UNCLE SAM KILLED GRANDMA: HOW THE ESTATE TAX CAN HELP ALLEVIATE MEDICARE UNCERTAINTY

Alexander G. Karl

In the United States, Medicare is the single largest purchaser of medical services. This government program is primarily used by the elderly population. The future of Medicare is murky as there are many obstacles hindering its funding. It is more important than ever to ensure funding for this governmental program. The funding for Medicare has been reduced, even though the aging baby boomer generation has caused an exponential growth in enrollment.

Wealthy individuals who are in similar health conditions as those who are Medicare beneficiaries are subject to the Estate Tax. This tax is calculated based on the estate's value before it is passed to its heirs. As more baby boomers age, there will be more deaths and more estates that are taxable. Reformation of the Estate Tax will generate more revenue and, due to its relationship with Medicare, can justifiably be used to fund Medicare.

This Note surveys the history and functionality of Medicare and the Estate Tax. This Note also analyzes the impacts of budget cuts. It suggests a congressional policy change that would allow the collected Estate Tax revenue to fund Medicare. To do so, the Estate Tax must be reformed in two steps: (1) lower the exclusion amount while raising the maximum tax rate; and (2) limit the Grantor Retained Annuity Trusts to prevent large transfers of untaxed wealth.

Alexander Karl is the Administrative Editor 2017–2018, Member 2016–2017, *The Elder Law Journal*; J.D. 2018, University of Illinois, Urbana-Champaign; B.A. in Economics and Political Science 2015, University of Illinois, Urbana-Champaign.

I. Introduction

Grandmas and grandpas nationwide rejoice upon their sixty-fifth birthday as if they hit the winning number in Bingo. This joyous moment qualifies them for Medicare,[1] and while pessimists view qualification as being one step closer to "meeting their maker," optimists reflect on their new reductions in health care costs.[2] Even though these pessimists are worried about death, at least they will be comfortable getting there—or so they thought. The future of Medicare is uncertain. Declines in federal spending, potential trust insolvency, increasing Medicare beneficiaries, and political uncertainty all leave the future of Medicare murky.[3] Yet, while the glass may currently be half empty for Medicare, there are more reliable and fair methods to ensure funding. One such method is the Estate Tax—a tax which affects wealthy individuals likely in similar health conditions as Medicare beneficiaries.[4]

Few issues resonate with American citizens and ruffle feathers more than tax reform. Taxes have always been an integral part of American society. Benjamin Franklin once quipped, "[I]n this world nothing can be said to be certain, except death and taxes."[5] Franklin's quote leads one to question whether the only way to avoid taxes is by realizing the other inevitable—death. But, sometimes even the Grim Reaper himself may not be able to keep Uncle Sam from entering your pocketbook. Created in its modern form in 1916,[6] the Estate Tax is imposed on the estate of every non-exempt decedent who is a citizen

1. WHAT'S MEDICARE?, https://www.medicare.gov/sign-up-change-plans/decide-how-to-get-medicare/whats-medicare/what-is-medicare.html (last visited Mar. 17, 2017) [hereinafter WHAT'S MEDICARE?].
2. *See generally id.*
3. Phillip Moeller, *Under a President Trump, Medicare Reforms are a Matter of When, Not if,* PBS (Nov. 23, 2016), http://www.pbs.org/newshour/making-sense/column-president-trump-medicare-reforms-matter-not/ ("His (Trump's) victory has put our entire health care system in play, if not up for grabs.").
4. *Medicare Enrollment Charts*, CHRONIC CONDITIONS DATA WAREHOUSE (Apr. 25, 2016), https://www.ccwdata.org/web/guest/medicare-charts/medicare-enrollment-charts#a1_age_2014 [hereinafter *Medicare Enrollment Charts*]; Sherry L. Murphy et. al., *Mortality in the United States, 2014*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Dec. 2015), https://www.cdc.gov/nchs/data/databriefs/db229.pdf [hereinafter Murphy].
5. BENJAMIN FRANKLIN, THE WORKS OF BENJAMIN FRANKLIN 161 (John Bigelow, ed., Federal ed. 1904).
6. Darien B. Jacobson et. al., *The Estate Tax: Ninety Years and Counting*, IRS, https://www.irs.gov/pub/irs-soi/ninetyestate.pdf [hereinafter *The Estate Tax: Ninety Years and Counting*].

or resident of the United States.[7] While some may see this as another money-grubbing attempt by the government, the Estate Tax should be reformed and its revenue applied directly to Medicare. This will help alleviate Medicare's financial uncertainty and maintain current levels of elderly care.

This Note will outline Medicare's uncertain future and the Estate Tax policy. Ultimately, it will identify the Estate Tax as being uniquely situated with Medicare, such that revenue generated from the tax should be applied directly to Medicare funding. Part II delves into the inner-workings of Medicare and the Estate Tax, and examines the history of both. Part III provides an extensive analysis of the impacts of budget cuts. Finally, Part IV provides recommendations for congressional policy change—including allocating the Estate Tax revenue to Medicare funding and possible Estate Tax expansion. Part V concludes.

II. Background

The following section will provide background information on both Medicare and the Estate Tax to show their unique relationship pertaining to the elderly. In turn, this will help set the narrative, describing the impact Medicare uncertainty has on the elderly and emphasizing the need for increased funding.

A. History of Medicare

Medicare is a federal health insurance program for citizens age sixty-five and older.[8] Despite the age limit, there are some circumstances where Medicare may apply to younger individuals, such as those with disabilities and those with permanent kidney failure.[9] Medicare is split up into four parts, each targeting a different area of healthcare. These parts and their background will be discussed in sequence below.

As the single largest purchaser of medical services in the United States, Medicare affects nearly every American in some form;

7. 26 U.S.C. § 2001 (2018).
8. WHAT'S MEDICARE?, *supra* note 1 (highlighting the basics of the Medicare program including the different parts).
9. *Id.* (stating permanent kidney failure is End-Stage Renal Disease which requires dialysis or a transplant).

beginning with the original Parts A and B.[10] The idea of Medicare was first discussed, but ultimately scrapped, in the beginning of the 1900's and did not return to discussion until the New Deal.[11] Once again, however, widespread criticism arose when the 1935 Social Security Bill contained a single line authorizing the study of health insurance.[12] In order to protect the enactment of Social Security, President Roosevelt removed the health insurance line.[13] As time passed, by 1962, 47% of elderly families had incomes below the poverty line, thus highlighting the need for change.[14] In 1964, the Democrats, led by President Lyndon Johnson, gained control over Congress and eventually enacted Medicare in 1965.[15] Section 226 of the bill laid out the main sentiment—every individual who satisfies certain requirements and is age sixty-five "shall be entitled to hospital insurance benefits."[16] Congress also included Part B, a voluntary coverage for non-hospital-related medical services, such as routine check-ups.[17]

In its current form, Part A is categorized as: (1) hospital insurance covering hospital stays, (2) medical care in a skilled nursing facility for up to 100 days following a three-day hospital stay, (3) blood for transfusions, (4) hospice care, (5) religious nonmedical health care institutions, and (6) some home health cares.[18] There are two ways to qualify for Part A, either pay a monthly premium,[19] or, like the vast majority of beneficiaries, qualify for premium-free Part A.[20] To qualify for premium-free Part A, one must either receive or be eligible to receive retirement benefits from Social Security, the Railroad

10. Jonathan Oberlander, *The Political History of Medicare*, 39 J. OF THE AM. SOC'Y ON AGING 119, 119 (2015) [hereinafter Oberlander].
11. *Id.*
12. Social Security Act of 1935, ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. ch. 7 (2018)); Oberlander, *supra* note 10, at 119.
13. Oberlander, *supra* note 10, at 119.
14. *Id.* at 120.
15. *See generally* Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965); Oberlander, *supra* note 10, at 121.
16. Social Security Amendments § 226, 79 Stat. at 290.
17. Social Security Amendments § 1831, 79 Stat. at 301–02.
18. WHAT'S MEDICARE?, *supra* note 1; *The Basics: Medicare*, NATIONAL HEALTH POLICY FORUM (Jan. 4, 2016), https://www.nhpf.org/library/the-basics/Basics_Medicare_01-04-16.pdf [hereinafter *The Basics: Medicare*].
19. *Part A Costs*, MEDICARE.GOV, https://www.medicare.gov/your-medicare-costs/part-a-costs/part-a-costs.html (last visited Mar. 17, 2017) (stating premiums for buying Part A are $411 each month in 2016 and $413 each month in 2017).
20. *Id.*

Retirement Board, or have had Medicare-covered government employment.[21]

