



## ESSAY

## Postmortem Austerity and Entitlement Reform

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**Abstract.** This Essay proposes a novel policy of “postmortem austerity” to address the unsustainable, rapidly escalating cost of federal entitlement programs following the 2017 tax reforms. If Social Security and Medicare continue on their current path to insolvency, then they will eventually require austerity reforms absent a politically unpopular tax increase. This Essay argues that, if austerity becomes necessary, federal entitlement reforms should be implemented progressively in a manner that minimizes displacement of benefits on which individuals relied when saving for old age. A policy of postmortem austerity would establish new eligibility criteria for Social Security and Medicare that postpone the effective date and economic consequences of benefit ineligibility until after death. All individuals would continue to collect federal entitlements during life, but at death, wealthy decedents would be deemed retroactively disqualified from part or all of Social Security and Medicare benefits received during life. The estates of such decedents would then be liable for repayment of disqualified benefits.

Social Security and Medicare have been slowly careening toward insolvency because the fiscal models for funding both programs have relied on increasingly outdated demographic and market assumptions. Since 1935, when Congress enacted the Social Security Act, government support for the elderly has become much more costly because Americans are now living longer in retirement.<sup>1</sup> Likewise, health care costs have increased significantly since 1965, when Congress established Medicare.<sup>2</sup> And yet, the payroll and other taxes that

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1. *See Benefits Planner: Retirement*, SOC. SECURITY ADMIN., <https://perma.cc/T7FD-URHX> (archived July 7, 2018) (“Since the program first began paying monthly Social Security benefits in 1940, the average life expectancy for men reaching age 65 has increased nearly 7 years to age 84.3, for women reaching age 65, their average life expectancy has increased nearly 7 years to age 86.6.”).

2. The Centers for Medicare & Medicaid Services report that national health expenditures as a percentage of Gross Domestic Product have increased from 5.6% in 1965 to 17.9% in 2016. *National Health Expenditure Data: Historical*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://perma.cc/K92G-J3NJ> (archived July 7, 2018) (to locate, select “NHE Summary

generate revenue for Social Security and Medicare have failed to keep pace with projected cost increases. For fiscal year 2018, the Congressional Budget Office (CBO) forecasts that outlays from the Social Security Old-Age and Survivors Insurance trust fund will exceed income receipts by \$19 billion and, by 2028, the trust's annual spending deficit will increase to \$313 billion.<sup>3</sup> Similarly, the CBO projects that outlays from the Medicare trust fund will exceed income receipts in 2019 and, by 2026, the trust fund balance will be depleted to \$0.<sup>4</sup> Social Security and Medicare now account for the majority of mandatory federal spending and are primarily responsible for the projected tripling of annual deficits to \$1.4 trillion over the next ten years.<sup>5</sup>

For a rich country like the United States, a logical way to reduce deficit spending without cutting benefits would be to increase taxes, but alas, Congress recently did just the opposite. The Tax Cuts and Jobs Act, enacted in December 2017,<sup>6</sup> significantly reduces overall tax receipts and is projected to contribute an additional \$1.456 trillion to the national debt by 2027.<sup>7</sup> As the 2017 tax cuts become increasingly unsustainable with the passage of time and growth of the national debt, the Act's lower rate structure will become ever more difficult to repeal as taxpayers begin to organize their finances around the Act's lighter tax burden. Soon enough, the old rates will be long forgotten, and any future repeal or expiration of the 2017 tax cuts will feel like a tax increase rather than a return to the status quo ante.

Viewed in an historical context, the 2017 tax cuts represent the latest iteration of a long-term trend of U.S. tax policy toward ever lower tax rates, a trend that reveals an especially intense aversion to taxation in the United States. While no one enjoys paying taxes, behavioral economists have observed that Americans exhibit a particularly, if not irrationally, acute dislike of taxation. In a recent laboratory study, for instance, participants appeared to reduce their

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including share of GDP, CY 1960-2016"). Similarly, national health expenditures, measured per capita, increased from \$209 in 1965 to \$10,348 in 2016. *Id.*; see also CONG. BUDGET OFFICE, THE 2017 LONG-TERM BUDGET OUTLOOK, at iii (2017), <https://perma.cc/TV65-EHL9> ("[G]rowth in spending on Medicare and the other major health care programs is driven by rising health care costs per person, which are projected to increase more quickly than GDP per capita.").

3. CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: 2018 TO 2028, at 133 tbl.C-2 (2018), <https://perma.cc/U57S-2JDK>.

