VALUATION IN A LEGAL VACUUM: A CLOSE LOOK AT THE VALIDITY OF THE SERVICE’S ATTEMPT TO DISREGARD DEFAULT STATE LAW RESTRICTIONS IN THE PROPOSED REGULATIONS UNDER IRC § 2704

INTRODUCTION

One of the biggest recent changes in the estate planning landscape is no doubt the proposed Treasury Regulations under IRC § 2704. After hinting about them for years, the Internal Revenue Service (the “Service”) finally issued the proposed regulations (REG-163113-02) on August 2, 2016. The proposed regulations represent the culmination of the Service’s hard-fought battle against valuation discounts ever since the enactment of IRC § 2704 as part of Chapter 14 in 1990.

By disregarding certain restrictions imposed on ownership interests in family entities, the proposed regulations would eliminate most, if not all, of the valuation discounts otherwise available to reduce the value of the transferred interests. Consequently, wealthy families stand to face a substantial increase in their transfer tax liability.

Not surprisingly, reaction to the proposed regulations has been swift. The proposed regulations have received widespread attention from commentators, the general public, as well as members of Congress. Notably, at least two bills have been introduced in Congress to overturn the proposed regulations, even

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1 The idea behind the proposed regulations has appeared in the “Greenbook,” the government’s annual revenue proposal, from 2005-2013, with almost no change from the Bush to the Obama administration. Kathleen Adcock, IRS Proposes New Regulations For §2704 — A Better Mouse Trap?, BLOOMBERG BNA (March 31, 2017), https://www.bna.com/irs-proposes-new-b73014446640.


3 See Adcock, supra note 1.

4 See infra Part I.C.3.

5 See Allyson Versprille, Family Businesses, Jobs Seen Thwarted by Proposed IRS Rules, BLOOMBERG BNA (March 31, 2017), https://www.bna.com/family-businesses-jobs-n73014446714 (noting that valuation discounts can range from 30 to 40 percent and thus the proposed regulations may create an additional 30 to 40 percent tax burden).
before they were finalized. During the 90-day public comment period, the Service received over 28,000 comments. At the public hearing held on December 1, 2016, 37 individuals, representing affected business owners and professional groups, presented their views. It is difficult to overstate the public interest in the proposed regulations.

While many practitioners have provided thoughtful comments on the topic, most of the discussions focus on their potential impact and alternative planning techniques to obtain valuation discounts after the finalization of the proposed regulations. Only a few have examined the validity of the proposed regulations themselves. This Note will take a critical look at this latter question and focus on one particular aspect at the heart of the proposed regulations—the validity of the Service’s attempt to disregard liquidation/redemption restrictions imposed by default state law under the proposed §§ 25.2704-2 and -3. The author believes this Note will make an important contribution, not only to the current discussion, but also to the likely ensuing litigation should the proposed regulations be finalized in their current form.

Part I of the Note would provide readers with the necessary background for the following discussions, by looking at transfer taxation in general, the current Regulations, and the changes introduced by the proposed regulations. Part II examines the various substantive arguments on the validity of the proposed regulations’ disregard of default state law restrictions, including an analysis of the statutory text, the relevant legislative history, federalism principles, and Congress’s delegation of legislative authority to the Service. Part III considers the potential policy impact of the proposed regulations. Part IV concludes.

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8 Id.

I.  **TRANSFER TAXATION AND THE VALUATION RULES UNDER IRC § 2704**

   **A. Transfer taxation in general**

   The Federal gift and estate taxes are perhaps the most well-known forms of Federal transfer
taxation.\(^{10}\) They are excise taxes imposed on certain transmissions of wealth during life and at death,
respectively.\(^{11}\) Both are computed by applying a statutory rate on a tax base, which is the amount of the
taxable gift in the case of the Federal gift tax, and the taxable estate in the case of the Federal estate tax.\(^{12}\)
Tax liability depends on the size of the tax base. Thus, how tax base is valued has a direct impact on the
transfer tax liability.

   The tax base is calculated, in part, by aggregating the fair market value of the transferred property
subject to tax.\(^{13}\) For assets such as publicly traded securities or cash, determining their fair market value is
relatively straightforward.\(^{14}\) However, for other assets such as ownership interests in closely held
businesses, such determination is considerably more difficult.\(^{15}\) Taxpayers generally have to look at a
number of factors in making such determination.\(^{16}\)

   Under current law, ownership interests in closely held entities such as partnerships, limited liability
companies, and closely-held corporations, often receive a discounted valuation from the proportionate
value of the underlying assets in the entity that those interests represent.\(^{17}\) These discounts arise from the
nature of these interests, which are usually subject to various limitations imposed by both local law and

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\(^{10}\) The third form of transfer taxation is the Generation-Skipping Transfer Tax.

