

## **Law and ethics: society and corporate social responsibility: is the focus shifting?**

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### **Abstract:**

In the U.S. most believe that business ethics emerge from society's values. The U.S. society expects socially responsible businesses to take profit-making actions that improve, or at least not harm, society, rather than create wealth for a privileged few. Businesses struggle to implement CSR because society's values are always changing, and business adjusts to keep its relationship with society stable. This relationship suggests watching for trends that may indicate if society's values are shifting.

To evaluate a businesses' commitment to CSR, society compares that businesses actions and CSR rhetoric, and if a gap exists, society judges the actions. Some see a gap that business is filling with a wealth-creation focus, and they ask if this reflects a shift in society's focus from CSR to wealth-creation. Such shifts are often found in society's actions; therefore, we review an action where society had the opportunity to balance individual wealth (profit) creation with its impact on society. That action was society's support of estate tax repeal in 2001. Like CSR decisions, this decision allowed society to balance financial self-interest with its economic, ethical, and philanthropic impact on society.

Most CSR reviews evaluate if business is complying with its CSR rhetoric. Instead, we evaluate if society complied with its CSR rhetoric. More simply stated, we ask; does society walk its CSR talk? This review draws on and relates legal and business ethics research. This evaluation has several implications, including whether society might embrace progressive CSR.

Keywords: social responsibility, CSR, ethics, estate tax

## INTRODUCTION

The United States, Europe, and many other countries expect businesses to act socially responsible.<sup>1</sup> However, each country defines corporate social responsibility (“CSR”) differently.<sup>2</sup> Some suggest the definitions differ because each country’s political, financial, educational, labor, and cultural systems influence CSR.<sup>3</sup> In the U.S. most believe that business ethics emerge from society’s values.<sup>4</sup> Accordingly, company mission and vision statements often reflect society’s values when describing the company’s commitment to CSR. Recognizing that CSR differs among societies; we focus on CSR in the U.S. society.

The U.S. society currently encourages socially responsible businesses to take only those profit-making actions that improve, or at least not harm, society, rather than create wealth for a privileged few.<sup>5</sup> While businesses may have the best of intentions to meet society’s expectations, they struggle to do so because society’s values are constantly changing and business adjusts to keep its relationship with society stable.<sup>6</sup> This relationship between society and business suggests watching for trends that may indicate if society’s values are shifting.<sup>7</sup>

To determine if a business is acting socially responsible, society compares the businesses’ actions and CSR rhetoric.<sup>8</sup> If society perceives a gap between these, it judges the actions.<sup>9</sup> Some see a gap that business is filling with a wealth-creation focus and they ask if this reflects a shift in society’s focus from CSR to wealth-creation.<sup>10</sup> Since society’s actions often reveal shifts in society’s values, we review an action where society had the opportunity to balance individual wealth (profit) creation with its impact on society. This action is society’s

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<sup>1</sup> Dima Jamali & Ramez Mirshak, *Corporate Social Responsibility (CSR): Theory and Practice in a Developing Country Context*, 72 J. BUS. ETHICS 243 (2007); Dirk Matten & Jeremy Moon, “Implicit” and “Explicit” CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility, 33 ACADEMY OF MGMT. REV. 404 (2008).

<sup>2</sup> Jamali & Mirshak, *supra* note 1.

<sup>3</sup> *Id.*

<sup>4</sup> TOM L. BEAUCHAMP & NORMAN E. BOWIE, *ETHICAL THEORY and BUSINESS* (Tom L. Beauchamp & Norman E. Bowie, eds., Prentice-Hall, 2d ed. 1983).

<sup>5</sup> Timothy M. Devinney, *Is the Socially Responsible Corporation a Myth? The Good, the Bad, and the Ugly of Corporate Social Responsibility*, ACADEMY OF MGMT. PERSPECTIVES, May 2009, at 44; R. Edward Freeman & Jeanne Liedtka, *Corporate Socially Responsibility a Critical Approach*, BUS. HORIZONS, July-Aug. 1991, at 92, 94 (“...the good society is concerned with more than wealth accumulation by a privileged group.”); Min-Dong Paul Lee, *A Review of the Theories of Corporate Social Responsibility: Its Evolutionary Path and the Road Ahead*, 10 INT’L J. OF MGMT. REV. 53 (2008).

<sup>6</sup> Devinney, *supra* note 5.

<sup>7</sup> Freeman & Liedtka, *supra* note 5.

<sup>8</sup> Peggy Simcic-Bronn, *Corporate Social Responsibility and Management Behavior: Actions Speak Louder than Words* (Paper presented at 6<sup>th</sup> INT’L CONF. ON CORP. REPUTATION, BOSTON, MA. 2002).

<sup>9</sup> *Id.*

<sup>10</sup> Freeman & Liedtka, *supra* note 5.

support of estate tax repeal in 2001.<sup>11</sup> Like CSR decisions, this decision gave society an opportunity to balance financial self-interest with its economic, ethical, and philanthropic impact on society.<sup>12</sup>

Many CSR reviews evaluate if a business is acting according to its CSR rhetoric. We take a different perspective. We evaluate if society's action in supporting tax repeal matches its own CSR rhetoric. More simply stated; we ask if society walks its CSR talk? This perspective causes us to critically think about whether individuals might follow a different standard of social responsibility than they set for business, contrary to current beliefs. This approach also causes individuals to step outside the role of detached observers evaluating CSR. This is because individuals have a stake in the decision, which removes the exercise from being a purely intellectual one. For these reasons, using this review to teach business ethics might help business ethics students who often study CSR using case analysis where they are detached observers.<sup>13</sup> Finally, this approach may help individuals understand why it is difficult for business to develop operational definitions of CSR.

Congress enacted the 2001 Economic Growth and Tax Relief Reconciliation Act ("Act" or "EGTRRA") which repealed the estate tax for those dying in 2010.<sup>14</sup> In making its decision, Congress considered that society overwhelmingly supported tax repeal.<sup>15</sup> Society's debates leading up to tax repeal were very controversial. Several describe those debates as partisan, with democrats wanting to retain the tax and republicans wanting to completely repeal it. These debates continue as Congress decides whether to permanently repeal the tax.<sup>16</sup> However, this is a reflection paper, not a political statement. Similarly, it is not a criticism of any socioeconomic class, a value judgment on society's support of the tax repeal in 2001 or an opinion about whether we should retain or repeal the tax. As we discuss, many believe that the estate tax is full of loopholes that make it unfair, complicated, and inefficient. Accordingly, it is important to remember our focus is not to evaluate the estate tax, but to consider if society's action in supporting tax repeal matches its CSR rhetoric. For this review, we draw on and relate research that separately examines CSR and the estate tax repeal. We also evaluate society's decision based on the information available when society made that decision.

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<sup>11</sup> WILLIAM H. GATES, SR., & CHUCK COLLINS, *WEALTH And OUR COMMONWEALTH, WHY AMERICA SHOULD TAX ACCUMULATED FORTUNES* (Beacon Press, 2004), (discussing the responsibility wealthy individuals have to their communities and country).

<sup>12</sup> *Id.*

<sup>13</sup> See Jim Grote, *Taxation without Respiration, Economic Liberty and Political Equality*, 13 BUS. ETHICS Q. 4 (2004) (reviewing GATES & COLLINS, *supra* note 11). In this respect, students will be considering income taxes as they graduate and begin employment. Additionally, they will be considering their wealth-creation opportunities and obligations to society, and estate taxes relative to their parents, grandparents etc.

<sup>14</sup> Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001).

<sup>15</sup> Larry M. Bartels, *Homer Gets a Tax Cut: Inequality and Public Policy in the American Mind*, 3 PERSP. ON POL. 15 (2005)

<sup>16</sup> Carl Huse, *Fate of Estate Tax Imperils Obama's Ambitions*, N.Y. TIMES, April 11, 2009; COUNCIL ON FOUNDATIONS, BOARD BRIEFING, FEDERAL ESTATE TAX, SHOULD IT BE ELIMINATED OR REPEALED? (April, 2001), <http://www.cof.org/> (type article title in search box) (hereinafter *Council*).

Accordingly, this paper has four parts: (1) a review of CSR (2) a review of estate tax law, its ethical underpinnings, and the repeal's impact on individual wealth and society; (3) a discussion of society's action and future research implications; and (4) a conclusion.

## CORPORATE SOCIAL RESPONSIBILITY (CSR)

Society and over ninety percent of Fortune 500 companies currently embrace CSR.<sup>17</sup> The International Association of Management Education and business schools also promote CSR in their institutions.<sup>18</sup> CSR's ethical orientation<sup>19</sup> causes many to consider it as synonymous with business ethics and as a subset of general ethics,<sup>20</sup> which is how we treat it in this paper. CSR's many definitions reflect a concern with society's welfare.<sup>21</sup> For example, one obligates business "...to develop and implement courses of action that aid in social issues that impact society."<sup>22</sup> Another defines CSR as the "...ethical behavior of a company towards society."<sup>23</sup> And one conceptualizes CSR using a pyramid to describe four overlapping obligations business has to society: economic, legal, ethical, and philanthropic.<sup>24</sup> Society expects that private citizens, as well as businesses, have an equal obligation to act socially responsible.<sup>25</sup>

Some criticize CSR as being rhetoric and not action.<sup>26</sup> Others suggest we replace it with a more caring approach,<sup>27</sup> or a responsiveness or performance based model.<sup>28</sup> A few suggest we replace CSR with a citizenship model that includes government responsibilities business owes to society because of businesses' size and power.<sup>29</sup>

<sup>17</sup> Lee, *supra* note 5, at 53.

<sup>18</sup> REP. OF THE ETHICS EDU. TASK FORCE TO AACSB INT'L. BOARD OF DIRECTORS, THE INT'L. ASS'N. OF MGMT. EDUC., *ETHICS EDUCATION IN BUSINESS SCHOOLS*, (2004), <http://www.aacsb.edu> (follow these links: "Resource Center," then "Ethics & Sustainability," then "Ethics Education").

<sup>19</sup> Archie B. Carroll, *The Four Faces of Corporate Citizenship*, 100 BUS. & SOC'Y REV. 1 (1998).

<sup>20</sup> J. Douglas Barrett, *Corporate Social Responsibility and Quality Management Revisited*, J. FOR Q. & PARTICIPATION, Jan. 2009, at 24; Carroll, *supra* note 10.

<sup>21</sup> Barrett, *supra* note 20, at 24.