4. *Id.* at 132 tbl.C-1, 133 tbl.C-2.

5. See CONG. BUDGET OFFICE, AN UPDATE TO THE BUDGET AND ECONOMIC OUTLOOK: 2017 TO 2027, at 13 tbl.1, 14-15 tbl.2 (2017), <https://perma.cc/Q3LK-3LZZ>; CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2011 TO 2021, at 60 (2011) (noting that, as of 2011, Social Security, Medicare, Medicaid, and other federally funded health projects were projected to account for nearly 70% of all mandatory federal spending—excluding offsetting receipts).

6. Act of Dec. 22, 2017, Pub. L. No. 115-97, 131 Stat. 2054 [hereinafter TCJA].

7. See JOINT COMM. ON TAXATION, JCX-67-17, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1, THE "TAX CUTS AND JOBS ACT" 8 (2017), <https://perma.cc/XV5J-NNT3>.

labor supply more in response to a salient tax increase than to an equivalent wage decrease.<sup>8</sup> Study participants were, therefore, more willing to tolerate an equivalent compensation loss attributable to an employer's pay cut than to a government tax increase. The principal investigators opined that such tax aversion may arise from a psychological "decoupling of tax payments and the services citizens receive in return and a lack of agency in deciding how taxes are spent."<sup>9</sup>

This "decoupling" theory suggests that individuals who cognitively dissociate the provision of public goods and services from the government provider are, in turn, likely to discount the necessity of taxation to pay for those programs. For evidence of this dissociation, consider the results of a 2008 national survey that asked respondents whether they had used a government program: 44.1% of respondents receiving Social Security Retirement and Survivors benefits and 39.8% of respondents receiving Medicare benefits reported (incorrectly) that they had not used a government program.<sup>10</sup> These survey results suggest that the decoupling theory may indeed have merit.

Until now, our unparalleled creditworthiness backed by a strong dollar has enabled the United States to offset near-term spending needs by issuing long-term debt.<sup>11</sup> At some point, however, the government will be forced to confront its structural reliance on debt as a significant funding source for current spending. Indeed, the CBO projects that, by 2028, the aggregate government debt held by the public will increase to 96% of Gross Domestic Product, a worrisome economic benchmark that increases the "likelihood of a fiscal crisis in the United States."<sup>12</sup>

If the phenomenon of tax aversion is as strong and durable as behavioral economists suggest,<sup>13</sup> then Congress may find it more politically palatable to reduce Social Security and Medicare outlays for older Americans than to raise taxes for all Americans.<sup>14</sup> But cutting retirement and health care benefits will impose great hardship on those who relied on the continued availability of Social Security and Medicare when planning for old age. How, then, might

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8. Judd B. Kessler & Michael I. Norton, *Tax Aversion in Labor Supply*, 124 J. ECON. BEHAV. & ORG. 15, 23 (2016).

9. *Id.* at 24.

10. See SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY* 38 tbl.2.1 (2011).

11. See Jacob Davidson, *How Much Does America's Huge National Debt Actually Matter?*, TIME (Feb. 11, 2016), <https://perma.cc/DL6A-NB4K>.

12. CONG. BUDGET OFFICE, *THE BUDGET AND ECONOMIC OUTLOOK: 2018 TO 2028*, *supra* note 3, at 5-6.

13. Cf. Gregory E. Maggs, *A Concise Guide to the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 397, 401 (2017) (describing the long-remembered Boston protest of the 1773 Tea Act).

14. Cf. Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. ILL. L. REV. 1105, 1128 ("[O]ne of the surest ways for congressional representatives to lose political support is to impose costs upon their constituents through tax increases or spending decreases.").

Congress reduce the cost of federal entitlement programs while simultaneously minimizing the displacement of benefits on which individuals reasonably relied? By way of response, this Essay offers a novel yet reluctant contribution to the debate about entitlement reform:<sup>15</sup> An innovative policy of postmortem austerity for Social Security and Medicare to recapture benefits paid to wealthy individuals during life from their estates after death. In this proposal, I recommend adapting the well-tested regulatory structure of the federal estate tax system to recover retroactively disqualified benefits in the federal entitlements context.<sup>16</sup>

Postmortem austerity would impose new eligibility criteria for Social Security and Medicare under which all individuals would continue to collect benefits during life as under current law. At death, however, wealthy decedents who leave behind significant assets in their estates would be retroactively disqualified from Social Security and Medicare benefits paid during life. Such estates would then be liable for repaying some or all benefits enjoyed by the decedent during life. By postponing the timing of entitlement disqualification until after death, postmortem austerity would mitigate the perceived loss of lifetime benefits while assuring all Americans peace of mind in their older years.<sup>17</sup>