\(^{11}\) **BRANT J. HELLWIG & ROBERT T. DANFORTH, UNDERSTANDING ESTATE AND GIFT TAXATION** 1

\(^{12}\) *See I.R.C. §§ 2001, 2501.*

\(^{13}\) *See I.R.C. § 2031 (defining gross estate as “the value at the time of his death of all property, real or
personal, tangible or intangible, wherever situated”); I.R.C. § 2503 (defining taxable gift as “the total
amount of gifts made during the calendar year, less the deductions”).*

\(^{14}\) **DALE S. ADAMS & ROBERT B. SMITH, FEDERAL ESTATE & GIFT TAXATION ¶ 4.02[3][c], at 8.**

\(^{15}\) *Id. ¶ 4.02[3][f], at 9.*

\(^{16}\) *Id; see also Rev. Rul. 59-60, 1959-1 C.B. 237 (listing the eight factors commonly used in the
valuation of closely held businesses).*

\(^{17}\) *See generally ADAMS & SMITH, supra note 14, ¶ 4.02[4] (discussing minority, marketability, and
other significant valuation discounts).*
the entity’s governing documents, including restrictions on voting rights, redemption, and transferability. The typical valuation discounts reflect the lack of control the interest holders have over the affairs of the entity and the difficulty the interest holders face when trying to sell these interests.

An example here would be helpful. The prototypical planning scenario would involve a parent wishing to transfer wealth to her children. The parent would transfer assets into a family limited partnership (FLP), in exchange for general and limited partnership interests. She would then gift the limited partnership interests to her children. Under the typical business organization statute, unless otherwise provided by the partnership agreement, the limited partner does not have the right to vote (i.e., control), nor to withdraw from the partnership, nor to even transfer the partnership interests to a third party. As the general partner, the parent would retain effective control over the assets of the partnership. As limited partners, the children have little say in how the partnership is run, nor can they liquidate their interests by withdrawing from the partnership. Needless to say, the limited partnership interests are not a very attractive investment to an unrelated third party. As such, their fair market value is most likely lower than the proportionate value of the partnership’s underlying assets that those interests represent. This valuation discount is appropriate because of the lack of control and lack of marketability inherent in the limited partnership interests.

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18 See id.
19 HELLWIG & DANFORTH, supra note 11 at 121 (noting that lack-of-control discount arises from “disabilities inherent in a minority interest,” including lack of control over the management of the business, investment of its assets, distribution policy, and redemption decision).
20 Id. at 122 (noting that lack-of-marketability discount arises from the difficulty in selling these interests).
21 See, e.g., REVISED UNIF. LTD. P’SHIP ACT § 406 (UNIF. LAW COMM’N 2001) (last amended 2013) (“any matter relating to the activities of the limited partnership may be exclusively decided by the general partner”) [hereinafter RULPA]; id. § 601 (no “right to dissociate as a limited partner before the termination of the limited partnership”); id. §702 CMT (“[m]ere transferees have no right to intrude as the partners carry on their activities as partners”).
22 Control here refers to the management of the entity, including the investment decision of assets held therein. It does not refer to the IRC § 2036-type retained powers that cause inclusion of the transferred assets in the transferor’s gross estate. See generally Richard L. Dees, Time Traveling to Strangle Strangi (and Kill the Monster Again), Part 1, 116 TAX NOTES 563 (August 13, 2007) (arguing against the application of IRC § 2036 in the FLP context).
A perceptive reader would notice the potential for abuse here. Suppose liquid investments such as publicly traded securities are contributed into the FLP. Because the valuation discounts only reflect the nature of the property being transferred, i.e., the limited partnership interests, the nature of the underlying assets in the partnership does not negate those discounts. By first contributing the publicly traded securities into a partnership and then transferring partnership interests, the donor is able to “manufacture” a valuation discount and pay less transfer tax than had he transferred the underlying assets outright. The typical combined discounts can be as much as 40%. In other words, by simply using the right “form,” the donor may be able to change the substance, shaving off a substantial portion of his transfer tax liability.