<sup>22</sup> PETER STANWICK & SARAH STANWICK, *UNDERSTANDING BUSINESS ETHICS* (Prentice-Hall, 2009).

<sup>23</sup> WORLD BUS. COUNCIL FOR SUSTAINABLE DEV., *CORPORATE SOCIAL RESPONSIBILITY: MEETING CHANGING EXPECTATIONS*, (1999), <http://www.wbcds.org> (type article title in search box).

<sup>24</sup> Carroll, *supra* note 19.

<sup>25</sup> See Reuven S. Avi-Yonah, *Corporate Social Responsibility and Strategic Tax Behavior*, (U. of Mich. L. & Econ., Olin Working Paper No. 06-008, 2006); See Carroll, *supra* note 19; Mark S. Schwartz & Archie B. Carroll, *Corporate Social Responsibility: A Three Domain Approach*, 13 Bus. Ethics Q. 503 (2003).

<sup>26</sup> Simcic-Bronn, *supra* note 8.

<sup>27</sup> Freeman & Liedtka, *supra* note 5.

<sup>28</sup> ANN K. BUCHHOLTZ & ARCHIE B. CARROLL, *BUSINESS & SOCIETY, ETHICS and STAKEHOLDER MANAGEMENT* (South-Western, 2007).

<sup>29</sup> Dirk Matten & Andrew Crane, *Corporate Citizenship: Toward an Extended Theoretical Conceptualization*, 30 ACAD. OF MGMT. REV. 166 (2005).

Economist Milton Friedman, a harsh CSR critic, believed that businesses' only social responsibility was to maximize shareholder profits within the rules of the game,<sup>30</sup> and its attempts to promote social responsibility were morally wrong.<sup>31</sup> Some call his view narrow,<sup>32</sup> others call it contrary,<sup>33</sup> but they agree he thought maximizing shareholder profits was the best way to benefit society. Despite the critics, today scholars continue conceptualizing ways CSR might bridge the gap between profit-making and improving society<sup>34</sup> and debating who should set CSR expectations.<sup>35</sup>

Critical to our review is the prevailing belief that CSR emerges from society's ethical norms.<sup>36</sup> In other words, society sets CSR expectations<sup>37</sup> to reflect its ethical norms.<sup>38</sup> Some describe a stronger presumption that business should follow society's dictates.<sup>39</sup> Yet, businesses struggle to develop working definitions of CSR because society's values are conflicting, confusing and always changing.<sup>40</sup> Businesses' exacerbate this struggle because they are sensitive to society's changes and adapt to keep their relationship with society stable.<sup>41</sup>

Society believes that CSR includes everything it thinks business can do to address the needs of people and the planet, and excludes only actions based on self-interest.<sup>42</sup> Business considers these expectations when it develops operational definitions of CSR. Some describe CSR responsibilities using general concepts of honesty, integrity, or fairness. Others identify specific behaviors.<sup>43</sup> Overall, the definitions reflect society's expectation that business should take those profit-making actions that promote the public good or at least not harm society,<sup>44</sup> do "...what is best for society..."<sup>45</sup> or improve society, not just create wealth for a "privileged group."<sup>46</sup> We use this standard to evaluate society's support of estate tax repeal because this

<sup>30</sup> Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sept. 30, 1970, at 1.

<sup>31</sup> *Id.*

<sup>32</sup> Schwartz & Carroll, *supra*, note 25, at 503.

<sup>33</sup> See Barrett, *supra* note 20, at 24; Lee, *supra* note 5, at 53.

<sup>34</sup> Schwartz & Carroll, *supra* note 25.

<sup>35</sup> HOWARD R. BOWEN, *THE SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN* (Oxford University Press, 1953); Devinney, *supra*, note 5, at 44; Matten & Crane, *supra*, note 29, at 166.

<sup>36</sup> Freeman & Liedtka, *supra* note 5; Schwartz & Carroll, *supra* note 25, at 508.

<sup>37</sup> BOWEN, *supra* note 35; BEAUCHAMP & BOWIE, *supra* note 4.

<sup>38</sup> Duane Windsor, *The Future of Corporate Social Responsibility*, 9 *The Int'l J. Of Org. Analysis* 255 (2001).

<sup>39</sup> Devinney, *supra* note 5, at 48.

<sup>40</sup> *Id.*

<sup>41</sup> Lee, *supra* note 5, at 66.

<sup>42</sup> Carroll, *supra* note 19; Devinney, *supra* note 5; Windsor, *supra* note 38.

<sup>43</sup> Barrett, *supra* note 20; Archie B. Carroll, *The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders*, 34 *Bus. Horizons* 39 (1991); The Social Issues in Mgmt. Division of the Academy of Mgmt., HOME PAGE DOMAIN STATEMENT, (Aug. 4, 2009), <http://sim.aomonline.org/>.

<sup>44</sup> BEAUCHAMP & BOWIE, *supra* note 4, at 55.

<sup>45</sup> Barrett, *supra* note 20, at 25.

<sup>46</sup> See Freeman & Liedtka, *supra* note 5.

standard reflects society's values. Additionally, we currently expect individuals, as well as businesses, to act in this socially responsible manner, which is also critical to this paper.

Despite CSR's wide acceptance, some believe a wealth-creation focus dominates CSR,<sup>47</sup> and they ask if this same focus dominates society's ethics.<sup>48</sup> The logic of this question arises from current beliefs that society's ethics precede and influence business ethics and that business adapts to reflect "...newly emerging values and norms society expects business to meet."<sup>49</sup> This relationship also explains why scholars suggest that we watch for shifts in society's values.<sup>50</sup> To appreciate the influence of such shifts, we need only to consider that CSR emerged when society shifted from its belief that maximizing shareholder value was the best way to improve society.<sup>51</sup>

As we watch society for shifts in society's values, we might also watch for changes in how society's ethics influence business. In this respect, some suggest that the ethics of society and business might be more of a mutual influence on each other than most believe, or that perhaps business ethics is becoming the norm.<sup>52</sup> This concerns those who think business follows a lower ethical standard than society. They argue that business must recognize this and raise its moral floor in order to improve its ethics and those of society.<sup>53</sup>

Society recently expressed some of these concerns during the 2009 financial crises. More specifically, some asked if the crisis was causing society to shift its values from CSR to wealth creation,<sup>54</sup> if CSR was dead,<sup>55</sup> or if society thought wealth accumulation was the means to improve social problems.<sup>56</sup> The shared self-interest business and society have in maximizing profits intensifies these concerns.<sup>57</sup>

Accordingly, to see if society's focus might be shifting from CSR to wealth creation, we review society's decision to support estate tax repeal in 2001. This decision gave society the opportunity to balance individual wealth creation (profit) and its accompanying power, with its economic, philanthropic, and ethical impact on society. This decision relates well to CSR because business wrestles with those same issues when making CSR decisions. Also, since over two-thirds of society supported the repeal, the decision seems to reflect society's values.<sup>58</sup>

<sup>47</sup> Windsor, *supra* note 38.

<sup>48</sup> *What's in the Journals*, Economist.com, (Feb. 23, 2009), <http://www.economist.com/> (then type "Steger" in the search box); ULRICH STEGER & AILEEN IONESCU-SOMERS, INT. INST. OF MGMT. DEV., OF BUBBLES AND BURSTS: WHERE IS SUSTAINABILITY IN ALL THIS?, (JAN, 2009), <http://www.imd.ch/research/challenges/TC005-09.cfm>, (then type article title in search box).

<sup>49</sup> Carroll, *supra* note 43, at 33; See Edwin M. Epstein, *The Good Company: Rhetoric or Reality? Corporate Social Responsibility and Business Ethics Redux*, 44 AM. BUS. L. J. 207, 222 (2007).

<sup>50</sup> Freeman & Liedtka, *supra* note 5; Lee, *supra* note 5.

<sup>51</sup> BOWEN, *supra* note 35.

<sup>52</sup> Freeman & Liedtka, *supra* note 5, at 95.

<sup>53</sup> *Id.*

<sup>54</sup> Economist.com, Guest Opinion, *The Rich Under Attack*, (Apr. 2, 2009), [http://www.economist.com/opinion/displaystory.cfm?story\\_id=13405314](http://www.economist.com/opinion/displaystory.cfm?story_id=13405314); See Windsor, *supra* note 38; See Steger & Ionescu-Somers, *supra* note 39.

<sup>55</sup> Economist.com, *supra* note 54; Steger & Ionescu-Somers, *supra* note 49.

<sup>56</sup> Economist.com, *supra* note 54; Steger & Ionescu-Somers, *supra* note 49.

<sup>57</sup> See Freeman & Liedtka, *supra* note 5, at 95.

<sup>58</sup> See GATES & COLLINS, *supra* note 11.

Earlier someone asked if "...society's changing values from a Puritan work ethic to more hedonistic-centered values..." might change capitalism in "...such a way that the basic structure of capitalism as we know it will disappear and evolve into something quite new and different."<sup>59</sup> We might ask that same question about CSR if trends show society's values are shifting from CSR to wealth creation as the best way to improve society.

To evaluate society's commitment to CSR we compare society's support of the repeal with its CSR rhetoric. This is one way society evaluates a businesses' commitment to CSR.<sup>60</sup> In using this evaluation, society judges those businesses whose actions and CSR rhetoric match as socially responsible and trustworthy.<sup>61</sup> If such words and actions conflict, society focuses on the actions<sup>62</sup> under the principle that actions speak louder than words.<sup>63</sup> Society also considers if the decision achieves a good result,<sup>64</sup> and if managers anticipated and considered the decision's total consequences before acting.<sup>65</sup> While motives are relevant to this evaluation, they are difficult to measure.<sup>66</sup> Measuring motives also involves considering at least two different perspectives. One perspective is that regardless of motive, good corporate citizens act to benefit society.<sup>67</sup> The other perspective is that motive matters because with it true change occurs, without it, actions are often just utilitarian.<sup>68</sup> While all of these considerations are relevant, some say that CSR is ultimately about the results.<sup>69</sup>

The principle, that actions speak louder than words, also applies when evaluating individual behavior.<sup>70</sup> And, as with businesses, sometimes a significant gap exists between an individual's words and actions.<sup>71</sup> Just as stakeholders "... interpret the gap between business actions and CSR rhetoric as an obvious signal of organizational insincerity,"<sup>72</sup> business may make this same interpretation if it sees a gap between society's actions and CSR rhetoric.