Differing from Part A, Part B is medical insurance covering doctors' services, outpatient care, medical supplies and other preventive services.[22] More specifically, the plan covers beneficiaries for clinical laboratory and diagnostic services; physical, occupational, and speech therapy; annual wellness exams; screening tests such as mammograms; and more.[23] Another difference is most people will have to pay for Part B through monthly premiums based on their income level.[24]

The two original parts of Medicare were designed to be funded in slightly different ways. Section 1817 of the Social Security Amendments of 1965 created a Federal Hospital Insurance Trust Fund for Part A hospital visits.[25] The fund is supplied from revenue generated through an extra payroll tax of 2.9% which is split into two, with employees and employers each paying half.[26] Additionally, "high-income" taxpayers will pay an additional payroll tax of 0.9% of their wages.[27] Health care providers are then paid an amount from the fund determined by the Secretary.[28] Contrary to Part A, Part B is funded primarily by premiums.[29] Pursuant to section 1831, the program is "to be financed from premium payments by enrollees together with

21. *Id.*
22. WHAT'S MEDICARE?, *supra* note 1.
23. *The Basics: Medicare*, *supra* note 18, at 2.
24. *Part B Costs*, MEDICARE.GOV, https://www.medicare.gov/your-medicare-costs/part-b-costs/part-b-costs.html (last visited Mar. 17, 2017) (highlighting the lowest premium in 2016 was $121.80 per month for those making $85,000 or less versus the highest premium being $389.80 per month for those making above $214,000) [hereinafter *Part B Costs*].
25. *See* Social Security Amendments § 1817, 79 Stat. 286 at 299–301.
26. 26 U.S.C. § 3101(b) (2018); 26 U.S.C. § 3111(b) (2018); Social Security Amendments § 1817 at 299 (stating 1.45% of the tax will be paid by employers and another 1.45% by employees).
27. 26 U.S.C. § 3101(b) (2018) (stating joint returns over $250,000, married individual returns over $125,000, and any other individual returns over $200,000 are subject to the extra 0.9% payroll tax).
28. Social Security Amendments § 110, 79 Stat. at 340 (stating "Secretary" means the Secretary of Health, Education, and Welfare); Social Security Amendments § 1815, 79 Stat. at 297 ("The Secretary shall periodically determine the amount which should be paid under this part to each provider of services with respect to the services furnished by it.").
29. Juliette Cubanski & Tricia Neuman, *The Facts on Medicare Spending and Financing*, KAISER FAM. FOUND. (July 18, 2017), http://kff.org/medicare/issue-brief/the-facts-on-medicare-spending-and-financing/ [hereinafter *The Facts on Medicare Spending and Financing*].

contributions from funds appropriated by the Federal Government."[30] The Trust Fund covers 80% of the services provided to the beneficiary and the rest is paid through monthly premiums.[31]

While Part A and B are relatively similar in how they work, Part C, otherwise known as Medicare Advantage Plans, differs greatly. Introduced in 1997,[32] and modified to its current form in 2003,[33] Part C allows the beneficiary to obtain a Medicare healthcare plan through a private company and receive the same coverage as Part A and Part B.[34] The cost of a Medicare Advantage Plan relies on a variety of factors—some examples of which are whether the plan charges a monthly premium, whether the plan pays any of the monthly Part B premium, and whether the plan has any deductibles.[35]

Finally, enacted in 2003,[36] and placed into effect in 2006,[37] Medicare Part D covers prescription drugs by adding coverage to original approved Medicare plans offered by private companies.[38] There are varying payments which must be made throughout the year for a Medicare drug plan including, premiums, yearly deductibles, copayments, and more.[39] Additionally, these payments will vary by beneficiary depending on a variety of factors, such as the drugs received and plans used.[40]

While it is important to note what Medicare covers for its beneficiaries under each plan, it is also vital to know what is not covered. Currently, long-term custodial care, hearing aids, routine eye care, eyeglasses, dentures, dental care, acupuncture, routine foot care,

30. Social Security Amendments § 1831, 79 Stat. at 301.
31. Social Security Amendments § 1833, 79 Stat. at 302.
32. Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997) (creating Medicare+Choice programs allowing individuals to receive healthcare through private health insurance plans).
33. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (2003) (modifying the Medicare+Choice program into the Medicare Advantage program).
34. WHAT'S MEDICARE?, *supra* note 1.
35. *Costs for Medicare Advantage Plans*, MEDICARE.GOV, https://www.medicare.gov/your-medicare-costs/medicare-health-plan-costs/costs-for-medicare-advantage-plans.html (last visited Mar. 17, 2017).
36. *CMS' Program History*, CMS.GOV, https://www.cms.gov/About-CMS/Agency-Information/History/index.html?redirect=/history/ (last visited Mar. 17, 2017) (highlighting that although Medicare Part D was enacted in 2003, it did not take effect until 2006).
37. *Id.*
38. WHAT'S MEDICARE?, *supra* note 1.
39. *Costs for Medicare Drug Coverage*, MEDICARE.GOV, https://www.medicare.gov/part-d/costs/part-d-costs.html (last visited Mar. 17, 2016).
40. *Id.*

and cosmetic surgery are excluded from coverage.[41] It is essential for beneficiaries to know their coverage as abrupt changes to a given plan could have drastic impacts.

Overall, there is a Medicare plan that suits every person age sixty-five and older.[42] As the baby-boomer generation ages—or as some would say gets over the hill—there is going to be a larger need for Medicare.

B. History of the Estate Tax

The Internal Revenue Service (IRS) describes the Estate Tax as a "tax on your right to transfer property at your death."[43] Imposing an excise tax on the privilege of transferring property at death is nothing new to human civilization. In fact, estate taxes can be dated back to ancient Egypt and Rome.[44] Enacted in its current form in 1916, the federal Estate Tax was imposed to raise revenue during wartime and to prevent the concentration of wealth.[45] Aimed at the wealthy, from 1916 to 2004, less than 2% of deaths triggered the Estate Tax.[46] The reason behind this low number is certain estates will not have to be calculated if their value is clearly not above the qualified exclusion rate.[47] The exclusion rate is the amount of money the government allows estates to transfer tax-free.[48] Any amount beyond this is subject to taxation.[49] It is well-founded that the government has broad taxation power,[50] and, in the following decades after enactment, the Estate Tax underwent two major changes.[51]

41. *What Part A & Part B Doesn't Cover*, MEDICARE.GOV, https://www.medicare.gov/what-medicare-covers/not-covered/item-and-services-not-covered-by-part-a-and-b.html (last visited Mar. 17, 2017); *The Basics: Medicare*, *supra* note 18.

42. *See* WHAT'S MEDICARE?, *supra* note 1.

43. 26 U.S.C. § 2031 (2018); *Estate Tax*, IRS (Oct. 28, 2016), https://www.irs.gov/businesses/small-businesses-self-employed/estate-tax [hereinafter *Estate Tax*, IRS].

44. *The Estate Tax: Ninety Years and Counting*, *supra* note 6, at 118.

45. Act of September 8, 1916, Pub. L. No. 64-271, 39 Stat. 756; *See The Estate Tax: Ninety Years and Counting*, *supra* note 6, at 118.

46. *The Estate Tax: Ninety Years and Counting*, *supra* note 6, at 126.

47. *See Estate Tax*, IRS, *supra* note 43.

48. *See What's New—Estate and Gift Tax*, IRS, (Aug. 27, 2017), https://www.irs.gov/businesses/small-businesses-self-employed/whats-new-estate-and-gift-tax [hereinafter *What's New—Estate and Gift Tax*].

49. *Id.*

50. *See* U.S. CONST. art. I, § 8, cl. 1.

51. *See The Estate Tax: Ninety Years and Counting*, *supra* note 6.