Titled “Special Valuation Rules,” Chapter 14 of the Internal Revenue Code was enacted in 1990 as a legislative response to curb certain “estate freeze” abuses. It provides a set of valuation principles in the valuation of the tax base for transfer tax purposes. The above hypothetical would be subject to these principles, including the rules under IRC § 2704(b).

B. IRC § 2704(b) and the current Treasury Regulations § 25.2704-2

IRC § 2704(b) is titled “Certain restrictions on liquidation disregarded.” It was designed to disregard certain restrictions on liquidation rights and consequently, to disallow any resulting valuation discount arising from such restrictions. IRC § 2704(b) has two operative provisions.

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23 ADAMS & SMITH, supra note 14, ¶ 4.02[4] at 15-16 (noting that the typical minority discount ranges from 10 to 30 percent, and marketability discount from 15 to 40 percent). See also Estate of Jung v. Comm'r, 101 T.C. 412 (1993) (35 percent marketability discount); Estate of Lauder v. Comm'r, 68 T.C.M. (CCH) 985 (1994) (40 percent marketability discount); Estate of Berg v. Comm'r, 61 T.C.M. (CCH) 2949 (1991) (20 percent minority discount). Note that the total discount is a multiplicative combination of individual discounts.

24 ADAMS & SMITH, supra note 14, ¶ 19.1 at 1; Patricia M. Annino, Chapter 14 (special valuation rules) and its impact on the family business owner, in 24 MASS. PRAC., EST. PLAN. § 23.6 (3d ed.).

25 ADAMS & SMITH, supra note 14, ¶ 19.1 at 1.

26 I.R.C. § 2704(b).

IRC § 2704(b)(1) would disregard any “applicable restriction” in valuing the ownership interests in family-controlled entities for transfer tax purposes.28 “Applicable restrictions” are defined under IRC § 2704(b)(2) as any restriction:

(A) which effectively limits the ability of the [entity] to liquidate, and

(B) with respect to which either of the following applies:

(i) The restriction lapses, in whole or in part, after the transfer . . . .

(ii) The transferor or any member of the transferor’s family, either alone or collectively, has the right after such transfer to remove, in whole or in part, the restriction.29

The effect of disregarding an applicable restriction is provided by Treasury Regulations: “If an applicable restriction is disregarded . . . the transferred interest is valued as if the restriction does not exist and as if the rights of the transferor are determined under the State law that would apply but for the restriction.”30 In other words, the applicable default state law would replace the disregarded “applicable restriction,” and the transferred interest is then valued accordingly.

However, IRC § 2704(b)(3)(B) also sets out an important statutory exception—any restriction “imposed, or required to be imposed, by any Federal or State law” is not an “applicable restriction.”31 This statutory exception is further clarified by Treas. Reg. § 25.2704-2(b), which provides “[a]n applicable restriction is a limitation [in the governing instrument] on the ability to liquidate the entity (in whole or in part) that is more restrictive than the limitations that would apply under the State law generally applicable to the entity in the absence of the restriction” (emphasis added).32

28 I.R.C. § 2704(b)(1).
29 I.R.C. § 2704(b)(2).
In other words, state law’s default provisions can be thought of as a floor in determining whether a particular restriction on liquidation right is an “applicable restriction.” Restrictions that are more restrictive than those imposed by the default state law would be deemed an “applicable restriction” and be disregarded for the purpose of valuing the transferred interests.

The second operative provision of IRC § 2704 is subsection (b)(4), which gives the Service the authority to provide by regulations “other restrictions that shall be disregarded . . . if such restriction has the effect of reducing the value of the transferred interest for [transfer tax] purposes but does not ultimately reduce the value of such interest to the transferee” (emphasis added). In other words, the Service can disregard “other restrictions” that have the proscribed effect. It is pursuant to this authority that the modified “applicable restriction” provision (under the proposed Treas. Reg. § 25.2704-2) and the new “disregarded restriction” provision (under the proposed Treas. Reg. § 25.2704-3) are promulgated.

