, or even primarily, on tax

\textsuperscript{133} §§ 2033, 2036(a)(2), 2038, 2041, and 2042(2).

\textsuperscript{134} I.R. Reg. § 25.2511-2(b).
considerations. Taxpayers should structure their ownership interests or transactions to achieve non-tax objectives, whether that objective is to reinforce the partnership theory of marriage, avoid probate, or protect assets from creditors. Taxpayers should not decide to own property as tenants in common rather than as joint tenants with the right of survivorship simply to avoid the estate tax. For the sophisticated taxpayer who has sought advice of counsel, however, that decision currently has to be made with the estate tax consequences in mind.

4. Administrative Feasibility

The final measure of a good tax system is administrative feasibility. The proposal would make both compliance and enforcement significantly easier by removing the burdensome record-keeping requirement of § 2040(a). It would be easier for executors and surviving joint tenants to complete the estate tax return and for the government to review that return. It would decrease disputes and litigation on the issue of what is sufficient consideration, both in terms of the nature of the consideration and the amount.

Simplification has an added benefit. The tax system depends on taxpayer compliance. If taxpayers perceive the system to be unfair or unduly burdensome, they are more likely to engage in behavior to avoid or evade that tax. On the other hand, creating a rationale and simple rule means that more taxpayers are likely to comply. The more taxpayers comply, the greater the perception of other taxpayers that the system is fair, and the more likely they are to comply. And so on.

V. CONCLUSION
A fundamental principle of federal transfer taxation is that “state law creates property rights and federal law taxes the interests created.” Tax law, however, need not be a slave to state property rights. It can, and should, be coherent and rational. When property interests are sufficiently similar, such as joint tenants and tenants in common, they should be taxed the same.

Section 2040(a) is an anachronism and unnecessary in a unified transfer tax system. It adds needless complexity and requires burdensome record-keeping. It serves primarily as a trap for unwary and unsophisticated taxpayers and should be repealed.