To avoid constitutional challenge and reduce incentives for wasteful end-of-life consumption, postmortem austerity should not entirely deprive disqualified participants of the power to transmit property at death.<sup>18</sup> One way to preserve the freedom of disposition would be to cap the overall recoverable amount of disqualified benefits at 40% of the decedent's estate, thereby leaving the decedent with testamentary power over the remaining 60% of assets owned at death. Further, to implement austerity progressively, the amount of the repayment obligation might be tied to the size of the estate, such that an estate of \$1 million would be liable for 25% of the cost of lifetime benefit outlays while an estate of \$10 million would be initially liable for 100% of that cost.<sup>19</sup> A

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15. My contribution is reluctant because I believe that Social Security and Medicare should be left in place and properly funded by tax revenues.

16. For a recent historical and descriptive overview of the federal estate tax, see generally 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 (2016).

17. Indeed, even wealthy individuals can suffer from peniaphobia, an intense fear of poverty. See Nina Hendy, *Being Rich Doesn't Inoculate You Against Debilitating Fear of Poverty*, SYDNEY MORNING HERALD (June 30, 2017), <https://perma.cc/AP5Q-RV8S>.

18. *C.f.* *Hodel v. Irving*, 481 U.S. 704, 716-18 (1987) (holding that the power to transmit property at death is protected by the Fifth Amendment Takings Clause).

19. To place a postmortem repayment obligation into context, consider the following illustration: A retiree with thirty-five years of maximum earnings who delays Social Security old-age benefits to age seventy would be entitled to the 2018 maximum Primary Insurance Amount of \$2,926.90 per month. See *Social Security Benefit Amounts*, SOC. SECURITY ADMIN., <https://perma.cc/YGU2-GE4D> (archived July 11, 2018); see also *Effect of Early or Delayed Retirement on Retirement Benefits*, SOC. SECURITY ADMIN., <https://perma.cc/R854-4F8X>

disqualification ceiling would also help retain the insurance function of Medicare by relieving estates of the full burden of any extraordinary medical costs incurred by the decedent. The repayment obligation should also be offset by Medicare premiums paid by the decedent while receiving medical benefits during life. To avoid disruption within the family unit, the repayment obligation should be deferred until the death of a surviving spouse. And, to facilitate adequate advance planning, implementation of any austerity reform should be phased in with at least fifteen years' notice such that any new eligibility rule would not apply to anyone currently over the age of fifty.

Under current law, Social Security and Medicare old-age benefits are not restricted to individuals who cannot afford the cost of retirement and medical expenses,<sup>20</sup> although individuals with higher incomes generally pay higher payroll taxes<sup>21</sup> and Medicare health insurance premiums.<sup>22</sup> Postmortem austerity, therefore, would depart from current law by retroactively disqualifying decedents who demonstrably lacked financial need for old-age support during life as determined by the size of their estate at death. But unlike prior calls for financial means-testing eligibility for federal entitlements,<sup>23</sup> the postmortem feature of this proposal minimizes the disruption often attributed to austerity reforms in several respects.

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(archived July 11, 2018); *Primary Insurance Amount*, SOC. SECURITY ADMIN., <https://perma.cc/6CLC-H8FN> (archived July 11, 2018). Setting aside cost of living adjustments, the time value of money, and other technical adjustments, if this retiree collected fifteen years of Social Security old age benefits until her death at age eighty-five, then she would accumulate \$526,842 in lifetime benefits between age 70 and death. Medicare outlays, however, would vary based on the health of the participant.