C. The Proposed Treasury Regulations §§ 25.2704-2 and -3

1. The need for the proposed regulations

Since the promulgation of the original Treasury Regulations under IRC § 2704, judicial developments and legislative changes at the state level have been very favorable to taxpayers. Indeed, courts have concluded that the “applicable restriction” provision under IRC § 2704(b)(1) through (3) applies only to limitations on the ability to liquidate the whole entity, and not the ability to liquidate an individual interest in the entity. In other words, under current law, if the entity’s governing document

33 The relevant state law provisions for our discussion here would be the default provisions that can be overridden by the entity’s governing instruments, i.e., those that would govern unless otherwise provided by the parties’ agreement. If a state law provision is immutable, it will govern regardless of what the entity’s governing document provides and will invalidate any contrary provisions contained therein. Therefore, in the presence of an immutable state law provision, there is simply no applicable restriction to be disregarded under § 2704(b)(1).
34 I.R.C. § 2704(b)(4).
35 Preamble, supra note 2, 81 Fed. Reg. at 51,419.
36 See Adcock, supra note 1; Preamble, supra note 2, 81 Fed. Reg. at 51,415-16.
37 Preamble, supra note 2, 81 Fed. Reg. at 51,415 (citing Kerr v. Comm’r, 113 T.C. 449, 473 (1999), aff’d, 292 F.3d 490 (5th Cir. 2002)).
limits the ability to liquidate the entity, and which limitation is more restrictive than the applicable default state law, such limitation would be disregarded as an “applicable restriction.” However, if the governing document instead merely limits the ability to liquidate an individual interest,38 such limitation is not disregarded even if it is more restrictive than the applicable default state law. As a result, the “applicable restriction” provision has been “rendered substantially ineffective.”39

In addition, following the enactment of IRC § 2704 in 1990, states have modified their business organization statutes to provide for default provisions that impose limitations “as restrictive as the maximum restriction on liquidation that could be imposed” in the governing document.40 Since the default state law is the benchmark in determining whether a particular limitation is an “applicable restriction,” the more restrictive the default state law is, the fewer limitations would be deemed an “applicable restriction.” This is so even though such limitations can later be relaxed by an amendment to the entity’s governing document, and which relaxed provisions would then override the more restrictive default State law.

Another illustration would be helpful. State law often provides that a limited partner does not have the right to demand redemption of his or her interest, unless otherwise provided by the partnership agreement.41 Thus, a provision in the partnership agreement imposing the same limitation would not be deemed an “applicable restriction” under IRC § 2704(b)(1), both because the limitation is placed on the right to redeem an individual interest, and because the limitation is not more restrictive than the applicable default state law. The limited partner’s interest would receive valuation discounts to reflect this lack of redemption right inherent in the limited partner’s status. After the transfer, the partnership

38 See, e.g., RULPA § 601 (no “right to dissociate as a limited partner before the termination of the limited partnership”).
40 Id.; see also infra Part III.A; Laurel Wheeling Farrar & Susan Pace Hamill, Dissociation from Alabama Limited Liability Companies in the Post Check-The-Box Era, 49 ALA. L. REV. 909, 934 (1998) (noting that changes in tax law, especially transfer taxation, are an important driver of developments in business organization law at the state level).
41 See supra note 38.
agreement could be amended to provide the limited partner with a redemption right or the partnership could simply redeem the limited partner’s interest. The transfer of wealth is then complete, at a fraction of the transfer tax cost.

2. Changes introduced by the proposed regulations.

The proposed regulation introduces, inter alia, two important changes to the statutory scheme. First, “applicable restrictions” would be expanded by the addition of a new category of “disregarded restrictions.”42 Under the proposed § 25.2704-3, “disregarded restrictions” are defined as certain specified limitations on “the ability to redeem or liquidate an interest in an entity, if the restriction, in whole or in part, either lapses after the transfer or can be removed by the transferor or any member of the transferor’s family . . . either alone or collectively” (emphasis added).43

In other words, the new “disregarded restriction” provision would apply to limitations on the ability to redeem or liquidate an individual interest, thereby filling the gap left open by the “applicable restrictions” provision, which applies only to entity liquidation.44

If a limitation is deemed a “disregarded restriction,” it would be disregarded and the transferred interest is then valued “under generally applicable valuation principles as if the disregarded restriction does not exist in the governing documents, local law, or otherwise” (emphasis added).45

The second important change under the proposed regulations is that both the “applicable restrictions” under the proposed § 25.2704-2 and “disregarded restrictions” under the proposed § 25.2704-3 would include limitations imposed by default state law provisions.46 This is a major break from current law, and

43 Prop. Treas. Reg. § 25.2704-3(b)(1). Not all limitations are subject to the “disregarded restriction” provision; only those that have certain impact on the liquidation of individual interests—namely, limitations on the ability to compel liquidation or redemption, on the amount received, and on the manner of payment. See id.
44 See id; see also Preamble, supra note 2, 81 Fed. Reg. at 51,417-18.
represents the Service’s response to the taxpayer-friendly legislative developments at the state level. In effect, both those restrictions imposed by the governing instrument that are more restrictive than the default state laws and those imposed by the default state laws themselves will be disregarded in the valuation of the transferred interests. Therefore, the only state law restrictions that are not disregarded under IRC § 2704 would be those imposed by immutable provisions, i.e., restrictions that the entity cannot override or “opt out” of through its governing documents.