Given this background, we see if a gap exists between society's support of the repeal and its CSR rhetoric. If a gap exists, we consider if, like some businesses, society is filling that gap with a wealth-creation focus.

<sup>59</sup> R. Joseph Mosen, *The Future of American Capitalism*, 21 CAL. MGMT. REV. 5, 12 (1979).

<sup>60</sup> Simcic-Bronn, *supra* note 8.

<sup>61</sup> Simcic-Bronn, *supra* note 8.

<sup>62</sup> Lee, *supra* note 5.

<sup>63</sup> Lee, *supra* note 5; Simcic-Bronn, *supra* note 8.

<sup>64</sup> BUCHHOLTZ & CARROLL, *supra* note 28.

<sup>65</sup> Epstein, *supra* note 49.

<sup>66</sup> Myrna Wulfson, *The Ethics of Corporate Social Responsibility and Philanthropic Ventures*, 29 J. of Bus. Ethics 135 (2001).

<sup>67</sup> Barrett, *supra* note 20; See Carroll, *supra* note. 19.

<sup>68</sup> See Jeffrey Yergler, Guest Opinion, *When Companies Act responsibly, Does Motive Matter?* PUGET SOUND BUS. J., May 18, 2007, <http://seattle.bizjournals.com/seattle/search/results.html>; See, BUCHHOLTZ & CARROLL, *supra* note 28.

<sup>69</sup> BUCHHOLTZ & CARROLL, *supra* note 28.

<sup>70</sup> Stephen K. Mittelstet, *Building Whole People, Whole Organizations, and Whole Communities*, THE PRESIDENCY, Winter 2009, at 24.

<sup>71</sup> See CHRIS ARGYRIS & DONALD SCHON, *ORGANIZATIONAL LEARNING: A THEORY OF ACTION PERSPECTIVE* (Addison-Wesley, 1978); See Simcic-Bronn, *supra* note 8.

<sup>72</sup> Simcic-Bronn, *supra* note 8, at 9.

First, it is relevant to discuss that economic self-interest was a vital consideration in society's decision whether to support the repeal, just as it is in CSR decisions. However, society believes that socially responsible businesses cannot base their decisions primarily on self-interest.<sup>73</sup> Society's attack on the rich during the 2009 financial crises confirmed this value.<sup>74</sup> Reports stated that society was not angry at people just because they were rich, or if they became rich through individual effort, but they were angry at the "greedy rich." The "greedy rich" included businesses and senior executives who seemed to get rich by simply moving money around, and then expected a taxpayer bailout when problems arose.<sup>75</sup> Some called this "socialism for the wealthy,"<sup>76</sup> and said taxpayers were angry because this widened the economic gap and fostered inequality.<sup>77</sup> Similarly, society confirmed this value by expressing its anger over CEO pay that was almost 364 times higher than an average worker's pay.<sup>78</sup> While excessive CEO pay has been a CSR concern for some time,<sup>79</sup> only recently have shareholder objections been described as minor revolutions.<sup>80</sup> Society was angry because such pay did not reflect merit and it widened the economic gap. Since these actions reflect society's values, it seems society's action in supporting the repeal would reflect these same values.

### ESTATE TAX REPEAL

While there are several alternatives to a complete tax repeal, society's decision in 2001 was whether to retain or repeal the tax. Accordingly we deal with only those options.<sup>81</sup> Also, while Congress implemented the law repealing the tax, it did so considering society's overwhelming support of tax repeal. This makes it relevant to review society's action, not that of Congress.<sup>82</sup> The complexity of this topic and the limited scope of this paper make it impossible, and unnecessary to discuss everything about estate tax repeal and alternatives. Therefore, we consider how the arguments given to retain and repeal the tax, and society's ultimate decision, relate to society's CSR rhetoric.

<sup>73</sup> Richard W. Wilcke, *An Appropriate Ethical Model for Business and a Critique of Milton Friedman's Thesis*, 9 THE INDEP. REV. 187 (2004).

<sup>74</sup> Economist.com, *supra* note 54.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Sarah Anderson et al., Inst. Of Policy Studies, *Executive Excess: The Staggering Social Cost of U.S. Business Leadership*, (Aug. 29, 2007), <http://www.ips-dc.org/reports/070829-executiveexcess.pdf>.

<sup>79</sup> Buchholtz & Carroll, *supra* note 28.

<sup>80</sup> Louis Lavelle, *A Payday for Performance*, Bus. Wk. Apr. 15, 2005.

<sup>81</sup> Burman et al., *Options to Reform the Estate Tax, Tax Policy Issues and Options*, 10 THE URBAN INST. 1 (2005); See, Mark Levine, *By Repealing the Basis Step-Up on Death, Did Congress Bury the Estate Tax or the Taxpayer*, REAL EST. ISSUE, Summer 2001, at 37; Roby Sawyers, *Reform or Repeal the Transfer Tax System?*, THE TAX ADVISOR, , Oct. 2004, at 620-623 (discussing three alternatives to tax repeal and how each has some of the same problems as the estate tax regime changed by the Act.)

<sup>82</sup> Bartels, *supra* note 15.

## Estate Tax Background

To facilitate the review we provide this general background on the federal estate tax (“estate tax” or “tax”) and the Act.

At death a person’s property is subject to estate tax *before* the heirs receive any remaining property.<sup>83</sup> The Act dealt with this tax and, accordingly, society includes those persons subject to this tax.

The Act gradually phased-out the estate tax between 2001 and 2009, and then temporarily repealed it for 2010.<sup>84</sup> During the phase-out period, the Act gradually increased the amount of property each person could pass tax free until it reached \$3.5 million in 2009 (“estate tax threshold”).<sup>85</sup> Like the prior estate tax regime, the Act did not tax property passing to a citizen spouse or charity.<sup>86</sup> The Act applied progressive tax rates to property subject to the tax.<sup>87</sup> Unless Congress acts otherwise; the Act reinstates the tax on January 1, 2011, at pre-Bush rules and tax rates, and with an estate tax threshold of about \$1 million.<sup>88</sup>

Just like the law it replaced, until 2010 the Act assumed that the value of inherited assets was the value at the owner’s death. Accordingly, heirs did not pay capital-gains tax on the appreciation from the date the owner acquired the property until the date the owner died (“accumulated appreciation.”). In 2010, the Act subjects some of this accumulated appreciation to capital gains tax when the heirs sell the assts.<sup>89</sup> Thus, in 2010 when the Act eliminated the estate tax on the wealthiest two percent of society and imposed the capital gains tax on all heirs, it shifted the tax burden downward.<sup>90</sup> In part, this caused many to ask why society supported a tax that benefitted only a wealthy few.<sup>91</sup>

## The Repeal’s Opportunity for Individual Wealth Creation (Profit)

As earlier discussed, society requires that socially responsible businesses take profit-making actions that improve, or at least not harm society, rather than create wealth for a limited few. Society also expects that private citizens, as well as businesses, will fulfill these responsibilities. Accordingly, the first question is whether estate tax repeal involved an individual wealth-creation (profit-making) opportunity.

<sup>83</sup> I.R.C. § 2001 (“A tax is hereby imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.”)

<sup>84</sup> The Act enacted I.R.C. § 2210(b) which states the tax will not apply to a person who dies in 2010. I.R.C. § 2664 states that the generation-skipping transfer tax does not apply to transfers occurring in 2010.

<sup>85</sup> I.R.C. §.2010(c).

<sup>86</sup> I.R.C. §2056.

<sup>87</sup> I.R.C. §2001.

<sup>88</sup> I.R.C. §2011(pre-EGTRRA rules are restored under the Act).

<sup>89</sup> I.R.C. §1022,(Prior to the Act, the basis of most assets inherited at death was adjusted to the fair market value on the date of death under I.R.C. §1014. The Act at I.R.C. §1022 changes this to allow only limited basis adjustments); Levine, *supra*, note 81 (discussing that in 1978 Congress enacted this law and retroactively repealed it because it was too difficult to administer).

<sup>90</sup> GATES & COLLINS, *supra* note 11.

<sup>91</sup> *Id.*

Tax repeal eliminates the estate tax on property people own at death. This provides a wealth-creation opportunity because it allows individuals to leave more property to their heirs. However, the repeal gives this opportunity only to the wealthiest two percent of society because they are the only ones who have estates large enough to be taxed.<sup>92</sup> The other 98% of society have estates too small to be taxed.<sup>93</sup> However, tax repeal could benefit this 98% in the future. In this respect, unless the tax is repealed, individuals who eventually accumulate enough wealth to meet the estate tax threshold will pay the tax. Some suggested individuals in this 98% of society supported the repeal because they held this “American Dream” of wealth and wanted to avoid paying estate tax if their dream materialized.<sup>94</sup>

Unethical acts often happen in business when business shifts its focus from making a profit to maximizing profit. This happens because that focus causes business to overlook other ethical issues.<sup>95</sup> The repeal had individuals focusing on maximizing individual wealth.<sup>96</sup> Yet, we found nothing that specifically addressed any concern that this focus might cause individuals to act unethically, like it does in business.

Many articles made the individual wealth creation focus apparent.<sup>97</sup> In fact, for years advisors had discussed that not only does exempting property from estate tax maximize individual wealth-creation opportunities, but also they discussed how individuals could multiply that wealth by creating certain long-term trusts.<sup>98</sup> Such trusts could let the heirs use and enjoy the trust property in a manner close to outright ownership, yet protect the property from erosion by future estate taxes and certain creditors.<sup>99</sup> Examples, like that below, show the potential wealth-

<sup>92</sup> Burman et al., *supra* note 81, 2 (“Almost 99 percent of the tax falls upon the top 5 percent, and over one-third is paid by the richest 1 in 1,000.”); GATES & COLLINS, *supra* note 11.

<sup>93</sup> GATES & COLLINS, *supra* note 11.

<sup>94</sup> Larry M. Bartels, *A Tale of Two Tax Cuts, a Wage Squeeze and a Tax Credit*, 59 NAT’L TAX J. 403, 423 (2006); MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* (PRINCETON UNIVERSITY PRESS, 2005).

<sup>95</sup> Epstein, *supra* note 49, 213 (“...an ideology of profit maximization which subordinates all other considerations to the Holy Grain of maximizing shareholder value.”); See Carroll, *supra* note 43 (discussing idea of making a profit got transformed into making maximum profits).