20. See 42 U.S.C. § 402(a) (2016) (eligibility for Social Security old-age insurance benefits); 42 U.S.C. § 426 (2016) (eligibility for Medicare hospital insurance benefits); Kathryn L. Moore, *An Overview of the U.S. Retirement Income Security System and the Principles and Values It Reflects*, 33 COMP. LAB. L. & POL'Y J. 5, 13 (2011) ("The absence of a means test distinguishes Social Security, a social insurance program, from welfare which, by definition, provides benefits based on need.").
21. The Medicare payroll tax is not subject to an income ceiling, so individuals with higher income pay more in Medicare payroll taxes. The Social Security tax, however, is subject to an annual income cap of \$128,400 (as of 2018). Soc. Sec. Admin., Fact Sheet: 2018 Social Security Changes, at 1 (2018), <https://perma.cc/UU9L-S3DR>.
22. See *What are the Medicare Premiums and Coinsurance Rates?*, U.S. DEP'T OF HEALTH & HUM. SERVS. (last reviewed Mar. 11, 2016), <https://perma.cc/EEP6-6Y75> (noting that premiums for Medicare Part B vary depending on income); see also Richard L. Kaplan, *Top Ten Myths of Medicare*, 20 ELDER L.J. 1, 25 (2012) (describing the increased cost of Medicare health insurance premiums for individuals with higher incomes).
23. The concept of means-testing entitlement reform is not new—others have proposed limiting access to benefits during life on the basis of financial need. But critics contend that means-testing would discourage preretirement savings (so as to preserve eligibility) and undermine the social insurance character of programs that might be otherwise be recast disparagingly as a form of welfare. See Samuel C. Thompson, Jr., *A Buffett Rule for Social Security and Medicare: Phasing Out Benefits for High Income Retirees*, 50 U. LOUISVILLE L. REV. 603, 617-20 (2012) (summarizing and responding to common criticisms of means-testing proposals).

First, postmortem austerity would ensure that everyone currently eligible for Social Security and Medicare benefits would remain eligible during life. No one would live in fear of becoming impoverished in old age as a result of losing entitlement benefits. The U.S. government, with its unparalleled size and scale, operates on a time horizon that renders it uniquely capable of bearing the burden of deferring recovery of disqualified benefits until after the death of program beneficiaries.

Second, postmortem austerity would be unlikely to discourage preretirement savings because individuals would not accrue any financial windfall during life from reducing preretirement savings. We also know from experience with the estate tax that there does not appear to be any observable correlation between wealth transfer taxes imposed at death and lower aggregate savings during life.<sup>24</sup>

Third, postmortem austerity would apply only to wealthy estates, thereby structuring austerity to achieve the policy goals of progressivity and redistribution in the allocation of public resources. The burden of austerity reform, therefore, would be imposed on individuals who are most able to pay for their own living expenses, as demonstrated after-the-fact by the existence of a wealthy estate at death.

Fourth, postmortem austerity rules would encourage at least some individuals to voluntarily decline Social Security and Medicare benefits during life, thereby preserving scarce public resources for those truly in need of support. Those for whom the loss of entitlement benefits would not impose financial hardship (or create anxiety about the potential for financial hardship) should have the autonomy to withdraw from Social Security and Medicare during life to avoid subjecting their estates to government liens after death. Easily navigable opt-out procedures would have to be devised and publicized to maximize voluntary refusal of federal entitlement programs.

And fifth, individuals would be able to anticipate and plan for any repayment obligation arising from postmortem disqualification in an orderly manner so as to minimize impact on survivors. To prevent individuals from

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24. The national savings rate has been higher in years in which estate tax rates were high, and the national savings rate declined in years in which the estate tax rates were historically low. For example, 1976 was the last year in which the maximum estate tax rate of 77% applied to estates over \$50 million. JOINT COMM. ON TAXATION, JCX-52-15, HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM 6-8 (2015), <https://perma.cc/D8YU-8MXY>. Since 1976, with some variability, the rate has generally decreased, and the exemption amount has significantly increased. *Id.* at 12 tbl.1. During that same time period, net national savings as a percentage of gross national income declined. See *The National Saving Rate in Historical Perspective*, PETER G. PETERSON FOUND. (Feb. 16, 2018), <https://perma.cc/7RRN-V73U>. In 2010, the year in which the estate tax was temporarily repealed altogether, Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 501(a), 115 Stat. 38, 69, the net national savings rate reached a low of -2.1% for the first time since the 1930s, see *The National Saving Rate in Historical Perspective*, *supra*.

strategically depleting assets through inter vivos gifts toward the end of life, however, the disqualification rules might have to impose a look-back period for lifetime transfers with secondary repayment liability imposed on lifetime transferees. Likewise, the term “estate” for purposes of entitlement benefit recovery may have to include certain inter vivos trusts and other non-probate transfers that convey title during life but delay transfer of possession until death.