The first major change occurred in 1932 when Congress permanently imposed a tax on *inter vivos* gifts.[52] Congress sought to keep wealthy individuals from transferring gifts during their lifetime in order to avoid the Estate Tax.[53] When finalized in 1932, a donor could transfer up to $50,000 tax-free for their lifetime, which was split to allow up to a $5,000 exclusion in any given year.[54] Just like the Estate Tax, the Gift Tax remains a large part of our current tax code.[55]

The second change to the Estate Tax attempted to fill the tax's loopholes. Introduced in 1976,[56] and finalized in 1986,[57] Congress imposed a tax on Generation-Skipping Trusts (GSTs).[58] GSTs—just as their name suggests—allow for the estate to skip a generation of taxes if the initial taxpayer forms a trust following their death with the beneficiaries being their grandchildren.[59] In these instances, the original decedent's children do not pay taxes even though they derive a benefit from the income received.[60] The new tax sought to close these loopholes by taxing all GSTs regardless of their form.[61] The rates imposed align with estate tax rates, thus attempting to de-incentivize these transfers.[62] While GSTs were addressed, other loopholes still remain such as the use of Grantor Retained Annuity Trusts (GRAT). With a GRAT, "the grantor transfers property and retains the right to receive an annual payment for a fixed term . . . [a]t the end of the fixed period, the assets remaining in the trust will pass either outright to, or continue in trust for, the beneficiaries named in the trust."[63] One of the only constraints to the trust occurs if the grantor dies during the GRAT term. In these situations, the trust property will be taxable to the

52. Revenue Act of 1932, Pub. L. No. 72-154, 47 Stat. 169; *The Estate Tax: Ninety Years and Counting*, *supra* note 6, at 121–22.
53. *The Estate Tax: Ninety Years and Counting*, *supra* note 6, at 122.
54. *Id.*
55. 26 U.S.C. § 2501 (2018).
56. *See The Estate Tax: Ninety Years and Counting*, *supra* note 6.
57. *Id.*
58. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085; *The Estate Tax: Ninety Years and Counting*, *supra* note 6.
59. *What Is a "Generation-Skipping Trust", and Why Should I Use One for a Portion of My Child's Inheritance?*, MCDONALD & KANYUK PLLC (Jan. 2014), http://www.mckan.com/assets/uploads/pdf/What_is_GST_Trust_2014.pdf [hereinafter *What is a "Generation-Skipping Trust"*].
60. *The Estate Tax: Ninety Years and Counting*, *supra* note 6, at 123.
61. *What is a "Generation-Skipping Trust"*, *supra* note 59, at 1.
62. *See id.*
63. Barbara Freedman Wand, *Transferring Wealth with the Grantor Retained Annuity Trust: GRATifying Results at a Low Cost*, 2 MARQ. ELDER'S ADVISOR 62, 62-63 (2000) [hereinafter Wand].

grantor's estate.[64] Because of this, it is especially appealing to young, wealthy individuals.[65] Thus, through GRATs, wealthy individuals utilize their wealth through annuity payments, while also likely avoiding Estate Taxes upon death.[66] Up until the 1990's, the Estate Tax and its provisions had faced relatively little opposition, however, American support began to dwindle.[67]

The 1990's brought about many anti-tax advocates who lobbied against taxes, and cleverly referred to the Estate Tax as the "death tax."[68] These advocates gathered a large backing of individuals who supported the tax's repeal even though the vast majority of Americans were not subject to it.[69] Although the tax wasn't initially repealed, President Bush signed legislation in 2001 to increase exclusion amounts and reduce rates through 2009 before being completely repealed in 2010 for one year.[70] At the end of 2010, the legislation was "sunseted" out, causing the Estate Tax exclusion and rates of 2001 to be reinstated.[71] After the tax's reinstatement, the exclusion amount continuously rose, and the marginal tax rate increased.[72]

The exclusion rate for single tax-return filers has been increasing steadily over the last five years from $1,500,000 in 2011, to $5,450,000 in 2016.[73] Therefore, for example, if in 2016 a decedent had a taxable estate of $6,450,000, they would owe taxes upon the $1,000,000

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64. *Id.* at 64.
65. *See id.*
66. *See id.*
67. *See The Estate Tax: Ninety Years and Counting*, *supra* note 6.
68. MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 13–14 (2011).
69. *See* Andrew Chamberlain, *Poll Questions on the Estate Tax*, TAX FOUND. (June 5, 2006), http://taxfoundation.org/blog/poll-questions-estate-tax (showing in 2006 68% of respondents favored repeal of the Estate Tax, and it was rated by Americans as the 'least fair' tax); *see also National Survey of Americans' Views on Taxes*, NPR (Apr. 2003), http://www.npr.org/news/specials/polls/taxes2003/20030415_taxes_survey.pdf (showing 57% of respondents favored repeal of Estate Tax).
70. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38.
71. Paul L. Caron & James R. Repetti, *The Estate Tax Non-Gap: Why Repeal a "Voluntary" Tax?*, 20 STAN. L. & POL'Y REV. 153, 156 (2009); *see Spending Millions to Save Billions: The Campaign of the Super Wealthy to Kill the Estate Tax*, PUB. CITIZEN'S CONGRESS WATCH & UNITED FOR A FAIR ECON. (Apr. 2006), https://www.citizen.org/documents/EstateTaxFinal.pdf.
72. *What's New—Estate and Gift Tax*, *supra* note 48; *Estate Tax*, IRS, *supra* note 43.
73. *Id.* (providing the exclusion rate for single filing taxpayers highlights the exclusion rate for joint filers is doubled).

excess of the exclusion, at a rate of 40%.[74] In addition to the exclusion rate, the Estate Tax is weakened even further as no Estate Tax is owed on assets passing to a decedent's surviving spouse.[75] Thus, the super wealthy are able to transfer any amounts of assets—untaxed—as long as it is bequeathed to a surviving spouse.[76]

The first step in calculating the decedent's estate is to identify all of their gross assets (Gross Estate).[77] The Gross Estate includes the fair market value of everything the decedent owned at the time of their death including cash, securities, real estate, insurance, trusts, annuities,[78] business interests, and other assets.[79] Once the decedent's Gross Estate is determined, the next step is to calculate what is actually taxed (Taxable Estate)[80] by applying necessary deductions.[81] There is a long list of available deductions,[82] some of which the IRS highlights as "mortgages and other debts, estate administration expenses, property that passes to surviving spouses and qualified charities" and in certain instances "[t]he value of some operating business interests or farms may be reduced for estates that qualify."[83] Finally, once the Taxable Estate has been calculated, the value of lifetime taxable gifts is added leading to a computation of tax, which may result in Estate Taxes being reduced by available credit.[84] While this is a long process full of calculations, not every estate must be calculated. Simple estates with a small amount of assets, clearly valued under the exclusion amount, need not file an Estate Tax return.[85]

C. Medicare's Uncertain Future

Previous years of federal Medicare spending show just how vast and important the program is. In 2015, Medicare benefit payments

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74. DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMIN. FISCAL YEAR 2016 REVENUE PROPOSALS (2015).
75. I.R.C. § 2056(a) (West Supp. 1989).
76. *See generally* Sheldon F. Kurtz, *Marital Deduction Estate Planning Under the Economic Recovery Tax Act of 1981: Opportunities Exist, but Watch the Pitfalls*, 34 RUTGERS L. REV. 591 (1982).
77. 26 U.S.C. § 2031 (2018); *Estate Tax*, IRS, *supra* note 43.
78. 26 U.S.C. § 2039 (2018).
79. 26 U.S.C. § 2031 (2018); *Estate Tax*, IRS, *supra* note 43.
80. 26 U.S.C. § 2051 (2018).
81. 26 U.S.C. § 2031 (2018); *Estate Tax*, IRS, *supra* note 43.
82. 26 U.S.C. § 2010 (2018).
83. 26 U.S.C. § 2031 (2018); *Estate Tax*, IRS, *supra* note 43.
84. 26 U.S.C. § 2010 (2018); 26 U.S.C. § 2031 (2018); *Estate Tax*, IRS, *supra* note 43.
85. *Estate Tax*, IRS, *supra* note 43.

totaled $632 billion,[86] with $540 billion of this amount coming from federal outlays.[87] Out of the total amount spent, roughly 23% went to hospital inpatient services, 12% to Medicare Part D prescription drugs, and 11% to physician payments.[88] Although it is important that Medicare receive adequate funding to aid its millions of beneficiaries, in recent years, growth in federal Medicare spending has been reduced.[89] In fact, "[a]verage annual growth in total Medicare spending was 4.4% between 2010 and 2015 down from 9.0% between 2000 and 2010 . . . ."[90]

This reduction has continued despite faster growth in enrollment due to the baby-boomer generation reaching Medicare eligibility age,[91] with over 80 million beneficiaries to be enrolled by 2030.[92] While the Congressional Budget Office projects the mandatory Medicare outlay to rise nearly $700 trillion over the next ten years,[93] the decline in spending growth and rise in beneficiary growth promotes uncertainty.[94] This uncertainty has created concerns regarding the solvency of Medicare trust funds.[95] Furthermore, uncertainty is perpetuated because there is no clear plan of action due to recent change of executive and congressional control.[96]

In President Barack Obama's 2016 State of the Union Address, he expressed the need to strengthen Medicare stating it is "more

86. *The Facts on Medicare Spending and Financing*, *supra* note 29.

87. *Id.* (highlighting this number is found by taking the mandatory Medicare spending and subtracting premiums and other offsetting receipts).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* ("Average annual growth in spending per beneficiary averaged just 1.4% between 2010 and 2015, down from 7.4% between 2000 and 2010.").

92. MEDICARE PAYMENT ADVISORY COMM., REPORT TO CONGRESS: THE NEXT GENERATION OF MEDICARE BENEFICIARIES (2015).

93. CONG. BUDGET OFF., MEDICARE–CONGRESSIONAL BUDGET OFF.'S JANUARY 2017 BASELINE (2017) (showing the mandatory outlay for Medicare will increase from $705 billion in 2017 to $1,402 billion in 2027).