<sup>96</sup> Chris Edwards, Cato Inst., *Repealing the Federal Estate Tax*, #36 Tax & Budget Bulletin 2006 (June), <http://www.cato.org/pubs/tbb/tbb-0606-36.pdf>; Warren S. Hersch, *Experts Applaud Gains, But Warn of Continuing Challenges*, NAT’L UNDERWRITER LIFE & HEALTH, (Dec. 16, 2006), <http://www.lifeandhealthinsurancenews.com/Pages/default.aspx> (enter title in search box); Paul Krugman, *Bad hair Day*, N.Y. TIMES, (May 30, 2001), <http://www.nytimes.com>; Paul W. McCracken, *Why Tax the Rich? Efficiency, Equity, and Progressive Taxation: Does Atlas Shrug? The Economic Consequences of Taxing the Rich*, 111 YALE L. J. 1391 (2000) (reviewing Joel B. Slemrod, *DOES ATLAS SHRUG?* (2000)); Stephen Moore, *Death by Taxes: Seniors May Plan Their Demises to Maximize Their Bequest*, WALL ST. J., May 30, 2008, at W11.

<sup>97</sup> Edwards, *supra* note 96; Hersch, *supra* note 96; Krugman, *supra* note 96; McCracken, *supra* note 96.

<sup>98</sup> Richard A. Oshins & Jonathan G. Blattmachr, *The MegatrusterSM: An Ideal Family Wealth Preservation Tool*, 267 PRAC. L. INST. 715, 737 (1998); Alaska Trust Co., *Home Page*, <http://www.alaskatruster.com/investment-trusts.html> (“Due to the transfer tax-free compounding, the trust will accomplish significant wealth accumulation.”) (last visited April 1, 2009).

<sup>99</sup> Oshins & Blattmachr, *supra*, note 98; Alaska Trust Co., *supra* note 98.

creation opportunity. This example shows a trust that is initially funded with \$1 million. The trust lasts for four generations, about 120 years.<sup>100</sup> The No Tax column shows the trust's growth if the assets are *not* subject to estate tax. The Estate Tax column shows the growth if the assets are subject to an estate tax at the end of each generation.

<u>"Growth</u>	<u>Trust-No Estate Tax (After 120 Years)</u>	<u>(Estate Tax)</u>
3.00%	\$34,710,987	\$2,169,437
4.00%	\$110,662,561	\$6,910,410" <sup>101</sup>

In addition to this focus on *maximizing* wealth that is exempt from estate tax, many articles focused on the Act's *simple* financial advantage to beneficiaries of those dying in 2010.<sup>102</sup> This benefit occurs because the Act only repealed the tax for those dying in 2010.<sup>103</sup> The focus on maximizing wealth caused questions about whether people might be kept alive on life support to delay a death until 2010, or if a death might be hastened to occur in 2010.<sup>104</sup> As discussed above, while nothing directly addressed whether the repeal's focus on maximizing individual wealth might cause individuals to act unethically, as happens in business, the foregoing questions suggest that concern.<sup>105</sup>

The repeal's wealth-creation opportunity helps society's most affluent members create economic dynasties. For example, the top 400 richest Americans on the Forbes 400 List have an average net worth of \$3.9 billion.<sup>106</sup> Assume one of these individuals dies in 2010 and can fund a trust like that above with \$3 million. If the trust has an annual growth rate of 4 percent the assets could be worth \$331 billion in four generations. This primarily benefits the affluent because wealth over about "\$15 million" is unnecessary for expenses.<sup>107</sup>

Some thought the repeal's wealth-creation opportunity would widen the economic gap between economic classes. This was a concern because the top one percent of Americans already owned over one-third of the nation's wealth.<sup>108</sup>

<sup>100</sup> Oshins & Blattmachr, *supra*, note 98; Alaska Trust Co., *supra* note 98.

<sup>101</sup> Oshins & Blattmachr, *supra*, note 98; *See also*, Alaska Trust Company, *supra* note 98.

<sup>102</sup> I.R.C. § 2601-2663; I.R.C. § 2210(b); *See supra* note 85.

<sup>103</sup> Edwards, *supra*, note 96; Hersch, *supra*, note 96; Krugman, *supra*, note 96; McCracken, *supra*, note 96; Moore, *supra*, note 96.

<sup>104</sup> Edwards, *supra* note 96 ("If you are in poor health in 2010 and you own substantial personal or business assets, your heirs might favor your prompt departure."); Krugman, *supra* note 96 ("If your ailing mother passes away on Dec. 30, 2010, you will inherit her estate tax-free. But if she makes it to Jan. 1, 2011, half the estate will be taxed away. That creates some interesting incentives. Maybe they should have called it the Throw Momma From the Train Act of 2001.")

<sup>105</sup> *See supra* note 96 and accompanying discussion.

<sup>106</sup> SPECIAL REPORT, *The Forbes 400*, FORBES, March 11, 2008, <http://www.forbes.com/2008/09/16/forbes-400-billionaires-list>.

<sup>107</sup> GATES & COLLINS, *supra* note 11, at 17.

<sup>108</sup> GATES & COLLINS, *supra* note 11, at 17 (discussing the widening economic gap matters because it distorts democracy and our economic system and "undermines social cohesion.")

Thus, the repeal involved a wealth-creation opportunity, the first part of the CSR analysis. Additionally, this opportunity directly benefitted only the wealthiest two percent of society.

### How the Repeal Might Impact Society

This leads to the second part of the CSR analysis. That part considers if the repeal's individual wealth creation (profit-making) opportunity improves society,<sup>109</sup> or at least does not harm society,<sup>110</sup> or if it just creates wealth for a privileged few.<sup>111</sup>

When society evaluates a businesses' commitment to CSR using this standard, it also considers if the managers anticipated the decision's *total* consequences before acting.<sup>112</sup> However, individuals do not have the resources or time that businesses have available for decision-making; therefore, it seems unfair to hold individuals to this same standard.<sup>113</sup> Accordingly, we consider some of the *more likely* consequences society might have anticipated based on the arguments surrounding the repeal.

When business makes CSR decisions it often does not have all the information it wants, or needs; it does not know the outcome; there is no right answer; and every argument has a counterargument.<sup>114</sup> Society was in this same situation when making its decision whether to support estate tax repeal.

### Economic Impact/Revenue

CSR uses the term "social contract" to characterize the two-way understanding required for the relationship between business and society.<sup>115</sup> Some think that tax revenue is the "lifeblood" of this social contract.<sup>116</sup> This may be the reason why some say that corporate social responsibility obligates businesses to pay their taxes. While that obligation accepts that businesses may act to minimize taxes, it does not accept that businesses may act aggressively to avoid taxes.<sup>117</sup> Some describe businesses who take such aggressive actions as "economic free-riders" who enjoy "...the benefits of corporate citizenship without accepting the costs...." They also accuse such businesses of unfairly shifting the tax burden onto individuals.<sup>118</sup> Yet, there is scant discussion about whether socially responsible businesses may support a tax repeal. While supporting tax repeal is different than aggressively avoiding taxes, it too can shift the tax burden

<sup>109</sup> See *supra* note 44 and accompanying text.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*; Freeman & Liedtka, *supra* note 5.

<sup>112</sup> Wulfson, *supra* note 66; See *supra* note 67 and accompanying text.

<sup>113</sup> See DeVinney, *supra* note 5.

<sup>114</sup> Buchholtz & Carroll, *supra* note 28; GRAETZ & SHAPIRO, *supra* note 94, at 227.

<sup>115</sup> BUCHHOLTZ & CARROLL, *supra* note 28, at 19.

<sup>116</sup> John Christensen & Richard Murphy, *The Social Irresponsibility of Corporate Tax Avoidance: Taking CSR to the Bottom Line*, 47 DEV.37 (2004); WILL HUTTON, *THE WORLD WE'RE IN* (Abacus, 2002).

<sup>117</sup> Christensen & Murphy, *supra* note 116; See Reuven S. Avi-Yonah, *Corporations, Society and the State: A Defense of Corporation Tax*, 90 VA. L.REV. 1193 (2004) (discussing this issue).

<sup>118</sup> Christensen & Murphy, *supra* note 116, at 39.

onto others, allow the benefits of citizenship without accepting the costs, and reduce tax revenue.<sup>119</sup> Accordingly, we consider if the tax repeal had any of those results.

Those who wanted to retain the tax said one reason to retain it was because it had historically generated billions of dollars in annual revenue,<sup>120</sup> which IRS data support.<sup>121</sup> They said that the government used this revenue to fund services and infrastructure.<sup>122</sup> Tax repeal would eliminate this revenue and the impact on society partly depended on whether tax repeal would somehow offset that revenue.

Those supporting the repeal said that tax repeal would cause an increase in revenue that would offset the revenue lost from the estate tax. Specifically, they argued that eliminating the tax would incentivize people to save using investments that would generate enough income tax revenue to offset that lost under tax repeal.<sup>123</sup> They assumed eliminating the tax would encourage people to save funds they would no longer need for: (a) paying estate taxes, (b) paying professionals for estate tax advice, and (c) making gifts to taxpayers in lower income tax brackets and tax-exempt charities in an effort to minimize estate taxes.<sup>124</sup> These savings would initially come from the wealthiest two percent of society who benefitted from tax repeal. It would also require society to rely on such wealthy few to willingly generate the necessary revenue.

The Congressional Budget Office and others said these assumptions were dubious because no empirical evidence showed how taxes affect private savings.<sup>125</sup> Accordingly, under

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<sup>119</sup> Christensen & Murphy, *supra* note 116; GATES & COLLINS, *supra* note 11; David Joulfaian, *The Behavioral Response of Wealth Accumulation to Estate Taxation: Time Series Evidence*, 59 NAT'L TAX J. 253 (2006).

<sup>120</sup> GATES & COLLINS, *supra* note 11; See, CTR ON BUDGET & POLICY, THE ESTATE TAX MYTHS AND REALITIES, (FEB. 23, 2009), [HTTP://WWW.CBPP.ORG /FILES / ESTATETAXMYTHS.PDF](http://www.cbpp.org/files/estatetaxmyths.pdf) (hereinafter, *CENTER*); See Edwards, *supra* note 96 (“Federal budget data indicate that estate taxes will raise \$28 billion [in2006]...”); See Edward McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L. J., 283 (1994)(stating that the main goal of the estate tax was not to generate revenue.)

<sup>121</sup> Internal Revenue Service, 2—1 Internal Revenue Service Data Book, (2001), <http://www.irs.gov/pub/irs-soi/01databk.pdf>.