Readers with prior knowledge of wealth transfer law will notice a striking similarity between my proposal for postmortem austerity and the federal wealth transfer tax system (the estate tax, in particular). This is not by coincidence. The United States has more than a century of experience in taxing property transfers at death under the federal transfer tax system.<sup>25</sup> So, the assertion of nontax claims at death in the Social Security or Medicare context should attempt to adapt or replicate the best features of the transfer tax system, which has been carefully refined by Congress and the Treasury Department to prevent transfers from escaping tax liability. For example, to prevent wealthy individuals from avoiding benefit disqualification through late-in-life inter vivos transfers, postmortem austerity rules might incorporate features of the federal gift tax, which represents one of the earliest legislative innovations to prevent taxpayers from deploying a similar technique to avoid the estate tax.<sup>26</sup> To this end, postmortem austerity rules might disqualify individuals who have small estates but made significant lifetime gifts. However, to avoid over-regulating gratuitous transfers, the disqualification rule could be limited to gifts transferred after a retiree has activated Social Security retirement and Medicare benefits.

Critics of this proposal, including opponents of the estate tax, might argue that incorporating the apparatus of federal transfer taxes into a system of postmortem austerity would undermine Congress’s intent to abrogate rather than expand the reach of federal transfer taxes. It is true that the 2017 tax reforms doubled the unified transfer tax exemption to \$11.2 million for individuals (\$22.4 million for married couples) until 2025,<sup>27</sup> thereby temporarily exempting all but the very (very) richest decedents from federal transfer taxes. It is also true that these amendments reflect a clear legislative

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25. See generally Caron, *supra* note 16 (describing the history and content of the federal estate tax).

26. See Jay A. Soled, *Federal Transfer Taxes: An Introduction*, in REID KRESS WEISBORD ET AL., WILLS, TRUSTS, AND ESTATES: THE ESSENTIALS 537, 538 (2018).

27. See TCJA § 11061(a) (to be codified at 26 I.R.C. § 2010(c)(3)(C)) (providing that “[i]n the case of estates of decedents dying or gifts made after December 31, 2017, and before January 1, 2026, subparagraph (A) shall be applied by substituting ‘\$10,000,000’ for ‘\$5,000,000,’” an amount that would be adjusted by the IRS for inflation under 26 I.R.C. § 2010(c)(3)(B) (2016)); 26 I.R.C. § 2010(c)(2) (2016) (portability of exemption amount between spouses); see generally *Estate Tax*, INTERNAL REVENUE SERV. (last reviewed or updated May 9, 2018), <https://perma.cc/NHF6-LGXZ>.

preference to scale back federal transfer taxes at least temporarily.<sup>28</sup> But the legislative choice to roll back transfer taxes says nothing about precluding the assertion of non-tax government claims at death. Indeed, by reducing the federal estate tax, Congress has made available a larger share of estate property for postmortem austerity reforms. It is also notable that Congress left untouched a government lien statute in the Medicaid context similar to my proposal for postmortem austerity in the Social Security and Medicare contexts: Medicaid estate recovery rules that require state Medicaid programs to recover certain costs paid to beneficiaries fifty-five years or older for nursing facility services, home and community-based services, and other related costs from the estates of beneficiaries at death.<sup>29</sup> Further, since Congress did not entirely repeal the federal transfer taxes (the 2017 transfer tax reforms sunset on December 31, 2025),<sup>30</sup> there is no discernable legislative intent to abolish the superstructure of wealth transfer taxation.

Postmortem austerity entitlement reform will undoubtedly face a steep uphill battle in Congress. But austerity reforms are always politically unpopular because they reduce benefits to which individuals believe they are entitled and on which many have come to rely. My proposal for postmortem austerity recognizes these political considerations by narrowly tailoring entitlement reform to reduce (but not eliminate) hardship and enhance (but not guarantee) public acceptance. If Congress is not willing to raise taxes to pay for federal entitlements, then it should adopt a nuanced approach to austerity that softens the social impact of reducing Social Security and Medicare benefits. Postmortem austerity does so by retroactively restricting benefits for individuals who conclusively demonstrate a lack of need, namely, wealthy decedents. And it does so by drawing on the well-tested statutory and regulatory framework of the federal transfer tax system. So conceived, the postmortem approach to entitlement austerity represents a novel yet familiar policy apparatus: something bold in the form of something old.

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28. See Patricia Cohen, *Who'd Gain from an Estate Tax Rollback: The 0.2 Percenters*, N.Y. TIMES (Nov. 16, 2017), <https://perma.cc/BLT5-UHLS>.

29. 42 U.S.C. § 1396p(b)(1)(B) (2016).

30. TCJA § 11061(a) (to be codified at 26 I.R.C. § 2010 (c)(3)(C)).