94. *See* PATRICIA A. DAVIS, CONG. RES. SERV., MEDICARE: INSOLVENCY PROJECTIONS (2016) [hereinafter MEDICARE: INSOLVENCY PROJECTIONS]; *see also What is the Medicare Trust Fund, and How is it Financed?*, TAX POL'Y CTR., http://www.taxpolicycenter.org/briefing-book/what-medicare-trust-fund-and-how-it-financed [hereinafter *What is the Medicare Trust Fund, and How is it Financed?*].

95. *See also What is the Medicare Trust Fund, and How is it Financed?*, *supra* note 94.

96. Harris Meyer, *GOP Preview: Major Differences on Medicare*, MODERN HEALTHCARE (July 9, 2016), http://www.modernhealthcare.com/article/20160709/MAGAZINE/307099955 (stating there is different vision between House leadership and Trump) [hereinafter Meyer].

important than ever."[97] However, contrary to his speech, President Obama later unveiled his Fiscal Year (FY) 2017 budget, which included a plan to cut Medicare by $419.4 billion over the next ten years.[98] Certain agencies, such as the Center for Medicare Advocacy, have expressed concern over these cuts, and have additionally noted that some of the cost would be translated to Medicare beneficiaries.[99] The budget calls for "structural reforms" that would shift roughly $56.4 billion onto beneficiaries.[100] The ambiguities and uncertainty regarding the past administration's vision for Medicare appears to have translated into our current regime.

Current Speaker of the House, Representative Paul Ryan, has proposed to cap and cut spending on Medicare,[101] which has led some members of Congress to adamantly disagree.[102] Additionally, newly elected President Trump was critical of Speaker Ryan's alignment with Obama on the proposed cuts.[103] President Trump went on to state, "[t]he only one that's not going to cut is me."[104] But, while the two Republican's proposals are not too far off, the current political state of Medicare remains uncertain.[105]

Regardless of whether you agree or disagree with a Medicare revamp, the possibility of finding an alternative source of funding has

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97. President Barack Obama, Remarks of President Barack Obama—State of the Union Address As Delivered (Jan. 13, 2016) ("That's why Social Security and Medicare are more important than ever. We shouldn't weaken them; we should strengthen them.").

98. U.S. DEP'T OF HEALTH & HUM. SERVICES, FISCAL YEAR 2017 BUDGET IN BRIEF (2016) [hereinafter FISCAL YEAR 2017 BUDGET IN BRIEF].

99. *The President's Proposed FY 2017 Budget: The Impact on Medicare*, CTR. FOR MEDICARE ADVOC., http://www.medicareadvocacy.org/the-presidents-proposed-fy-2017-budget-the-impact-on-medicare/ (highlighting the pros and cons of the Medicare proposals).

100. FISCAL YEAR 2017 BUDGET IN BRIEF, *supra* note 98.

101. Meyer, *supra* note 96 (highlighting that Paul Ryan and other top House Republican leaders have a platform to repeal and replace the Affordable Care Act thus capping and cutting spending on Medicare).

102. *Compare* 115 CONG. REC. H475 (daily ed. Jan. 13, 1999) (statement of Rep. Ellison) ("Congressional Republicans have stated their plans to not just repeal the Affordable Care Act, but to gut Medicare, Medicaid and Social Security."), *with* 115 CONG. REC. H475 (daily ed. Jan. 13, 1999) (statement of Rep. Ellison) ("Republican proposals would threaten nursing home coverage for millions of seniors, undermine comprehensive health care for children by cutting Medicaid, and slash benefits earned after years of hard work.").

103. *See generally* Meyer, *supra* note 96.

104. *Id.*

105. *Id.*

long been discussed.[106] The proceeding paragraphs delve into the current system of Medicare funding, and identify that Estate Tax revenue may be applied directly to ensure the futures of millions of Americans.[107]

III. Examining Medicare Funding, Level of Care and Estate Tax Reform Proposals

With uncertainty surrounding Medicare, it is important to understand how it is currently funded and how these levels of funding translate to the care of the program's beneficiaries. Understanding this will allow for insight into real-world issues surrounding the uncertainty. Additionally, there are proposals to reform the Estate Tax to generate more revenue that could be applied to Medicare funding. The following subsections outline the current system of Medicare funding, expand upon the level of care this provides, and lay out various Estate Tax proposals.

A. Medicare Funding

There are three main sources of Medicare funding: general revenue, payroll taxes, and beneficiary premiums.[108] For perspective, as of 2014, total Medicare revenue was comprised of 41% general revenue, 38% payroll taxes, and 13% beneficiary premiums.[109] These sources are dispersed into two different trust funds created by the Social Security Act:[110] the Hospital Insurance (HI) trust fund (otherwise known as Medicare Part A), and the Supplemental Medical Insurance (SMI) trust fund (otherwise known as Medicare Part B and D).[111] Despite both trusts being created to fund Medicare, the money paid into the funds and their sources vary.[112]

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106. *See generally* Stephen H. Long & Timothy M. Smeeding, *Alternative Medicare Financing Sources*, 62 THE MILLBANK MEMORIAL FUND Q. HEALTH AND SOC'Y 325 (1984) [hereinafter Long & Smeeding].
107. See *supra* Section I.
108. *The Facts on Medicare Spending and Financing*, *supra* note 29, at 8.
109. *Id.*
110. *See generally* Social Security Amendments of 1965, Pub. L. No. 89-97, § 1817, 79 Stat. 286 (1965).
111. *What is the Medicare Trust Fund, and How is it Financed?*, *supra* note 95 (outlining the Medicare trust funds and how they are funded).
112. *See id.*

Section 1817 of the Social Security Act of 1965 created the HI trust fund.[113] Its subsections provide that the trust is to be funded through taxes on non-self-employment (or hereinafter referred to as regular) income,[114] and taxes upon self-employment income.[115] When analyzed closer, the tax rates paid through regular employment and self-employment are identical.[116] Through regular employment, both employees and employers are required to pay a payroll tax of 1.45% of wages.[117] Additionally, highly compensated employees pay an additional 0.9% bringing their total up to 2.35%.[118] Differing from regular employees, self-employed individuals are required to pay all the trust fund taxes themselves.[119] This means self-employed individuals pay the full 2.9% (or 3.8% for high income individuals) payroll tax.[120] These taxes make up 87% of the HI trust fund, thus it is mainly self-funded.[121] The remainder of funding is received from general revenue, premiums, transfers from states, taxation on social security benefits, and trust interest.[122] Overall, the HI trust has receipts of roughly $275 billion.[123]

Although created under the same act,[124] the SMI trust fund differs because the act does not impose a payroll tax for funding.[125] Instead, the trust is funded primarily through general revenue.[126]

113. Social Security Amendments § 1817.

114. *See* Social Security Amendments § 1817(a)(1), (stating taxes imposed by §§ 3101(b) and 3111(b) of Internal Revenue Code of 1954—which refer tax rates to be paid by individuals and employers—will be applied to the trust fund).

115. *See* Social Security Amendments § 1817(a)(2), (stating taxes imposed by § 1401 (b) of Internal Revenue Code of 1954—which refers tax rates to be paid by self-employed individuals—will be applied to the trust fund).

116. *See* 26 U.S.C. § 1401 (2018); 26 U.S.C. § 3101(b)(1) (2018) (noting both regular employees and self-employed individuals pay 2.9% in payroll taxes).

117. *See* 26 U.S.C. § 3101(b)(1) (2018).

118. *See* 26 U.S.C. § 3101(b)(2) (2018) (stating a highly-compensated employee is one who either earns over $200,000 in a taxable year, $250,000 jointly, or $125,000 if married and filing alone).

119. *See generally* 26 U.S.C. § 1401 (2018).

120. *See* 26 U.S.C. § 1401 (2018).

121. *The Facts on Medicare Spending and Financing*, *supra* note 29 (highlighting the funding numbers from 2014).

122. *Id.*

123. *See What is the Medicare Trust Fund, and How is it Financed?*, *supra* note 94 (stating in 2015 the HI trust fund received $275 billion).

124. Social Security Amendments of 1965, Pub. L. No. 89-97, § 1841, 79 Stat. 286 (1965).

125. *See* Social Security Amendments § 1841, at 308-09 (stating nothing regarding payroll taxes).

126. *See* Social Security Amendments § 1844, at 313.