<sup>122</sup> Bartels, *supra* note 15; GATES & COLLINS, *supra* note 11, at 11 (“The estate tax...generates revenue to pay for government from those most able to pay.”)

<sup>123</sup> Edwards, *supra* note 96 (“However, if the estate tax were repealed, income and capital gains tax revenues would increase to partly or fully offset the loss in estate tax revenues.”); J. ECON. COMM. OF CONG., COSTS AND CONSEQUENCES OF THE FEDERAL ESTATE TAX, (COMM. STUDY, MAY 2006), [HTTP://WWW.HOUSE.GOV/JEC/FISCAL/TX-GRWTH/ESTATTAX/ESTATTAX.HTM](http://www.house.gov/jec/fiscal/tx-grwth/estatetax/estatetax.htm). (hereinafter *Committee*); *Center*, *supra* note 120.

<sup>124</sup> GATES & COLLINS, *supra* note 11; *Center*, *supra* note 120; *Committee*, *supra* note 123; Edwards, *supra* note 96; McCaffery, *supra* note 120; James R. Repetti, *The Case for the Estate and Gift Tax*, 86 TAX NOTES 1493 (2000).

<sup>125</sup> Bartels, *supra* note 94; REV. & TAX POL'Y BRIEF, *EFFECT OF THE FEDERAL ESTATE TAX ON FARMS AND SMALL BUSINESSES*, (CONG. BUDGET OFFICE, 2005), <http://www.cbo.gov/ftpdocs/65xx/doc6512/07-06-EstateTax.pdf>, (hereinafter *CBO*); *Center*, *supra* note 120, (stating that because people save for different reasons, the repeal's impact on private savings is unknown); Joulfaian, *supra* note 119, at253 (“How this reduction in returns affects saving is theoretically

tax repeal people might spend instead of save. They suggested that such spending might include paying for professional advice about estate planning under the repeal.<sup>126</sup> Additionally, they said that even if the repeal curtailed gifting, it might not cause income tax revenue to increase because the assumption underlying this might be incorrect, i.e. the donors might not be in higher tax brackets than the gift recipients.<sup>127</sup> Finally, some suggested that the repeal could initially add about \$1 trillion to the national deficit.<sup>128</sup>

Again, every argument had a counterargument. What these arguments seemed to make certain was the uncertainty of whether tax repeal would cause a sufficient increase in revenue to offset the revenue eliminated by tax repeal. Given the uncertainty of the revenue impact, CSR would suggest minimizing the risk of harm and anticipating the decision's potential impact before acting. This suggests asking which might be more likely to cause a deficit: (a) retaining a mandatory estate tax that had historically generated billions in revenue annually, or (b) repealing the tax and annually relying on taxpayers to willingly save and arrange their finances to generate billions in income tax revenue.

The answer also requires considering how a revenue deficit might impact society. Since the government used the revenue to support public services and infrastructure, a deficit would cause the government to raise taxes or curtail public spending.<sup>129</sup> Raising taxes would shift the tax burden downward, unless taxes were only raised on the two percent of society who the repeal benefitted. Alternatively, eliminating public funding would harm those relying on such funding. The degree of harm would partly depend on whether the government eliminated funding for essential services and infrastructure. Because individuals did not know how the government would act, their decisions would assume the foregoing risks of harm to society.

Along with the risks of harm, the decision would also require considering the potential revenue benefits to society under tax repeal. In this respect, if the two percent of society benefitting from the repeal generate the anticipated revenue, then everyone might be better off under tax repeal than they were under the estate tax regime.

Ultimately, it was uncertain if tax repeal would increase savings and generate revenue. However, it was certain that tax repeal would: (a) eliminate a mandatory government tax and billions of revenue dollars that it had historically generated, and (b) require society to rely on a wealthy few to voluntarily save and invest those savings to generate billions in revenue to fully offset the revenue lost under tax repeal.

In the end, society overwhelmingly supported tax repeal. The above arguments given in favor of tax repeal are that maximizing the wealth of a limited may generate revenue that benefits society. These arguments would reflect the thinking not only of those making the arguments, but also of those who relied on such arguments in deciding to support tax repeal. The

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ambiguous, and, a priori, depends on the offsetting substitution and income effects.”); Repetti, *supra* note 124; CONG. BUDGET OFFICE, *AN ANALYSIS OF THE PRESIDENT'S BUDGETARY PROPOSALS FOR FISCAL YEAR 2007*, (MARCH 2006) (noting that most empirical evidence indicates that taxes have little impact on individual savings).

<sup>126</sup> CBO, *supra* note 125; Center, *supra*, note 120; Oshins & Blattmachr, *supra* note 98; Repetti, *supra* note 124; See also Theresa Forsman, *The Accountants' Employment Act*, BUS. WK, June 13, 2001 (discussing that spending on professional fees will increase under the Act).

<sup>127</sup> Repetti, *supra* note 124.

<sup>128</sup> Center, *supra* note 120.

<sup>129</sup> GATES & COLLINS, *supra* note 11, at 11.

outcome of the repeal on revenue is to maximize the wealth of a limited few in hopes that they will use their wealth to economically benefit society.

### Philanthropic Impact

CSR reflects society's value to help those in need. Accordingly, society uses CSR to encourage businesses to act philanthropically.<sup>130</sup> Similarly, the government uses tax incentives, like the estate tax charitable deduction, to encourage individuals to act philanthropically.

Everyone agreed that the estate tax charitable deduction incentivized some wealthy individuals to make charitable donations at death. However, they disagreed about the deduction's stimulus effect on such giving and if eliminating the deduction would affect that giving.<sup>131</sup> While IRS data showed that charities had received billions from estates annually,<sup>132</sup> it is not possible to empirically determine how much of that people gave because of the deduction.<sup>133</sup> Accordingly, tax repeal could cause charities to lose very little, as repeal supporters argued, or billions, as others argued.<sup>134</sup> Additionally, individuals disagreed if tax repeal would imply the government no longer valued charitable giving at death, and, therefore, cause people to donate less.<sup>135</sup>

However, while tax repeal could harm charities, it could also benefit them. In this respect, eliminating the tax allows the wealthiest taxpayers to amass substantially more assets than they could under the estate tax regime. Some said this would give the wealthy more assets to donate, incentivize them to donate more, and ultimately this would result in charities receiving more than they had received under the estate tax regime.<sup>136</sup>

Here again, it was uncertain how tax repeal would affect charitable giving. However, it was certain that tax repeal would eliminate a charitable estate tax deduction that incentivized some individuals to make charitable gifts at death. It was also uncertain how eliminating that deduction would affect charitable giving. Tax repeal shifted the risk of harm to charities because it required charities to rely on the willingness of the wealthiest two percent of society to donate, and those few could decide not to benefit charity.

The arguments in favor of tax repeal relative to philanthropy are that maximizing the wealth of a limited few may benefit charities. Again, these arguments would reflect the values of those making the arguments, and those who relied on such arguments to support tax repeal. The

<sup>130</sup> Carroll, *supra* note 19; *See supra* note 24 and accompanying text.

<sup>131</sup> Gerald. E. Auten, *Taxes and Philanthropy Among The Wealthy, The Economic Consequences of Taxing the Rich*, in DOES ATLAS SHRUG, 143 (Joel B. Slemrod ed. 2000); Burman et al., *supra*, note 81, 5 ("Current law provides very strong incentives for wealthy people to make charitable contributions and bequests."); Davies, et al., *Behavioral Implications of U.S. Tax Policy: Does Tax Law Influence Individual Taxpayer Behavior?*, 5 S. D. BUS. REV. 4 (2008); Joulfaian, *supra* note 119.

<sup>132</sup> Ken Rankin, *Estate Tax Repeal Would Hit Charities Hardest*, ACCT. TODAY, Oct. 10-23, 2005, at 5.

<sup>133</sup> *Id.*

<sup>134</sup> Jeffrey A. Baskies, *Estate Tax Reform/Repeal: What's A Charity to Do?*, MINN. LAWYER, Feb 7, 2007; Burman et al., *supra* note 81; Hersch, *supra*, note 96; *See* Martha Britton Eller, Internal Revenue Service *Charitable Bequests: Evidence from Federal Estate Tax Returns*, (2001), <http://www.irs.gov/pub/irs-soi/95escbar.pdf>.

<sup>135</sup> Rankin, *supra* note 132.

<sup>136</sup> Baskies, *supra* note 134; GATES & COLLINS, *supra* note 11.

result of tax repeal requires charities to trust that maximizing the wealth of a limited few will result in more charitable revenue.

### Impact on Creating the Desired Society

Throughout this paper we have discussed why society's support of tax repeal lends itself nicely to a review of whether society acted consistently with its CSR rhetoric. Another reason is because tax repeal and CSR both address the fairness of wealth distribution.<sup>137</sup> CSR addresses the fairness of wealth distribution between employees within a particular company, country, or world.<sup>138</sup> Estate tax and tax repeal address the fairness of wealth distribution among individual members of society, and the fair distribution of the tax benefits and burdens.<sup>139</sup>

CSR and the estate tax/tax repeal also address the society we want to create and how to create that society.<sup>140</sup> That society is a democratic society that offers everyone an equal opportunity for wealth and power. It is a society that rewards merit, not birth-right, and that is without powerful aristocracies.<sup>141</sup> CSR addresses businesses' obligation to create that society. Estate tax and tax repeal address the obligation of individuals to create that society. The following discussion draws on these similarities to help evaluate if society's support of tax repeal reflects its CSR rhetoric about creating the desired society.

The controversy about the repeal involved the best way to create the society described above. The two different approaches forced individuals to grapple with several of the fairness issues involved in CSR decision-making. We discuss three of those issues that are relevant to this review. The first issue was which members in society should bear the tax burden: the wealthiest two percent of society ("limited group"), or the rest of society. The second issue was whether facilitating or curtailing wealth in a limited group was the best way to create that society. The third issue involved whether successful individuals owe a debt to society for its contributions to their success.<sup>142</sup>

Society's concern did not seem to be with mere concentrations of individual wealth, but with the social, economic, and political power accompanying concentrations of individual wealth.<sup>143</sup> The concern is that such power could threaten political stability and democracy because individuals holding the power are not accountable to the majority.<sup>144</sup> Those involved in

<sup>137</sup> See *supra* note 17 and accompanying text; O.C. FERRELL, JOHN FRAEDRICH, & LINDA FERRELL, BUSINESS ETHICS, ETHICAL DECISION MAKING AND CASES 2009 UPDATE (South-Western, 7<sup>th</sup> Ed. 2009); Matten & Moon, *supra* note 1; McCaffery, *supra* note 120.