Going back to our previous illustration—under the default state law, a limited partner does not have the right to demand redemption of his or her partnership interest. However, because this restriction may be overridden by the partnership agreement, it is a restriction imposed by default state law on the ability to redeem an individual interest in the partnership. Thus, it is disregarded under the proposed § 25.2704-3. The limited partner’s interest is then valued for transfer tax purposes as if the restriction does not exist, presumably as if the limited partner could demand redemption of his or her interest at its fair market value. As a result, it would be very difficult to support any discount on the valuation of such interest. In one fell swoop, the Service completely rewrites the rules of the game.

3. The impact of the proposed regulations

The proposed regulations would disregard certain restrictions on liquidation and redemption rights, whether they are imposed by the governing documents or by default state law. Because “the nonexistence of a restriction on liquidation or withdrawal implies the existence of liquidation or withdrawal right,” the most likely result is that the transferred interest will be valued based on certain assumptions of implied liquidation and put rights.

47 See supra note 32 and accompanying text.
48 See infra Part I.C.3.
49 For a comprehensive discussion of the possible effects of the proposed regulations, see NEW YORK STATE BAR ASSOCIATION, JOINT REPORT ON PROPOSED REGULATIONS UNDER SECTION 2704 OF THE CODE, 17-19 (2016) (outlining three possible effects—no change in valuation discounts, valuation in a legal vacuum, and deemed put right resulting in the elimination of most, if not all, of valuation discounts) [hereinafter NEW YORK STATE BAR JOINT REPORT].
Indeed, several provisions in the proposed regulations provide the implied valuation assumptions that would replace the disregarded restrictions imposed by default state laws and the governing instruments. For example, the definition of “disregarded restrictions” under the proposed § 25.2704-3(b)(1) sets forth a standard regarding the amount, manner, and timing of payment on the liquidation of an individual interest such that a restriction more restrictive than which standard would be disregarded. Notably, the same standard is also found under the proposed §§ 25.2704-2(b)(4)(iv) and 25.2704-3(b)(5)(v), which provide a safe harbor for both the “applicable restriction” and “disregarded restriction” provisions. The safe harbor requires that each holder of an interest in the entity has an enforceable put right as described in the proposed § 25.2704-3(b)(6), which provides for, inter alia, payment upon six-month notice, in cash and/or other property, for an amount at least equal to the “minimum value” of the interest. The term “minimum value” is further defined as “the interest’s share of the . . . fair market value . . . of the property held by the entity, reduced by the outstanding obligations of the entity.”

If the interest is valued as if its holder has a put right to sell the interest back to the entity at a mandated “minimum value,” taxpayers would be hard-pressed to support any valuation discount that reduces the interest’s value beyond the “minimum value.” Indeed, no lack-of-marketability discount is appropriate because the interest holder has the option to sell the interest back to the entity. Even if the interest holder lacks control over the entity’s management, the put right allows the interest holder to exit from the business and regain control over the redemption proceeds. As a result, most, if not all of the traditional valuation discounts currently available for transferred interests in family-controlled entities would be eliminated.

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54 See Deborah M. Beers & Elizabeth Carrott Minnigh, Gift and Intra-Family Sale Transfers in 2016 Essential As Proposed Rules Would Apply Broadly to Disallow Valuation Discounts, DAILY REPORT FOR EXECUTIVES (BNA), October 11, 2016 (noting that the proposed regulations would “virtually eliminate minority interest and lack of marketability discounts now available to transferors of interests in family-
II. TESTING THE VALIDITY OF THE PROPOSED REGULATIONS