General revenue accounts for roughly 73% of the trust.[127] Much of the remaining revenue comes from beneficiary premiums, which accounts for roughly 25% of the trust.[128]

Similar to the increased payroll taxes for highly compensated individuals, beneficiaries with high annual incomes are subject to increased premiums.[129] In fact, "beneficiaries with annual incomes over $85,000/individual or $170,000/couple pay a higher, income-related Part B premium reflecting a larger share of total Part B spending, ranging from 35% to 80%."[130] These amounts are fixed until 2020, at which point the income thresholds will be indexed to inflation.[131] Overall, the SMI trust has receipts of roughly $369 billion.[132]

Through the Social Security Act, the federal government has set up a reserve to help provide elderly Americans with adequate healthcare.[133] While the current level of funding provides care to Medicare's roughly fifty-eight million users,[134] the HI trust fund has a grim future which could significantly impact the level of care received by beneficiaries.

B. Medicare Level of Care

Each Medicare Part covers different expenses associated with healthcare: Part A covers inpatient care in hospitals, and skilled nursing facilities; Part B covers services from doctors and outpatient care; Part C is a combination of Part A and B; and Part D covers prescription drug costs.[135] Each beneficiary is encouraged to sign up for plans that fit their respective needs.[136] Furthermore, Medicare helps guide any unsure individuals to an appropriate doctor,[137] and provides many preventative services.[138]

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127. *The Facts on Medicare Spending and Financing*, *supra* note 29.
128. *Id.*
129. *See id.*
130. *Id.*
131. *Id.*
132. *See What is the Medicare Trust Fund, and How is it Financed?*, *supra* note 94 (stating in 2015 the SMI trust fund received $369 billion in revenues).
133. U.S. DEP'T OF HEALTH & HUM. SERVICES, HHS FY 2017 BUDGET IN BRIEF—CMS—MEDICARE (2016), https://www.hhs.gov/about/budget/fy2017/budget-in-brief/CMS/medicare/index/html.
134. *Id.*
135. U.S. DEP'T OF HEALTH AND HUM. SERVICES, MEDICARE BASICS 1, 49 (2014), https://www.medicare.gov/Pubs/pdf/11034.pdf.
136. *Id.*
137. *Id.*
138. *Id.*

Providing preventative services promotes the beneficiary's health as "[p]reventative services can find health problems early, when treatment works best, and can help prevent certain diseases or illness."[139] Preventative tests and services which may be eligible for Medicare coverage include pneumococcal and flu shots; certain "wellness" "physician visits;" and screenings for breast cancer, prostate cancer, diabetes, glaucoma, and more.[140]

The fundamental healthcare provided by Medicare to millions of Americans is crucial to saving and improving lives. Many beneficiaries have stated "[M]edicare has enabled me to receive emergency services I could not have otherwise afforded,"[141] and "I had NO medical insurance until I turned 65 and became eligible for Medicare. Since then I have had several expensive medical problems, plus chronic glaucoma. Without Medicare I don't know how I would have been able to get the care I needed."[142] The theme of affordability is reiterated by many beneficiaries, as most are on limited fixed incomes.[143]

Much of a Medicare beneficiary's yearly income is derived from an accumulation of savings, thus varying greatly.[144] Despite the variance, most beneficiaries have yearly incomes well below the national average.[145] For example, in 2014, 50% of beneficiaries had incomes below $24,150 and 25% had incomes below $14,350.[146]

Additionally, beneficiaries have low amounts of savings, as 50% of individuals had below $63,350 saved and 25% had savings below $11,900.[147] Predictive figures of Medicare beneficiary's income levels are moderately higher.[148] By 2030, the median income and savings are expected to rise $4,300 and $39,450 respectively.[149] These incredibly low figures highlight the importance of strict beneficiary budgeting and the need for Medicare reform, regarding costs and levels of care.

139. *Id.* at 22.
140. *Id.*
141. *Medicare Beneficiaries are Grateful (A Compilation of Beneficiary Testimonials)*, CTR. FOR MEDICARE ADVOC., http://www.medicareadvocacy.org/49-medicare-beneficiaries-are-grateful-a-compilation/.
142. *Id.*
143. *See* Gretchen Jacobson et al., *Income and Assets of Medicare Beneficiaries, 2014-2030*, KAISER FAMILY FOUND. (Sept. 10, 2015), http://kff.org/medicare/issue-brief/income-and-assets-of-medicare-beneficiaries-2014-2030/.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*

The future solvency of the HI trust fund, political uncertainty, and drastic increase in beneficiaries has led to questioning of the viability of current Medicare funding.[150] In the years leading up to 2014, HI trust expenditures exceeded taxes.[151] Although this has since stabilized, the trust is projected to be exhausted by 2028.[152] Once the fund becomes exhausted, HI would continue to receive payroll tax income but would only be able to cover 87% of Part A expenses.[153] Therefore, there would be the need for an alternative source of funding—likely either from the federal government's general revenue or increased beneficiary premiums.[154]

Additionally, not only does the HI trust funds financial uncertainty and its depletion raise doubts in the future of Medicare, but the drastic increase in beneficiaries also compounds problems.[155] In the United States, "[t]here are roughly 77 million baby boomers—who will be eligible for Medicare at the rate of 10,000 per day over the next 19 years."[156] Because of this stark increase, there will be over eighty-one million Medicare beneficiaries by 2030.[157] As changes to funding and increases in beneficiaries occur, it has a real world impact on beneficiaries by lowering the level of available care.[158]

Currently, individuals on Medicare can find readily available care; however, the future will start to yield a decline in the number of medical workers per beneficiary.[159] To elaborate, "[a]s the number of Medicare beneficiaries increases from about 55 million in 2015 to 81 million by 2030, the number of workers per beneficiary will decline from 3.1 to 2.4."[160]

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150. *See The Facts on Medicare Spending and Financing*, *supra* note 29; Robert Moffit & Alyene Senger, *Medicare's Rising Costs—and the Urgent Need for Reform*, THE HERITAGE FOUND. (Mar. 22, 2013), http://www.heritage.org/health-care-reform/report/medicares-rising-costs-and-the-urgent-need-reform [hereinafter *Medicare's Rising Costs—and the Urgent Need for Reform*].

151. *The Facts on Medicare Spending and Financing*, *supra* note 29.

152. *Id.*

153. MEDICARE: INSOLVENCY PROJECTIONS, *supra* note 94.

154. *See id.* (mentioning possible HI trust fund reform could involve general revenue); *see also Medicare's Rising Costs—and the Urgent Need for Reform*, *supra* note 150 (discussing reform involving increased beneficiary premiums).

155. *See Medicare's Rising Costs—and the Urgent Need for Reform*, *supra* note 150.

156. *Id.*

157. *Id.*

158. *See What is the Medicare Trust Fund, and How is it Financed?*, *supra* note 94.

159. *See id.*

160. *Id.*

Even more problematic than not having adequate care would be having no care at all. Some proposals' answer to fend off the HI budget woes and increasing beneficiaries is to raise Medicare's eligibility age.[161] The AARP has proposed raising the eligibility age to sixty-seven, instead of sixty-five.[162] The increase in age would alleviate some of the budget issues as it would reduce Medicare's costs by about 5% over the next twenty years.[163] While reducing costs for Medicare would help even its budget, raising the eligibility age would force millions of Americans to wait longer for affordable healthcare and would indicate the federal government valued a balanced budget over healthy senior citizens.[164]

The issues presented by the HI trust, unpredictable future of Medicare funding, and increasing beneficiaries, are daunting and have no clear answer. With millions of Americans' futures at stake, it is evident the time to act to ensure access to affordable healthcare is now. The pressing need for funding changes requires immediate action and all forms of revenue generation must be considered. Revenue from the Estate Tax may provide a viable alternative to help mitigate Medicare's budget issues.

C. Estate Tax Reform

The Estate Tax is uniquely situated with Medicare because it is imposed upon individuals at the time of their death, many of whom are likely over the age of sixty-five.[165] With comparable age characteristics, Estate Tax revenue could be directed towards Medicare financing. The proceeding paragraphs discuss the current Estate Tax and possible tax reform in relation to Medicare's uncertain budget future.