<sup>138</sup> Ferrell et al., *supra* note 137; Matten & Moon, *supra* note 1; McCaffery, *supra* note 120.

<sup>139</sup> GATES & COLLINS, *supra* note 11; McCaffery *supra* note 120.

<sup>140</sup> GATES & COLLINS, *supra*, note 11, 7 (estate tax addresses the kind of nation we want to become); McCaffery, *supra* note 120; Ferrell et al., *supra* note 137.

<sup>141</sup> GATES & COLLINS, *supra* note 11; McCaffery, *supra* note 120.

<sup>142</sup> Center, *supra* note 120; GATES & COLLINS, *supra* note 11.

<sup>143</sup> GATES & COLLINS, *supra* note 11, 13 (discussing people are not against the rich, but they believe that wealth concentrations corrode liberty); See Avi-Yonah, *supra* note 25 (discussing this issue); See McCaffery, *supra* note, 120 (discussing that it is how one uses wealth, not its mere concentration, that is threatening). See footnote 75 and accompanying text (discussing that people were not against the rich, but against businesses who were greedy).

<sup>144</sup> McCracken, *supra* note 96.

the repeal disagreed about whether the government should, or could, control individual power by using the estate tax to limit intergenerational transfers of family wealth at death.<sup>145</sup>

The answers to these three questions partly depend on a person's theory or interpretation of economic justice, philosophy about property rights, individual effort, society's contributions, performance, and concept of justice and distributive justice (collectively "theories"). These same theories are involved in CSR decision-making. A thorough discussion of these theories is beyond the scope and purpose of this paper. However, we briefly discuss a few of the theories involved in society's decision to help illustrate the relationship between that decision and CSR, particularly regarding the kind of society we want to create.

**Tax Burden.** The decision about which members of society should bear the tax burden involved a few specific issues. One issue that seemed fairly straightforward was whether anyone should pay the tax because it was an unfair "double tax." Those who supported tax repeal described the tax in the foregoing manner because they said the property was subject to income tax when earned and estate tax at death.<sup>146</sup> To the contrary, those who wanted to retain the tax disagreed. They relied on statistics which showed that large estates are primarily comprised of highly appreciated assets that are taxed for the first time at death.<sup>147</sup>

Another less straightforward issue was whether only the two percent of society's wealthiest members should bear the tax burden under the estate tax regime, or whether the other 98% of society should bear that burden under the estate tax repeal.<sup>148</sup> The issue seemed particularly difficult because tax repeal would shift the tax burden from the wealthiest two percent of taxpayers to the other 98% of society.<sup>149</sup> In addition to creating a regressive tax,<sup>150</sup> the repeal would eliminate society's most progressive tax, the estate tax. Accordingly, some thought repealing this tax could begin the repeal of all progressive taxes.<sup>151</sup> While some said the tax itself was unfair because only the wealthiest two percent of society paid it, others said taxing only those individuals was fair because it represented society's philosophical commitment to progressive taxation.<sup>152</sup>

Another fairness issue involved the allocation of benefits. This issue was central to the controversy about whether the best way to create the desired society was by facilitating or curtailing individual wealth concentrations. The following further discusses these two approaches.

<sup>145</sup> CBO *supra* note 125; GATES & COLLINS, *supra* note 11;

<sup>146</sup> GATES & COLLINS, *supra* note 11; Hersch, *supra* note 104.

<sup>147</sup> CBO, *supra* note 125; Council, *supra* note 16; C. Verschoor, *Is repealing the Estate Tax Unethical?*, STRATEGIC FIN. June 2005, at 19; Edwards, *supra* note 96; GATES & COLLINS, *supra* note 11, at 83.

<sup>148</sup> Avi-Yonah, *supra* note 25; GATES & COLLINS, *supra* note 11 (discussing this 98% would bear the tax burden by paying capital gains tax on certain inherited assets).

<sup>149</sup> Gates & Collins, *supra* note 11; Iris J. LAV & JOEL FRIEDMAN, CTR. ON BUDGET & POLICY ISSUES, *CAN CAPITAL GAINS CARRY-OVER BASIS REPLACE THE ESTATE TAX?* (MAR. 15, 2001), <http://www.cbpp.org/cms/index.cfm?fa=view&id=1702>; Levine, *supra* note 82.

<sup>150</sup> Levine, *supra* note 81.

<sup>151</sup> GAR ALPEROVITZ & LEW DALY, *UNJUST DESERTS HOW THE RICH ARE TAKING OUR COMMON INHERITANCE AND WHY WE SHOULD TAKE IT BACK* (The New Press, 2008).

<sup>152</sup> ALPEROVITZ & DALY, *supra*, note 151.

**Concentrating Wealth.** We earlier discussed that tax repeal would create economic inequities by concentrating wealth in the hands of a limited few. Those who wanted to retain the tax thought this would create aristocracies, widen the economic gap, and destroy democracy.<sup>153</sup> However, those supporting tax repeal said that such individual concentrations of wealth would create greater good in the aggregate for society. Specifically, they said that concentrating wealth in a limited few would incentivize and allow those few to save more money and take greater business risks which would fuel productivity and growth to facilitate the economy.<sup>154</sup> As earlier discussed, they also said that concentrating wealth in a limited few would result in charities and the government receiving more revenue than they had received under the estate tax regime.<sup>155</sup> Finally, they said that eliminating the tax would facilitate economic equality through free-choice and protect basic property rights that the government should not take through mandatory estate tax. Essentially, these arguments are that the economic inequalities tax repeal causes are fair because ultimately these inequalities may benefit everyone.<sup>156</sup>

In addition to describing the foregoing benefits to society from tax repeal, those seeking tax repeal argued that the tax should be repealed because it was full of problems, including the following.<sup>157</sup> First, they said the tax was ineffective in curtailing wealth transfers at death because individuals could engage in sophisticated planning that allowed them to avoid the tax and pass wealth to their heirs.<sup>158</sup> Second, they said that the tax revenue, the money people spent to avoid the tax, and the money the government spent to administer the tax removed valuable capital from savings, business activity, and investments that could be better used to facilitate the economy.<sup>159</sup> Third, they said that because only the affluent could afford the planning that was necessary to avoid the tax, the tax allowed those affluent to shift the tax burden downward.<sup>160</sup> They argued that these and other effects made the tax ineffective and justified its repeal.

These arguments about allowing economic inequalities reflect the egalitarian theory of justice that is used in making CSR decisions, i.e. "... there is no injustice in the greater benefits

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<sup>153</sup> Constance Crawford, *Is it Ethical to Eliminate Estate Taxation? The Consequences of an Unfair and Inequitable Tax System in the United States*, 8 J. OF APPLIED BUS. & ECON. 111 (2008); GATES & COLLINS, *supra* note 11; McCaffery, *supra* note 120; Verschoor, *supra* note 147.

<sup>154</sup> *Center*, *supra* note 120; Edwards, *supra* note 96, 2 ("Liberals who complain about 'concentrations of wealth' have it wrong. Wealth accumulation by anyone and everyone is good for the economy. Frugal savers who become wealthy are great benefactors to society....")

<sup>155</sup> *Center*, *supra* note 120; Edwards *supra* note 96; GATES & COLLINS, *supra* note 11.

<sup>156</sup> *Center*, *supra* note 120; Edwards, *supra* note 96, 2 ("The winners from estate tax repeal would be average workers who would gain from a larger capital stock and entrepreneurs' greater job creation efforts.")

<sup>157</sup> Burman et al., *supra* note 81.

<sup>158</sup> *Id.*; CBO, *supra* note 125; *Committee*, *supra* note 123; *Council*, *supra* note 16; *See* Edwards, *supra* note 96.

<sup>159</sup> CBO, *supra* note 125; *Committee*, *supra* note 123; *Council*, *supra* note 16; *See* Edwards, *supra* note 96.

<sup>160</sup> CBO, *supra* note 125; *Committee*, *supra* note 123; *Council*, *supra* note 16; *See* Edwards, *supra* note 96.

earned by a few provided that the situation of persons not so fortunate is thereby improved.”<sup>161</sup> They also reflect a libertarian theory of justice that concentrates on individual property rights.<sup>162</sup>

In summary, individuals supporting tax repeal sought to eliminate a mandatory government estate tax that was intended to curtail wealth distributions at death. They sought to replace that tax with a system that concentrated wealth and power in a limited few and allowed those few to freely decide if they wanted to arrange their wealth to benefit society.

**Curtailling Wealth/Retain Estate Tax.** The individuals who wanted to retain the tax took the opposite approach and argued that the best way to create the desired society was to curtail, not facilitate, wealth transfers.<sup>163</sup> They argued that the risk of societal harm caused by concentrating wealth and power in a few individuals overshadowed any benefits that might trickle down to society from such concentrations. They argued that those holding concentrations of wealth would have so much political, social and economic control over society that it would limit the free choice of everyone else. They also said that allowing concentrations of wealth and power would facilitate the creation of aristocracies and class systems that would harm democracy.<sup>164</sup> Collectively, they said that these and other affects of tax repeal did not create the desired society. Accordingly, they said that it was necessary to curtail wealth-creation opportunities, not facilitate them. They wanted to retain the estate tax because they said it was effective in curtailing wealth transfers at death,<sup>165</sup> and, to support this, they referred to IRS statistics showing that the tax raised billions of dollars in revenue annually.<sup>166</sup> They used examples, like the one above, to show how tax repeal would facilitate the wealth-creation opportunity for society’s wealthiest members.<sup>167</sup> Earlier, one scholar used the foregoing arguments to support that we currently need to curtail wealth concentrations to avoid problems like those of “a hundred years earlier: a huge increase in inequality and the rise of new concentrations of wealth and power, fueled this time by the information revolution of the late twentieth century.”<sup>168</sup> Those who wanted to retain the tax also said that concentrating wealth under tax repeal would widen the economic gap and create an unequal society, which should concern everyone because it could cause political instability that reduces growth and investment.<sup>169</sup> They also said that tax repeal put society at a great risk of harm because it required society to rely on a wealthy few to willingly share their benefits.

Here again, the arguments given to support tax repeal are that creating economic inequalities of wealth and power may improve society and that these inequalities are fair because they may result in compensating benefits for society overall. While this seems to reflect an

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<sup>161</sup> Beauchamp & Bowie, *supra* note 4, at 602; CARROLL & BUCHHOLTZ, *supra* note 28, at 210-251 (discussing the various ethical tests used to evaluate if a decision reflects good CSR).

