

This book deals with the federal wealth transfer taxes and the federal income tax insofar as it bears on gratuitous transfers. In many ways, federal taxes — and their role in the creation and perpetuation of inequality — are among the most important policy issues of contemporary legal and political thought. This book is meant to serve as a basic guide for students encountering the topics for the first time as well as a provocative companion for those taking a deeper dive into the federal taxation of gratuitous transfers. The book covers some of the most challenging and exciting tax law and policy questions that lawyers ever encounter. Apart from being incredibly complex, the law of gratuitous transfers is important.

The law of federal wealth transfers matters immediately and concretely (in dollars and cents terms) to the taxpayers who may be subject to it, as well as the myriad professionals who advise them. While the revenue raised by the estate and gift tax is just a small percentage of all federal tax dollars collected in the United States every year,¹ how the law taxes (or often fails to tax) wealth transfers speaks volumes about what a society values.²

As of 2023, the federal wealth transfer taxes consist of a unified estate and gift tax and a generation-skipping transfer tax. The federal transfer tax system is separate and apart from the federal income tax.

This coursebook differs (to a greater or lesser degree) from others in the same field in the following respects:

- (1) pervasive use of problems as a pedagogical tool;
- (2) emphasis on text, statutes, and regulations, rather than cases (especially cases that involve routine application of law to facts);
- (3) integration of and detailed treatment of related income tax materials, including the income taxation of estates and trusts;
- (4) relation of tax doctrine to tax planning strategies;
- (5) focus on doctrine that influences the practice of estate and trust law, rather than doctrine for its own sake;
- (6) integration, early on, of valuation issues into “taxability” material;
- (7) reference to state law (including recent developments) as it bears on transfer tax issues, with full coverage of issues raised by community property systems;

1. According to the Congressional Budget Office, of the 2.7 million decedents in 2016, only about 5,500 of these (0.2%) were subject to the estate tax. In 2018, only 2,000 taxpayers in the entire country paid any gift tax. See Understanding Federal Estate and Gift Taxes, Cong. Budget Off., June 2021, <https://www.cbo.gov/system/files?file=2021-06/57129-Estate-and-Gift-Tax.pdf>.

2. See, e.g., Tsilly Dagan, *The Currency of Taxation*, 84 Fordham L. Rev. 3539 (2016) (arguing that tax law “simultaneously reflects and shapes our identities, self-perceptions, and social interactions in various contexts, including within our families and communities, as well as our sense of social solidarity and participation in political institutions”).

- (8) “building block” organization, rather than segmented organization according to Code sections; and
- (9) attention to issues of inequality of all kinds, through the lens of the tax system.

To elaborate on the last two items, the first chapter operates as a transition from courses in Property, Individual Income Taxation, and Wills, Estates, and Trusts. The second chapter provides an overview of the basic features of the federal transfer tax landscape. Thereafter, the book progresses from problems attendant upon routine or simple estates to those attendant upon wealthy estates with complex tax-oriented features. Throughout, the book raises questions about who benefits from certain tax provisions, what type of behavior the law encourages, and what the long-term effects of particular rules might be. This organizational scheme renders it possible (if not optimally desirable) for the student to take this course concurrently with the basic courses in Individual Income Taxation and Wills, Estates, and Trusts. The organizational format of this text entails the repetition of basic or important points and the relationship of the fine points to the basics. In general, the intent has been to create a fresh view of the subject. Where appropriate, the book brings the previous edition up to date, but also adopts an analytic lens that is contemporary as of 2023. Subsequent annual supplements will facilitate the continued use of the text; the only thing certain about the laws of federal gratuitous transfers is that they will change!

The book incorporates the changes of the “Tax Cuts and Jobs Act of 2017” (the “TCJA”), P.L. 115-97, signed into law on December 22, 2017 and effective as of January 1, 2018. Many of the TCJA’s provisions are designed to expire on December 31, 2025. Unless the law is revised before then (and we expect it will be) the tax law will revert to its pre-TCJA state. The precise contours of the future of federal wealth transfer taxation are difficult to forecast, but this text enables students to acquire the analytic tools they need to understand any future changes that may occur. In some ways, change is to be expected and welcome. After all, new tax laws have a way of equalizing the expertise of very junior and very senior attorneys (and those who fall anywhere in the range between those two poles). When the laws change, all professionals will see enormous returns on any investment of their time in understanding what the new laws (and Treasury Regulations!) say and how they may impact taxpayers.

The emphasis on text, analysis, problems, and policy also renders this text suitable for an LL.M. program in taxation. As the book progresses, it becomes more technical, with increased references to drafting issues and commentary on controversial legal issues.

The organization (proceeding from simple to complex estates), the frequent references to state law and income tax provisions, the descriptions of transactions and their uses, and the elaborate discussion concerning the drafting and use of formula clauses in relation to the marital deduction combine to make this book suitable for a tax-oriented estate planning course.

One reason to study the federal transfer taxes is that many doctrines of state law come into play primarily in a tax context. A leading example is the law of disclaimers. In the absence of the federal transfer taxes, various kinds of trusts (and, within trusts, powers of appointment) would be used much less often. Indeed, much of the “law” concerning trusts and powers of appointment is to be found in cases involving the federal transfer taxes.

Study of the federal transfer taxes well serves the development of skills relating to statutory exegesis, transactional analysis, and planning. The very nature of the subject, the transfer of wealth to the natural objects of one’s bounty and charity, is intrinsically forward-looking, as it

is concerned with managing property around a future certain event — one's death (and thereafter). The subject demands attention to questions of wealth, inequality, and the law's role in creating and sustaining both.

A few editorial points. Cases and other sources are edited, often heavily, but in the interests of continuity, omissions are not always indicated by periods or asterisks. Footnotes within cases and other excerpted materials are freely omitted; those retained have the same numbering as in the original. Any significant alterations of the original are set off in brackets. Brackets also are used to indicate editors' notes and explanations and, in cases, summaries of facts and arguments.

Citation form has been standardized. Citations given are not necessarily complete. Citations to parallel sources (such as L.Ed.) and to the prior history of a case are often omitted. Unless otherwise indicated, all section ("§") references are to the Internal Revenue Code of 1986 as amended or to Treasury regulations under said Code.

The abbreviations "H" and "W" are often used to refer to "husband" and "wife." We also refer to "Spouse 1" and "Spouse 2" in examples and problems where spouses are involved in order to enhance reader comprehension. "A" and "B" or taxpayers with specific names denote parties who are not married, unless otherwise specified.

Let the adventure begin! You will not be disappointed.