A. The reviewing test for tax regulations

Testing the validity of tax regulations involves a difficult and confusing area of law. Some of this confusion stems from a historical distinction between two types of Treasury Regulations—“interpretive regulations” and “legislative regulations.”\(^{55}\) Legislative regulations are said to be issued pursuant to a specific grant of authority that is explicitly provided in the statute.\(^{56}\) Legislative regulations are meant “to controlled closely held corporations, partnerships and limited liability companies”); John A. Bogdanski, *Proposed Valuation Regulations: Aggressive, Unclear, Questionable*, 43 EST. PLAN. 31, 33 (2016) (“[T]his large dragnet seems to have the potential to eradicate most lack-of-control discounts from the wealth transfer tax scene”); Steve R. Akers, *Section 2704 Proposed Regulations*, BESSEMER TR., http://www.bessemertrust.com/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/Advisor/Presentation/Print%20PDFs/Section%202704%20Proposed%20Regulations%20Summary_WEB%20FINAL.pdf (the proposed regulations “may significantly restrict (or eliminate) lack of control discounts in valuing interests in entities and may impact marketability discounts as well”).

However, not all commentators agree with this assessment. See *Estate Planning Update Webcast*, BESSEMER TR. (Nov. 15, 2016) (noting that the Service did not explicitly say that all valuation discounts are eliminated); Bogdanski, *supra* at 7 (noting the uncertainties in the impact of the proposed regulations and that one IRS official has reportedly indicated that the broadest reading of the proposed regulations leading to all elimination of valuation discounts is incorrect); Matthew R. Madara, *Proposed Estate Tax Regs Have Been Misconstrued, Official Says*, 2016 TAX NOTES TODAY 1918 (Oct. 3, 2016); Matthew R. Madara, *Misinformation Cited in Estate Tax Valuation Rules Controversy*, 2016 TAX NOTES TODAY 223-5 (Nov. 17, 2016).

An interesting perspective is provided by Bill Blatt, who served as legislation council for the Joint Committee that drafted IRC § 2704. He advocated for the use of liquidation value of the underlying assets in valuing the entity interests. In a way, this is very similar to the “minimum value” concept in the proposed regulations. See generally William S. Blatt, *Minority Discounts, Fair Market Value, and the Culture of Estate Taxation*, 52 TAX L. REV. 225 (1997).


It is important to note that this legislative-interpretive distinction in the tax regulation context is different from the legislative (or substantive)-interpretive distinction in the administrative law context. In the latter case, the distinction is between legally binding rules that have been promulgated pursuant to the APA rulemaking procedures, and those that have not been so promulgated and are thus not legally binding. In the tax regulation context, the distinction is based on the source of authority pursuant to which the rules were promulgated. Both “interpretive tax regulations” and “legislative tax regulations” are legally binding and presumably have been promulgated pursuant to APA rulemaking procedures.

\(^{56}\) Walton, 115 T.C. at 597.
fill gaps deliberately left open by Congress.” In contrast, interpretive regulations are said to be issued pursuant to the general grant of authority under IRC § 7805(a), under which “the Treasury Department may prescribe all needful rules and regulations for the enforcement” of the Internal Revenue Code. Interpretive regulations are meant “to interpret, explain, and apply the rules prescribed by Congress.”

Courts had been split over how much deference should be paid to the two types of Treasury Regulations. On one hand, Chevron deference supposedly would apply to all agency’s interpretations that have the force and effect of law. The Internal Revenue Service is an administrative agency. Therefore, all Treasury Regulations validly promulgated pursuant to notice-and-comment rulemaking procedures are presumably “given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” On the other hand, some courts and many practitioners view tax regulations differently from other types of agency regulations. They would give less deference to “interpretive” tax regulations than to “legislative” tax regulations.

In Mayo Foundation for Education and Research v. United States, the Supreme Court finally resolved this question. The Court held that interpretive rules issued “pursuant to an explicit authorization to prescribe needful rules and regulations, and only after notice-and-comment procedures” merit Chevron deference. According to the Court, “the principles underlying . . . Chevron apply with full force in tax context.” Indeed, courts have long given legislative regulations controlling weight. Mayo clarifies that

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58 Id.
59 Id.
62 See Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 45 (2011) (“It is also true that this Court, in opinions predating Chevron, stated that it owed less deference to a rule adopted under that general grant of authority than it would afford rules issued pursuant to more specific grants.”).
63 Id.
64 Id. at 46.
65 Id. at 55.
the same deference should also be given to an interpretive regulation, i.e., “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by” an agency.

Under the *Chevron* framework, agency regulations are examined under a two-part test. First, the court asks whether Congress has “directly addressed the precise question at issue.” If Congress has not done so, i.e., “the statute is silent or ambiguous on the question,” the court then asks whether the regulation is “a permissible interpretation of the statute.”