<sup>162</sup> *Id.* at 594

<sup>163</sup> GATES & COLLINS, *supra* note 11.

<sup>164</sup> GATES & COLLINS *supra* note 11; Crawford, *supra* note 154.

<sup>165</sup> GATES & COLLINS *supra* note 11; Crawford, *supra* note 154.

<sup>166</sup> GATES & COLLINS *supra* note 11; Crawford, *supra* note 154. The argument is that while some may avoid the tax, not everyone is doing so because it generates billions in annual revenue.

<sup>167</sup> See *supra* note 99 and accompanying text (showing if the wealth-accumulation potential if the tax is repealed).

<sup>168</sup> McCracken, *supra* note 96, at 11.

<sup>169</sup> Avi-Yonha, *supra* note 25, at 1411; McCracken, *supra* note 96.

egalitarian theory of justice, that theory is that such inequalities are just only if they result in compensating benefits for everyone, which may require arranging the inequalities so that they are reasonably expected to benefit everyone.<sup>170</sup> One might ask if tax repeal's result of having society's benefits depend entirely on the willing cooperation of a wealthy few falls short of creating a reasonable expectation of such benefits. Considering that the repeal also shifted the tax burden downward, it seems to burden the middle class and poor to benefit the wealthiest members of society.<sup>171</sup>

### **Society's Contributions.**

The third issue to evaluate regarding society's decision to support estate tax repeal is whether individuals owe a debt to society for society's contribution to their success. This fairness issue addresses the society we want to create. Specifically, the repeal involved discussions about not only the fairness of having individuals pay society for its contributions to individual success, but also using the estate tax as the method of payment. Alperovitz & Daly thoroughly discuss this topic in their book *Unjust Deserts: How the Rich Are Taking Our Common Inheritance*.<sup>172</sup> They claim that individuals earn wealth through a combination of their own effort, luck, and a variety of services the government and society provide. Therefore, they argue that successful individuals owe a debt to society and the government for such contributions, and the estate tax is payment for that debt.<sup>173</sup> Some who agree with this philosophy might object to imposing a mandatory estate tax to obtain payment. However, the repeal eliminated this payment method without providing an alternative. Others believe individuals earn their own success and do not owe a debt to society. Those individuals might dismiss arguments that similarly talented individuals in countries other than the U.S. would not have the political, social, and economic structure to develop such wealth.

Ultimately, society supported tax repeal which eliminated using estate tax as a method of paying society for its contributions to individual success. Additionally, the repeal did not include an alternative method of payment. Thus, the repeal's outcome reflects the philosophy that people earn wealth solely as the result of their individual effort and owe nothing to society.

CSR/Estate Tax Relationship. Before addressing the last issue involved in the repeal, at this point it is relevant to discuss another similarity the above information reveals about estate tax repeal and CSR. In this respect, as discussed above, the estate tax was intended to address society's concerns about individuals having too much power over society as a result of concentrated wealth. The estate tax sought to control this power by curtailing intergenerational transfers of wealth among families at death. Some thought the tax effectively met this goal and that it was the best way to create the desired society, others disagreed.

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<sup>170</sup> John Rawls, *An Egalitarian Theory of Justice*, 599, 602, in *ETHICAL THEORY AND BUSINESS* (Tom L. Beauchamp & Norman E. Bowie, eds, 2<sup>nd</sup> ed., 1983), (“...economic inequalities are to be arranged so that they are...reasonably expected to be to everyone's advantage....”).

<sup>171</sup> *Id.* at 603.

<sup>172</sup> ALPEROVITZ & DALY, *supra* note 151; GATES & COLLINS, *supra* note 11; *Council*, *supra* note 16.

<sup>173</sup> ALPEROVITZ & DALY, *supra* note 151; *Council*, *supra* note 16; GATES & COLLINS, *supra* note 11; McCracken *supra* note 96.

Similarly, CSR addresses society's concern that businesses could have too much power over society as a result of its wealth.<sup>174</sup> Accordingly, through CSR society encourages businesses to balance profit-making actions with their impact society.<sup>175</sup> CSR does this by expecting socially responsible businesses to only take those profit-making actions that improve society, or at least cause no harm, and not just create wealth for a limited group.<sup>176</sup>

Again, this shows another similarity between estate tax/tax repeal and CSR. The only difference is that one addresses the potential harm to society when individuals have too much wealth and power, and the other addresses that concern when businesses have too much wealth and power. Yet, the outcome of the repeal is to allow a wealth-creation opportunity that benefits a limited few, while CSR expects socially responsible businesses to avoid taking profit-making actions that only create wealth for a limited few. Therefore, it seems the outcome of society's support of tax repeal is at odds with its CSR rhetoric.

Conclusion/Fairness/Desired Society. This third issue involved arguments for and against tax repeal that created many uncertainties. However, the arguments seemed to make certain that tax repeal creates a society that: (a) taxes the middle and lower classes, (b) facilitates inequalities of wealth and power favoring the wealthiest two percent of society (c) requires 98% of society to rely on the voluntary actions of a wealthy few to generate revenue, support charity, and improve the lives of everyone; and (e) rewards birth-right instead of merit. In conclusion, tax repeal creates a society that maximizes the wealth of a limited few in hopes that doing so will improve society overall.

Relative to the issue at hand, that outcome of tax repeal indicates that society has different expectations of social responsibility for individuals and businesses. In this respect, the repeal shifts the tax burden from the rich to the middle class and poor--thus, it benefits a few wealthy individuals by simply moving money around. To the contrary, society objected when corporations tried to benefit by simply moving money around.<sup>177</sup> Tax repeal also rewards individuals based on birth-right, instead of merit, and it widens the economic gap. To the contrary, society objected to excessive CEO pay for those very reasons.<sup>178</sup> On their face, these contradictions indicate that society has a different standard of social responsibility for individuals and businesses.

### **Values/Protect the Family Farm**<sup>179</sup>

The final issue we evaluate is the tax repeal's affect on family businesses. Relative to this issue, society values family farms and seeks to protect them.<sup>180</sup> Some argued that tax repeal was necessary because the tax forced families to sell their farms to pay estate taxes when the owner

<sup>174</sup> Ferrell et al., *supra* note 137; Matten & Crane, *supra* note 29.

<sup>175</sup> Ferrell et al., *supra* note 137; Schwartz & Carroll, *supra* note 25.

<sup>176</sup> See *supra* note 46 and accompanying text.

<sup>177</sup> The Rich Under Attack, *supra* note 74.

<sup>178</sup> Anderson et al., *supra* note 78.

<sup>179</sup> Burman et al., *supra* note 81 (raising estate tax threshold to protect family farms and businesses is an alternative to estate tax repeal); Crawford, *supra* note 153.

<sup>180</sup> Burman et al., *supra* note 81; CBO, *supra* note 125; Committee, *supra* note 123; GATES & COLLINS, *supra* note 11.

died.<sup>181</sup> This argument was met with two counterarguments by those who wanted to retain the tax. First, they said the research did not show any family farms were lost because of estate tax; in fact, it showed that only a few family farms owned any tax.<sup>182</sup> Second, they said that family farms could minimize the risk of a forced sale by using favorable tax laws to reduce and pay any estate tax due at low interest rates over time.<sup>183</sup>

Ultimately, tax repeal made certain that no family farms will pay estate tax. Unlike the law it replaces, tax repeal also made it certain that no businesses will pay estate tax, whether they are worth millions, billions, or more.<sup>184</sup> Some said that allowing all businesses to pass free of estate taxes would benefit society because those businesses would not be interrupted to pay estate taxes at the owner's death. Others thought the repeal's harm to society by allowing family businesses to become economic dynasties outweighed those potential benefits.<sup>185</sup>

Relative to family businesses, the repeal allows family business to become economic dynasties and hopes that they provide economic benefits to society.

### Summary of the Repeal's Potential Impact on CSR

Again, our purpose is to see if the repeal reflects society's CSR rhetoric, not to otherwise make any value judgment about it or the tax.<sup>186</sup>

Accordingly, and in summary, the estate tax provides a wealth-creation opportunity for the wealthiest two percent of society. The question is whether this opportunity improved society, or at least did not harm society, or if it only created wealth for a limited few.

Briefly, to summarize the foregoing: Individuals supporting tax repeal called the estate tax regime unfair, inefficient, and unproductive. They justified the economic inequalities initially caused by tax repeal saying that ultimately those inequalities might provide everyone with compensating benefits.

On the other hand, those who wanted to retain the tax said the tax effectively curtailed transfers of family wealth at death and, therefore, limited individual power over society. They also said the tax generated billions in revenue to the government and charities, and reflected society's value of progressive taxation. They thought tax repeal unfairly created economic inequities in society, shifted the tax burden to the lower and middle class, and increased society's risk of economic and social harm.

The repeal's certain impacts on society include to shift the tax burden from the wealthiest two percent of society to the lower and middle class and initially create economic inequalities favoring only the wealthiest two percent of society. This creates a regressive tax system and allows a wealthy few to benefit by simply shifting money around.

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<sup>181</sup> *Committee, supra* note 123; *Council, supra* note 16; Edwards, *supra* note 94.

<sup>182</sup> *CBO, supra* note 125; *Committee, supra* note 123; *Council, supra* note 16; GATES & COLLINS, *supra* note 11; GRAETZ & SHAPIRO, *supra* note 95.

<sup>183</sup> *CBO, supra* note 125; *Committee, supra* note 123; *Council, supra* note 16; GATES & COLLINS, *supra* note 11; GRAETZ & SHAPIRO, *supra* note 95

<sup>184</sup> GATES & COLLINS, *supra* note 11.

<sup>185</sup> GATES & COLLINS, *supra* note 11; Verschoor, *supra* note 147.

<sup>186</sup> *See, Crawford, supra* note 154 (discussing the ethics of estate tax repeal); *See also, GRAETZ & SHAPIRO, supra* note 94; *See also, Verschoor, supra* note 147.

The repeal also eliminates billions in government and charitable revenue. However, if those few who benefit from the repeal invest their estate tax savings in capital and give more to society than they gave under the estate tax regime, the repeal's economic inequalities may make charities, the government, and society better-off if than they were under the estate tax regime. While this would improve society, nothing in the repeal creates a reasonable expectation that the wealthy few will act in this manner to benefit society.