In 2017, the Estate Tax will see minor changes. The tax's exclusion rate is rising forty-thousand dollars to $5.49 million.[166] The top bracket tax rate is 40%—which remains the same despite dropping 15% in the

161. *The Future of Medicare: 15 Proposals You Should Know About*, AARP, http://www.aarp.org/content/dam/aarp/health/medicare-and-medicaid/2012-05/The-Future-Of-Medicare.pdf (last visited Sept. 10, 2017).
162. *Id.*
163. *Id.*
164. *Id.*
165. Murphy, *supra* note 4 (stating in 2014 life expectancy in the United States was 78.8 years).
166. *What's New—Estate and Gift Tax*, *supra* note 48.

previous fifteen years.[167] This 40% rate is imposed upon taxable estates valued over $6.4 million.[168] Because of the increase in exclusion rate and drop in the top tax rate bracket, the Estate Tax has generally been weakening—impacting less than 0.2% of decedents and raising less than 0.6% of all federal revenues.[169] In fact, the Estate Tax currently is described as "the smallest major source of federal revenue, raising roughly $20 billion a year."[170] Over the next ten years, from 2017–2026, the Congressional Budget Office estimates, under current law, the Estate Tax will generate about $275 billion.[171] While this may seem to pale in comparison to Medicare's roughly $500 billion yearly federal outlay, Estate Tax revenue over ten years would offset over half of the $419 billion proposed ten-year budget cuts.[172] Additionally, while around twenty-five billion dollars a year is not enough to completely alleviate Medicare trust fund insolvency, it is a start in a battle where every penny helps.[173] In the Estate Tax's current form, only a small impact may be had on Medicare uncertainty; but through reform, allowing for even greater revenue generation, the impact may be much larger. Some options for Estate Tax reform, which will be discussed below, are (1) lowering the exclusion rate; (2) lowering the exclusion rate and raising the maximum tax rate; (3) eliminating GRATs; and (4) eliminating spousal exclusion portability.

1. LOWER EXCLUSION RATE TO $2 MILLION

One possibility to expand the revenue generation of the Estate Tax is to lower the exclusion amount, thus broadening the tax base. Some have advocated for lowering the exclusion amount from its current $5.45 million to $2 million.[174] This was the exclusion amount

167. *See id.*
168. Paul L. Caron, *The One-Hundredth Anniversary of the Federal Estate Tax: It's Time to Renew Our Vows*, 57 B.C. L. REV. 823, 824 (2016) [hereinafter *The One-Hundredth Anniversary of the Federal Estate Tax: It's Time to Renew Our Vows*].
169. *Id.*
170. TAX FOUND., OPTIONS FOR REFORMING AMERICA'S TAX CODE 95 (2016) [hereinafter OPTIONS FOR REFORMING AMERICA'S TAX CODE].
171. CONG. BUDGET OFF., AN UPDATE TO THE BUDGET AND ECONOMIC OUTLOOK: 2016 TO 2026 (2016).
172. *See* OPTIONS FOR REFORMING AMERICA'S TAX CODE, *supra* note 170, at 95; FISCAL YEAR 2017 BUDGET IN BRIEF, *supra* note 98.
173. *See* OPTIONS FOR REFORMING AMERICA'S TAX CODE, *supra* note 170, at 95 (noting that over ten years the current Estate Tax would generate $200 billion); FISCAL YEAR 2017 BUDGET, IN BRIEF, *supra* note 98 (highlighting a ten year Medicare cut of $419 billion is more than the $200 billion generated by the Estate Tax).
174. OPTIONS FOR REFORMING AMERICA'S TAX CODE, *supra* note 170, at 97.

from 2006 to 2008.[175] Lowering the exclusion would raise the number of taxable estates, thus raising the number from around only 0.2% per year.[176] Some may be opposed to lowering the exclusion rate, but in the past, the Estate Tax has impacted many more Americans.[177] At the Estate Tax's peak, it applied to over 7% of all decedents.[178] For perspective on how many individuals this could affect, "the Population Division of the Bureau of the Census projects that 2.7 million people will die in 2017."[179] Thus, there is a large projected pool of decedents which may be liable to pay the Estate Tax if the exclusion is lowered.

As a result of the proposal, there would be revenue growth of $154 billion over a ten-year period.[180] Due to this change, however, it is also projected Gross Domestic Product (GDP) would decline by 0.3%; thus causing a ten-year revenue generation drop of eighty-two billion dollars.[181] This impact on GDP could possibly have a negative effect on payroll taxes, as they are tied to economic output and employment rates.[182] While this option would bring in more households to tax, it would only increase taxes for high-income households due to graduated rates starting at a lower exclusion amount.[183] Lowering the exclusion rate is one possible policy change, however, it is not the only one.

2. LOWER EXCLUSION RATE TO $3.5 MILLION AND RAISE MAXIMUM TAX RATE TO 65%

A second popular proposal is to combine a reduced exclusion rate as well as increase the maximum Estate Tax rate. This would both broaden the tax base and generate more revenue per taxable estate.[184] The proposal combines lowering the exclusion amount to $3.5 million and raising the maximum tax rate to 65%.[185] While this may sound like a large tax rate jump, it would only affect estates larger

175. *Id.*
176. *The One-Hundredth Anniversary of the Federal Estate Tax: It's Time to Renew Our Vows*, *supra* note 168, at 824.
177. *See id.* at 823.
178. *Id.*
179. *Key Elements of the U.S. Tax System*, TAX POLICY CENTER, http://www.taxpolicycenter.org/briefing-book/how-many-people-pay-estate-tax (last visited Sept. 10, 2017).
180. OPTIONS FOR REFORMING AMERICA'S TAX CODE, *supra* note 170, at 97.
181. *Id.*
182. *See* MEDICARE: INSOLVENCY PROJECTIONS, *supra* note 94.
183. OPTIONS FOR REFORMING AMERICA'S TAX CODE, *supra* note 170, at 97.
184. *See id.*
185. *Id.*

than $500 million.[186] The tax rates would be gradual, from 45% for taxable estates from $3.5 million to $10 million; 50% from $10 million to $50 million; and 55% for estates from $50 million to $500 million.[187] The graduated tax rates could be further adjusted to also generate revenue, if needed.[188]

As a result, the proposal would generate $310 billion over ten years.[189] This additional $310 billion is nearly three-fourths of potential Medicare budget cuts, and could help protect the solvency of the HI trust. In anticipation of owing an estate tax, individuals would likely respond by saving and investing less.[190] In turn, this would negatively impact economic output—leading to a 1% GDP reduction, 194,000 fewer full time jobs, and a decrease in revenue of $28 billion over ten years.[191] Due to the potential negative impact on GDP, payroll taxes may decrease.[192] Therefore, the revenue growth through increased Estate Tax revenue may not have as strong of an impact on available Medicare funds.

If the exclusion rate were decreased, and top tax rate increased, this would increase the Estate Tax burden mainly on wealthy households.[193] If the above proposal were implemented, it would reduce after-tax incomes by 0.4% for the top 20% of households, and have an even stronger effect on the top 1% by reducing their incomes by 1.3%.[194] Changes to the fundamental core of the Estate Tax—exclusion and tax rates—have not been the only reform proposals. Some have inquired about eliminating GRATs and the spousal exclusion portability.

3. IMPOSE LIMITS ON GRATS

GRATs diminish Estate Tax revenue generation by allowing wealthy individuals to use their acquired wealth and transfer it, tax free.[195] Once the GRAT is created, grantors hope the assets contributed appreciate at a higher rate of return than those provided

186. *Id.*
187. *Id.*
188. *See id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *See generally* MEDICARE: INSOLVENCY PROJECTIONS, *supra* note 94.
193. *See* OPTIONS FOR REFORMING AMERICA'S TAX CODE, *supra* note 170, at 97.
194. *Id.* at 98.
195. *See generally* Wand, *supra* note 63.

by the Internal Revenue Code.[196] If the GRAT performs better than the anticipated rate, the return transfers tax free to the next generation.[197] In other words, individuals receive annuity payments from the trust and "zeroes out the GRAT by ensuring that the present value of the annuity equals the amount transferred into the trust, thus eliminating any gift tax on the transfer."[198] Because death during the GRATs life will result in its inclusion in the grantor's Taxable Estate, grantors will minimize the risk of death during this period by choosing short trust terms.[199] This technique was created by a relative of Wal-Mart founder, Sam Walton, and provides the uber-rich with a tool to evade the Estate Tax.[200] GRATs are particularly enticing to young millionaires and billionaires as they have been used by entrepreneurs such as Facebook's Mark Zuckerberg, Dustin Moskovitz, and Sheryl Sandberg.[201]

In 2013, it became apparent GRATs were commonplace amongst the very wealthy and one estimate noted a reduction in Estate and Gift taxes by "$100 billion since 2000, or one-third of the total estate and gift taxes collected over this period."[202] In some instances, individuals have transferred billions of dollars tax free.[203] For example, Sheldon Adelson, of Las Vegas Sands, gave $7.9 billion through twenty-five GRATs to his heirs.[204] In total, he avoided $2.8 billion in taxes.[205] The amount of taxes avoided due to GRATs has led to calls for reform.