*Mayo* also provides important guidance in applying the *Chevron* framework on tax regulations. *Mayo* rejects the multi-factor analysis previously used by the Court to review tax regulations in *National Muffler*, a pre-*Chevron* case. The practical effect of this holding is to narrow the ground for invalidating a tax regulation in *Chevron*’s step two. Under *National Muffler*, agency’s inconsistency with its prior position or lack of contemporaneity between the enactment of the statute and the promulgation of the

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66 Id. at 57 (“Our inquiry . . . does not turn on whether Congress's delegation of authority was general or specific”).

67 *Chevron*, 467 U.S. at 844.

The Service claims that both the proposed §§ 25.2704-2 and -3 are issued under the specific grant of authority under I.R.C. § 2704(b)(4) and are thus “legislative regulations.” See Preamble, supra note 2, 81 Fed. Reg. at 51,419. However, one can argue that the expanded “applicable restriction” provision exceeds the I.R.C. § 2704(b)(4) specific grant of authority. Under I.R.C. § 2704(b)(4), the Service may disregard “other restrictions,” implying that the specific grant of authority is limited to restrictions have not already been addressed elsewhere. I.R.C. § 2704(b)(1) has already addressed restrictions on the ability to liquidate the entity. Thus, if I.R.C. § 2704(b)(1) is broadly interpreted, I.R.C. § 2704(b)(4) may not provide the Service with the authority to disregard “restrictions” on the ability to liquidate the entity. In that case, the expanded “applicable restriction” provision under the proposed § 25.2704-2 can only be issued based on the general grant of authority under I.R.C. § 7805(a) and is thus an “interpretive regulation.”

In any case, *Mayo* resolved the difficult question of whether different reviewing standards should be applied to the two types of regulations. The *Chevron* framework, as clarified by *Mayo*, applied in both cases.

68 *Chevron*, 467 U.S. at 843.

69 Id.

70 See *Mayo*, 562 U.S. at 55-56 (rejecting the *National Muffler* framework for tax regulations); see also Steve R. Johnson, *Preserving Fairness in Tax Administration in the Mayo Era*, 32 VA. TAX REV. 269, 273 (2012) (commenting that under *Mayo*, the “proper standard for evaluating the validity of tax regulations is provided by the general administrative law *Chevron* decision rather than by the pre-*Chevron*, tax-specific *National Muffler* case”).

71 Michael Hall, *From Muffler to Mayo: the Supreme Court's Decision to Apply Chevron to Treasury Regulations and its Impact on Taxpayers*, 65 TAX LAW. 695, 707 (2012) (“Application of the *Chevron* standard shrinks the already limited ways taxpayers could previously raise sustainable challenges under the *National Muffler* approach.”).
regulation would result in heightened skepticism by a reviewing court. Mayo holds that neither of these factors are dispositive.

At the same time, however, the Court also takes an expanded view of the relevant factors in Chevron’s step-two analysis, discussing considerations such as “administrative convenience,” legislative purpose, and judicial precedents. Therefore, inconsistency with the statutory origin and purpose is probably still a relevant factor in testing the validity of a tax regulation.

In the following discussions, this Note will discuss various substantive arguments on the validity of the proposed regulations’ disregard of restrictions imposed by default state law. Part II.B starts out with an analysis of IRC § 2704 language. Part II.C then analyzes the relevant legislative history and statutory structure of Chapter 14. Part II.D considers the validity of the proposed regulations in light of federalism principles. Finally, part II.E examines the Service’s legislative authority in issuing the proposed regulations. These substantive arguments are applicable to both parts of the Chevron’s test—in determining whether the statute is ambiguous as well as in examining the reasonableness of the agency’s interpretation.

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72 Id.; Nat’l Muffler Dealers Ass’n, Inc. v. United States, 440 U.S. 472, 477 (1979) (“Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner’s interpretation”).

73 Hall, supra note 71, at 707; Mayo, 562 U.S. at 55 (“Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the Chevron framework . . . neither antiquity nor contemporaneity with [a] statute is a condition of [a regulation's] validity”).

74 See Mayo, 562 U.S. at 59-60.

75 See Chem. Mfr. Ass’n v. Nat. Res. Def. Council, Inc., 470 U.S. 116, 126 (1985) (deference to agency’s interpretation “unless the legislative history or the purpose or structure reveal a contrary intent on the part of Congress”); see also Dees, supra note 9 (using extensive discussion of legislative history of I.R.C. § 2704 and Chapter 14 to discuss the validity of the proposed regulations).