Tax repeal eliminates a tax on wealth owned at death; therefore, it allows wealthy families to pass more wealth among generations. In turn, this allows families to concentrate wealth and avail themselves to having political, social, and economic power over society. These individuals are not accountable to the majority, which democracy requires. The repeal also rewards birth-right and facilitates aristocracies.

If the repeal's initial inequalities motivate the wealthy few who benefit to use their wealth and power to improve society, then everyone may be better off than they were under the estate tax regime. However, since society's benefits depend on uncontrollable assumptions about human behavior and investment performance, society bears the risk of harm if these assumptions are incorrect. Thus, the repeal seems to benefit a wealthy few, and place the risk of harm to society.

Arguments that the wealthy few will arrange their finances to improve the lives of everyone have what Windsor calls a "vener of respectability."<sup>187</sup> In this respect, when referring to similar arguments made by businesses, Windsor said that the modern approach to creating wealth is not like the "unrestrained greed that preceded the Progressive Era," but, it is thought to be "...the best path to social welfare improvement."<sup>188</sup> However, he cautions that this might just be "wealth seeking wrapped within responsibility rhetoric..."<sup>189</sup> Since tax repeal also suggests maximizing wealth of a limited few is a path to social improvement, it seems Windsor's caution applies to tax repeal.

Ultimately business and society's interests are to merge, and CSR is to address the differences during the short-term gap.<sup>190</sup> As we initially said in this paper, some believe that business is filling this gap with a wealth-creation focus.<sup>191</sup> Similarly, the repeal's outcome indicates that society is also filling that gap with that same focus. Additionally, even if the limited few want to help society, it may take time for them to do so, but the repeal immediately reduces revenue. This raises the question of whether the repeal's short-term impact on society might be so harmful that the long-term result will not matter.<sup>192</sup>

Earlier we discussed Milton Friedman's belief that maximizing wealth for a limited few was the best way to improve society. Society rejected that view in favor of CSR. Yet society supported a tax repeal that maximizes the wealth of a limited few individuals in hopes it will improve society. On its face, the repeal's outcome indicates that society's action is at odds with its CSR rhetoric, or, that contrary to current beliefs, society has different standards of social responsibility for individuals and businesses. While one action is not a trend, it might reflect an emerging societal value. However, this outcome might cause us to consider how this action

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<sup>187</sup> Windsor, *supra* note 38, at 226.

<sup>188</sup> *Id.*, at 226.

<sup>189</sup> *Id.*, at 226.

<sup>190</sup> BOWEN, *supra* note 35; Windsor, *supra* note 38.

<sup>191</sup> Windsor, *supra* note 38.

<sup>192</sup> Windsor, *supra* note 38 (*citing* cf Keyes, 1936).

might affect observant businesses who perceive this as indicating a shift in society's values from CSR to wealth-creation as a means to improve society.<sup>193</sup>

### Impact of Society's Motives on the Repeal's Outcome

The repeal's outcome influences CSR if it reflects society's values, a result indicated by society's overwhelming support of the repeal. While the outcomes would reflect the values of those making the arguments, and those who relied on the arguments to support tax repeal, it may not reflect the motives of everyone who supported tax repeal. In fact, most agree that the society's motives are unclear, and they suggest motives indicating that not everyone who supported tax repeal intended the repeal's outcome.<sup>194</sup>

In this respect, some support is attributed to a variety of reasons including successful campaigns of powerful groups opposed to progressive taxes,<sup>195</sup> misunderstanding how the tax worked,<sup>196</sup> and the American dream of future wealth.<sup>197</sup>

Motives are relevant, and there are suggestions that some were motivated to support tax repeal because of self-interest in reducing their own taxes.<sup>198</sup> This research shows that some individuals who supported tax repeal recognized the country's growing economic inequality and thought it was bad, thought the rich should pay higher taxes, and thought the government should spend more on social programs.<sup>199</sup> This research suggested that many failed to recognize how the repeal would impact public policy or their own economic well-being, that their taxes might increase, or the middle class and poor would subsidize the rich.<sup>200</sup> These suggestions are similar to those of earlier research showing that the public has limited interest in tax questions and wealth distribution and that individuals vote on tax issues based on how those affect them personally, not on how those affect the rich or economic inequality.<sup>201</sup>

Collectively, the suggested motives support those who say not to take the repeal's results at face value.<sup>202</sup> Contrary to the repeal's outcome, these motives also cast doubt on the perception that society is shifting its values from CSR to wealth creation.

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<sup>193</sup> DeVinney, *supra* note 5.

<sup>194</sup> Bartels, *supra* note 15; Bartels, *supra* note 94.

<sup>195</sup> GATES & COLLINS, *supra* note 11, at 4; GRAETZ & SHAPIRO, *supra* note 94, at 5.

<sup>196</sup> Bartels, *supra* note 94, at 411; GATES & COLLINS, *supra* note 11; GRAETZ & SHAPIRO, *supra* note 94.

<sup>197</sup> Bartels, *supra* note 94.

<sup>198</sup> AM. NAT'L ELECTION STUDIES (NES) SURVEY, 2002, (CITED BY BARTELS, *SUPRA* NOTE 15, AT 23).

<sup>199</sup> Bartels, *supra* note 94.

<sup>200</sup> Bartels, *supra* note 94.

<sup>201</sup> WALTER J. BLUM & HARRY KALVEN, JR., *THE UNEASY CASE FOR PROGRESSIVE TAXATION* (1953).

<sup>202</sup> Bartels, *supra* note 94, at 19 ("If there is any coherent public demand for tax burden-shifting evident in these responses, it is for an upward shift from the poor and middle class to the rich rather than the reverse.")

## DISCUSSION AND IMPLICATIONS FOR CSR FUTURE RESEARCH

### Progressive CSR

Society's overwhelming support of tax repeal raises the question of whether society may support one standard of social responsibility for individuals and another for businesses.<sup>203</sup>

Currently, we currently assume equal social responsibilities for individuals and business.<sup>204</sup> This and the belief that CSR reflects society's values would cause us to assume that society would act according to its CSR rhetoric. The outcome of the repeal raises the question, as some suggest, whether society might adopt a progressive form of CSR that requires businesses, because of their sheer size and power, to assume greater social responsibilities than individuals.<sup>205</sup> Windsor thought society might embrace progressive CSR because it already embraced progressive income and estate taxation.<sup>206</sup> While the repeal eliminates society's most progressive tax,<sup>207</sup> research shows that contrary to that outcome, society supports higher taxes on the rich.<sup>208</sup> Interestingly, those arguments made by individuals supporting tax repeal reflect a higher standard a higher standard of social responsibility for the most affluent members of society. In this respect, they argued that the wealthiest two percent of society who benefit from the repeal would arrange their wealth to generate taxable income, donate to charity, and make everyone in society better-off than they were under the estate tax regime, i.e. those having more would do more.<sup>209</sup> Since the sheer size and power of businesses gives them an opportunity to earn more wealth than individuals, it seems that progressive CSR would require businesses to assume a higher standard of social responsibility than individuals. It is time to review this issue because if society is not willing to pay taxes or voluntarily contribute to solve social problems, the government will lack the revenue to do its job, which leaves businesses to assume this responsibility.<sup>210</sup>

### How Does Business Influence Society?

The repeal also challenges us to reconsider if business values continue to reflect and emerge from society's values. Scholars earlier suggested this when stating that the concern about deteriorating American business ethics was because business ethics were becoming society's ethics.<sup>211</sup> Similarly, others have asked if the past decades of glorifying wealth created from corporate profits and CEO's who got rich by placing profit over CSR were influencing society to

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<sup>203</sup> Windsor, *supra* note 38; Matten & Crane, *supra* note 29.

<sup>204</sup> Windsor, *supra* note 38; Matten & Crane, *supra* note 29; *See also* Carroll, *supra* note 19, 1 (“Just as private citizens are expected to fulfill these responsibilities, companies are as well.”)

<sup>205</sup> Matten & Crane, *supra* note 29.

<sup>206</sup> Windsor, *supra* note 38, at 242.

<sup>207</sup> McCaffery, *supra* note 120.

<sup>208</sup> Bartels, *supra* note 95.

<sup>209</sup> GATES & COLLINS, *supra* note 11; *See* McCracken, *supra* note 96.

<sup>210</sup> *See* Avi-Yonah, *supra* note 25.

<sup>211</sup> Freeman & Liedtka, *supra* note 5, at 95.

want those results.<sup>212</sup> Society's support of a repeal that maximizes individual wealth heightens this concern. That and the economic climate's toll on individual wealth makes this research timely.<sup>213</sup> Such research should also consider if business should raise its moral floor and assume more leadership for CSR.<sup>214</sup>

## CONCLUSION

Scholars have suggested that we watch society's actions to see if society is shifting its focus from CSR to wealth-creation. Accordingly, we reviewed society's action in supporting the estate tax repeal in 2001. This decision was relevant because it engaged society in the opportunity to balance individual wealth-creation (profit) with its impact on society. This decision lent itself nicely to a review of whether society's action matched its CSR rhetoric because it required individuals to balance the same considerations that business balances when making CSR decisions.

Society's rhetoric and actions influence CSR. If business sees a gap between society's rhetoric and actions, business might follow society's actions under the guiding principle that actions speak louder than words. The arguments given to support tax repeal reflect that maximizing the wealth of a limited few was the best way to improve society. The repeal's outcome maximizes wealth-creation opportunities for a limited few and gives them an opportunity to voluntarily arrange their wealth to improve society. However, the motives suggested for society's support caution us that tax repeal might not indicate society has shifted its values from CSR to wealth-creation as a means to improve society. Instead, those motives suggest that at least some of those who supported tax repeal continue to support CSR. However, this action and other actions discussed in the paper may indicate that at least some members of society might embrace a higher CSR standard for business and they might suggest that business ethics have a greater influence on society's ethics than many currently believe.

If the wealthy few who benefit from the tax repeal voluntarily use their wealth to improve society, they may impact CSR's future. Unfortunately, we will not know that for some time since the repeal's benefit for wealthy families only arises if a family death occurs in 2010, the year the tax is fully repealed.

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<sup>212</sup> GEORGE A. AKERLOF & ROBERT J. SHILLER, *ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM* (Princeton Univ.Press, 2009); GATES & COLLINS, *supra* note 11; HUTTON, *supra* note 116, at 24.

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<sup>214</sup> Freeman & Liedtka, *supra* note 5.

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