One such proposal for reform was presented by President Obama, and sought to require GRATs to "have a minimum term of 10 years; maximum term of the life expectancy of the grantor (plus 10 years); an initial remainder interest value of greater than zero; and annuity payments that decline during the term of the trust."[206] The plan would force individuals away from GRATs by increasing the probability of death during the term, and decreasing the utilization of

196. Paul L. Caron & James R. Repetti, *Revitalizing the Estate Tax: 5 Easy Pieces*, 142 TAX NOTES 1231, 1240 (2014) [hereinafter *Revitalizing the Estate Tax: 5 Easy Pieces*].
197. *See generally* Long & Smeeding, *supra* note 106.
198. *Revitalizing the Estate Tax: 5 Easy Pieces*, *supra* note 196.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*

income paid into the annuity.[207] If implemented, it is projected to increase revenues by $3.9 billion in the 2014–2023 period.[208]

Another proposal would impose a lifetime cap on the amount which can be transferred through a GRAT by linking the trusts to the current exclusion rate for the Estate and Gift Tax.[209] This would only allow for transfers *up to* the current exclusion rate, subjecting any additional amount to taxes.[210] While reforming and eliminating the GRAT loophole would provide increased revenue, the final Estate Tax reform that will be discussed is the elimination of Estate Tax spousal exclusion portability.

4. ELIMINATE SPOUSAL EXCLUSION PORTABILITY

After years of limited exclusion amounts between spouses at death, the Economic Recovery Tax Act of 1981 (ERTA) allowed for unlimited marital deduction for both Estate and Gift Tax transfers between spouses.[211] Congress stated "that an individual should be free to pass his entire estate to a surviving spouse without the imposition of tax."[212] This unlimited marital deduction has since been expanded.[213] With the enactment of the American Taxpayer Relief Act of 2012, a surviving spouse may use a deceased spouse's unused Estate Tax exclusion.[214] This concept has been informally dubbed "portability," and could allow a married couple to use both of their federal Estate Tax exclusions separately.[215]

For example, if in 2017 a decedent left all their $7.49 million estate to their spouse, it would escape the Estate Tax due to the unlimited marital deduction rule. Additionally, because no part of the deceased $5.49 million exclusion was used, it would carry over to the surviving spouse for their use at time of death. Therefore, if the surviving spouse also died in 2017 their exclusion amount would be $10.98 million. When transferring the $7.49 million estate, no Estate

207. *See id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *See* Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (1981).
212. H.R. REP. NO. 97-201, pt. 2, at 159 (1981).
213. *See* American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013).
214. *Id.*
215. Edwin G. Fee Jr., *Portability of the Federal Estate Tax Exemption*, 42 MD. B. J. 34, 35–36 (2009).

Taxes would be owed due to portability. If there was no portability, however, the taxable estate would be $2 million. When multiplied by the 40% Estate Tax rate, this $2 million would result in $800 thousand in Estate Tax saved.

While portability allows married couples greater estate planning flexibility,[216] it inherently goes against the tax's goal of preventing the concentration of wealth.[217] The unlimited spousal deduction was aimed to help surviving spouses after the death of a loved one,[218] however, it could be argued portability has gone past the affectionate transfers sought by Congress, and is now restricting federal revenue.

The above subsections all provide possible Estate Tax reform aimed to increase revenue. With their pros and cons, some ideas may be better than others in aiding against the current Medicare troubles. The following section will outline and discuss why Estate Tax revenue should be applied directly to fund Medicare, and explain how the Estate Tax should be reformed.

IV. Moving Forward: The Estate Tax Should be Applied Directly to Medicare Funding and Undergo Reform to Generate More Revenue

With uncertainty surrounding Medicare funding, its level of care, and political future,[219] there is a need for stability. Stability can be provided by a reformed Estate Tax. This section outlines why the Estate Tax should fund Medicare and why the Estate Tax should be reformed by lowering the exclusion rate, raising the maximum tax rate, and eliminating GRATs.

A. The Estate Tax Should Fund Medicare

The Estate Tax is uniquely situated to fund Medicare—and specifically the HI trust—because it impacts the same elderly individuals as Medicare. The Estate Tax should be used to fund Medicare because (1) the Estate Tax is more targeted to users of Medicare; (2) it is fairer than increasing payroll taxes; (3) it is more realistic than raising premiums on Medicare recipients; and (4) the

216. *See generally id.*
217. *The Estate Tax: Ninety Years and Counting*, *supra* note 6, at 118.
218. *See generally id.*
219. *See* Section III (A)-(B).

wealthy live longer, thus use more medical services. These will be addressed in sequence below.

1. THE ESTATE TAX IS MORE TARGETED TO MEDICARE BENEFICIARIES

Individuals subject to the Estate Tax and Medicare are of similar age and health. In 2014, the largest group of Medicare beneficiaries was age sixty-five to seventy-four.[220] This comprised 47% of all Medicare beneficiaries.[221] In comparison, in 2014 the life expectancy in the United States was 78.8 years.[222] Wealthy individuals also have medical issues as they advance in age—the difference is whether they can afford to cover these expenses. It is inhumane to see individuals of similar ages and health receive a substantially lower level of healthcare.

2. APPLYING THE ESTATE TAX TO MEDICARE FUNDING IS FAIRER THAN RAISING PAYROLL TAXES

With solvency concerns relating to the HI trust, some have called for further increasing payroll taxes to protect the funds.[223] One plan calls for a payroll tax increase of 1.0%-0.5% to be paid by the employer and 0.5% to be paid by the employee.[224] This would bring the total payroll tax to 3.9%.[225] If implemented, the plan would disproportionately impact lower-income taxpayers in comparison to high-income taxpayers.[226] Thus, "a percentage-point increase in the HI tax would represent a greater proportion of the income of lower-income taxpayers than would be the case for high-income taxpayers."[227] Finally, increasing payroll taxes would not yield greater Medicare benefits for beneficiaries.[228]

Because of this disproportionate impact and failure to increase benefits, a payroll tax increase should be a last resort. Estate Tax

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220. *Medicare Enrollment Charts*, *supra* note 4.
221. *Id.*
222. Murphy, *supra* note 4.
223. *Increase the Payroll Tax Rate for Medicare Hospital Insurance by 1 Percentage Point*, CONG. BUDGET OFF. (Dec. 8, 2016), https://www.cbo.gov/budget-options
/2016/52268.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*

revenue is taken from the very wealthy[229]—those who can and should be paying to help provide care to elderly Americans in need.

3. APPLYING THE ESTATE TAX TO MEDICARE FUNDING IS FAIRER THAN RAISING BENEFICIARY'S PREMIUMS

As most Medicare's beneficiaries are low-income individuals, raising premiums may lead to their plans becoming unaffordable. But, raising premiums has been touted as a possible aid to Medicare's financial status.[230] For example, one proposal "would increase the lowest income-related premium percentage by five points."[231] Another seeks to increase premiums 10% over the next five years.[232] Some may argue this would result in minimal monthly raises in premiums—as the minimum Part B premium as of 2017 is $135[233]—but continual raises could have budget impacts for beneficiaries. To counteract the potential hazard on low-income beneficiaries, plans have proposed only raising high-income beneficiary's premiums.[234] But, even this proposal notes "a significant amount of savings from this proposal is only possible by going relatively far down the income scale to reach a sizable share of beneficiaries—at which point affordability of these additional costs could be called into question."[235] Thus, raising premiums brings about a risk of causing Medicare plans to become unaffordable. Applying Estate Tax revenue to directly fund Medicare could help the program's financial uncertainty, while not subjecting the affordability of beneficiary's plans to incremental premium raises.

229. *What's New -Estate and Gift Tax*, *supra* note 48 (highlighting a 2016 exclusion of $5.45 million).

230. *See* Juliette Cubanski et al., *Raising Medicare Premiums for Higher-Income Beneficiaries: Assessing the Implications*, KAISER FAM. FOUND. (Jan. 13, 2014), http://kaiserfamilyfoundation.files.wordpress.com/2014/01/8276-02-raising-medicare-premiums-for-higher-income-beneficiaries.pdf (discussing potential raises in Part B and Part D premiums and their effect on beneficiaries) [hereinafter *Raising Medicare Premiums for Higher-Income Beneficiaries: Assessing the Implications*]; *Medicare's Rising Costs—and the Urgent Need for Reform*, *supra* note 150 (arguing gradual raises in premiums would help solve Medicare's cost problem).

231. *See Raising Medicare Premiums for Higher-Income Beneficiaries: Assessing the Implications*, *supra* note 230, at 5 (outlining a proposal based off a previous budget which had premiums beginning to raise in 2017).

232. *Medicare's Rising Costs—and the Urgent Need for Reform*, *supra* note 150, at 2.

233. *Part B Costs*, *supra* note 24.

234. *See Raising Medicare Premiums for Higher-Income Beneficiaries: Assessing the Implications*, *supra* note 230.

235. *Id.* at 8.

4. THE WEALTHY LIVE LONGER AND USE MORE MEDICAL SERVICES

Distribution of Medicare services is disproportionate, as higher income beneficiaries obtain more care than lower income beneficiaries.[236] Additionally, despite paying more into Medicare funding, high-income beneficiaries reap proportionally more benefits than their low-income counterparts.[237] One reason for the disproportion is "primarily the result of more intensive use of physician and ambulatory services by wealthier beneficiaries."[238] Additionally, this use is exacerbated because high-income beneficiaries have longer lifespans, thus allowing more time to use Medicare services.[239]

This disproportionate use of services by the wealthy is just another way low-income beneficiaries receive the short end of the stick. Taking Estate Tax revenue to apply to Medicare funding would help offset this disproportionate use. As the uncertainty with Medicare continues, if something were to happen to its viability, the wealthy are more equipped to find alternative healthcare—again leaving millions of low-income beneficiaries to bear the burden.

The previous paragraphs described a few of the numerous arguments for using Estate Tax revenue to directly fund Medicare. While this change would be beneficial to the sustainability of Medicare for future generations, its impact would be further strengthened by reforming the Estate Tax.

B. The Estate Tax Should be Reformed

Reforming the Estate Tax has brought about fierce debate. Some want to strengthen the tax to generate more revenue,[240] and others want to weaken the tax to promote financial individualism.[241] But, if the tax revenue is to be applied to fund Medicare, it should be strengthened. Two enactments which should be made to increase revenue are (1) lowering the exclusion amount to $3.5 million and

236. *See* Robert E. Moffit, *Reducing Taxpayer Subsidies to Wealthy Medicare Recipients is Sound Policy*, THE HERITAGE FOUND. (Dec. 11, 2015), http://thf-reports.53.amazonaws.com/2015/IB4497.pdf; Mark McClellan & Jonathan Skinner, *The Incidence of Medicare*, 6013 NBER WORKING PAPER SERIES 1, 2–4 (1997) (stating Medicare has net transfers from the poor to the wealthy due to regressive financing mechanisms, higher expenditures, and longer survival times of wealthy beneficiaries) [hereinafter McClellan].

237. McClellan, *supra* note 236, at 3–4.

238. *Id.* at 3.

239. *Id.* at 2.

240. *See generally* OPTIONS FOR REFORMING AMERICA'S TAX CODE, *supra* note 170.

241. *Id.*

raising the maximum tax rate to 65%; and (2) limiting GRATs to prevent large transfers of untaxed wealth.

1. LOWER THE ESTATE TAX EXCLUSION TO $3.5 MILLION AND THE RAISE MAXIMUM TAX RATE TO 65%

The first method which should be implemented to help increase the revenue generated by the Estate Tax is two-pronged: lower the Estate Tax exclusion to $3.5 million and raise the maximum tax rate to 65%. These changes would allow for a broader tax base, as well as increased revenue per taxable estate.

Lowering the exclusion would capture more people eligible for the Estate Tax—thus broadening the tax base.[242] As the amount of Medicare beneficiaries increases due to the baby boomer generation,[243] the increase in elderly Americans will lead to an influx in deaths. Thus, with more individuals dying, there will be more Taxable Estates. Some may argue the exclusion should be reduced even further—such as to $2 million.[244] While implementing this change would generate $154 billion over ten years,[245] it may be difficult to pass an exclusion decrease this large through legislation. Additionally, this decrease would have a larger secondary economic effect than the two-prong change proposed. Lowering the exclusion to two million dollars would decrease GDP by $82 million over ten years,[246] compared to the two-prong change causing GDP to decrease $28 million over ten years.[247] As the first of the two-prongs would decrease the exclusion to broaden the tax base, the second prong would raise the maximum tax rate.

Reforming the tax rates would involve gradual raises based on the amount of the taxable estate.[248] Rates would vary from 35% to 65%.[249] While the top rate is a drastic change from our current 40% maximum rate,[250] the new rate of 65% would only hit estates over $500 million;[251] thus, only impacting the super wealthy. Some may argue this rate is drastically high, however, there have been past

242. *Id.* at 97.
243. *What is the Medicare Trust Fund, and How is it Financed?*, *supra* note 94.
244. OPTIONS FOR REFORMING AMERICA'S TAX CODE, *supra* note 170, at 97.
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *See What's New—Estate and Gift Tax*, *supra* note 48.
251. OPTIONS FOR REFORMING AMERICA'S TAX CODE, *supra* note 170, at 90.

instances of high Estate Tax rates. For example, from 1942 to 1976 the maximum tax rate was set at 77%.[252] Therefore, rates as high as 65% are not unheard of in the American tax system. Through these changes, the Estate Tax would generate more revenue than our current system.

If the two-pronged change were implemented, the tax would generate an additional $310 over the next ten years.[253] When applied directly to Medicare funding, not only could it aid in the dwindling HI funds, but also would offset most of the potential $419 billion ten-year budget cut.[254] Additionally, these increased funds can be used to promote adequate levels of care as the number of beneficiaries is set to skyrocket. In response to potentially strengthening the Estate Tax, some have quipped that the wealthy will simply choose to donate their wealth and receive a tax cut, rather than pay it to the federal government.[255] While this may be a problem, elderly wealthy individuals may be more inclined to pay the Estate Tax if they knew the funds would be used to provide medical services to less fortunate elderly individuals in similar health states as themselves.

The two-pronged reform, lowering the exclusion and raising tax rates, would generate increased revenue and alleviate some of Medicare's funding pressure. While these basic changes to the tax itself will help, there also must be changes to eliminate tax loopholes.

2. LIMIT GRATS TO IMPEDE WEALTHY INDIVIDUALS FROM TRANSFERRING WEALTH UNTAXED

Wealthy individuals often escape paying large amounts of taxes through GRATs. These trusts allow a risk-free chance to transfer wealth based on an initial annuity investment outgrowing specified Internal Revenue Code return rates.[256] Any increased growth transfers tax-free to the next generation and if the annuity does not out-perform specified rates there is no risk to the investor.[257] Wealthy individuals can transfer unlimited amounts of money through GRATs, thus

252. *The Estate Tax: Ninety Years and Counting*, *supra* note 6, at 122.
253. OPTIONS FOR REFORMING AMERICA'S TAX CODE, *supra* note 170, at 98.
254. FISCAL YEAR 2017 BUDGET IN BRIEF, *supra* note 98.
255. *See* Edward A. Zelinsky, *Why the Buffett-Gates Giving Pledge Requires Limitation of the Estate Tax Charitable Deduction*, 16 FLA. TAX REV. 393, 418 (2014) (discussing the incentive for the wealthy to donate their estates rather than risk paying the estate tax).
256. *Revitalizing the Estate Tax: 5 Easy Pieces*, *supra* note 196, at 1240.
257. *Id.*

rendering it—and any reform on exclusion and tax rate—useless. Therefore, two limits should be imposed to weaken the use of GRATs. There should be a minimum term limit and a lifetime cap on the amount that can be transferred.

If a grantor dies during the term of their GRAT, the entire amount will be subject to the Estate Tax.[258] Thus, to limit the tax risk, grantors will often put short term limits; such as a few years.[259] Therefore, to increase the amount of money paid to the Estate Tax, and deter GRAT use, there should be a minimum term of ten years. While this would not impact young wealthy individuals—such as Mark Zuckerberg—it would keep older individuals from using GRATs.[260] In addition to this term limit, the amount transferable through GRATs should be tied to the Estate and Gift Tax exclusion. Thus, no individual should be allowed to transfer more money tax-free through GRATs than they would be allowed under alternative exclusions.[261] This would force all individuals to the same exclusion amounts, and further push the wealthy from GRATs.

V. Conclusion

With millions of elderly Americans relying on Medicare, the solvency of trusts, potential budget cuts, political uncertainty, and increased beneficiaries have jeopardized the future of reliable and affordable healthcare for the elderly. Finding a stable source of funding is of utmost importance to not only secure medical services, but to guarantee their quality. Because of this immediate need, one viable source of this revenue is the Estate Tax. Wealthy elderly individuals are uniquely situated to help fund our current Medicare system. Payments from wealthy deceased individuals—who were likely over the age of sixty-five and in similar health states—are more targeted to users of Medicare, fairer than increasing payroll taxes, more feasible for beneficiaries than raising premiums, and help offset the unequal distribution of services.

Furthermore, the Estate Tax should be strengthened to generate more revenue. Reform should include lowering the exclusion amount

258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*

to $3.5 million, raising the maximum tax rate to 65%, and imposing restrictions on GRATs.

While some may want the government out of their pockets, there seems to be a sentiment that those so close to death should be covering a portion of the cost to help keep others alive and healthy. Medicare needs substantial backing which could be provided post-mortem. With this funding, Uncle Sam can help keep grandma and grandpa alive and kicking until it may be their turn to pay it forward.