76 See Dole v. United Steelworkers of Am., 494 U.S. 26, 35 (1990) (describing the Chevron’s step-one analysis as “determining the congressional intent using traditional tools of statutory construction,” with the starting point being “the language of the statute,” but “in expounding a statute,” courts are “not guided by a single sentence, but look to the provisions of the whole law, and to its object and policy”); see also William F. Funk et al., Administrative Procedure and Practice 150 (5th ed. 2014) (discussing factors used in Chevron’s step-one analysis).

It is worth noting that the best time to challenge a regulation is at Chevron’s step one, i.e., by showing the statute is unambiguous. According to one study, the government wins 42 percent of the time at step one and 89 percent at step two, with an overall success rate of 71 percent. See Orin S. Kerr, Shedding

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B. Statutory language of IRC § 2704

An analysis of IRC § 2704 statutory language does not support the Service’s distinction between mandatory and default state law provisions. As a threshold matter, the statutory text makes no mention of any such distinction. The exception under IRC § 2704(b)(3)(B) simply provides that “the term ‘applicable restriction’ shall not include . . . any restriction imposed, or required to be imposed, by any Federal or State law” (emphasis added). In fact, the use of the word “any” (“any . . . State law”) suggests the term “State law” should be broadly interpreted.

Moreover, the use of the disjunctive “imposed or required to be imposed” is also significant. Mandatory rules are already “required to be imposed.” Therefore, to satisfy the disjunctive, there should be another type of state laws that is “imposed” but not “required to be imposed.” The most natural answer would be default rules, which are imposed by the state legislatures and will control in the absence of contrary provisions in the governing documents. However, because the parties can override such default rules, they are not “required to be imposed.” In that sense, the default rules are imposed but not required to be imposed, fitting naturally into the second part of the disjunctive.

Statutes should be read to include their natural meanings, and to avoid making any part of the statutory text redundant. If “State law” includes only mandatory provisions, arguably, the first part of the disjunctive would be redundant. Since the statutory language does not distinguish between default and mandatory state laws, the most natural reading of IRC § 2704 would be to avoid making this distinction.

C. The proposed regulations would likely be inconsistent with the legislative history and purpose of Chapter 14.


77 I.R.C. § 2704(b)(3)(B).

78 See, e.g., REVISED UNIF. P’SHP ACT (UNIF. LAW COMM’N 1997) PREFATORY NOTE (“The Revised Act is . . . largely a series of ‘default rules’ that govern the relations among partners in situations they have not addressed in a partnership agreement.”) [hereinafter RUPA].

1. Enacted to narrowly target specific abuses, Chapter 14 was not intended to eliminate traditional valuation discount or to impose an across-the-board family attribution rule.

Chapter 14 was enacted as a legislative response to certain estate-freeze abuses. It replaced the short-lived and controversial IRC § 2036(c), which was dubbed “the cure . . . worse than the disease.”

To understand the history behind Chapter 14, it is necessary to delve into the story of its predecessor, IRC § 2036(c). At the time IRC § 2036(c) was enacted in 1987, Congress initially explored whether to eliminate minority and marketability discounts through the use of family corporations and partnerships. In fact, the House of Representatives actually passed legislation that would have overturned existing case law and eliminated minority and other discounts. However, after the two chambers exchanged their offers, the House cut back on its position, so much so that Congress eventually enacted only the Senate’s “anti-estate freeze” provision for preferred stock under IRC § 2036(c). Chapter 14’s legislative history made clear that Congress was not eliminating traditional valuation discounts under IRC § 2036(c).

However, by 1990, the problems associated with IRC § 2036(c) became obvious. It was “simply too ambiguous and confusing,” and “overly broad and unintelligible to even the most sophisticated counsel.” The effort to repeal IRC § 2036(c) thus enjoyed a rare bi-partisan consensus. As its replacement, Chapter 14 was meant to be narrowly targeted at certain abuses:

[§ 2036(c)] takes an approach that throws the baby out with the bathwater. Consequently, a wide range of otherwise legitimate transactions are suspect under its provisions. The bill we are

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80 See supra note 24.
82 Id. at 1305.
83 Dees, supra note 9 (citing H.R. REP. NO. 100-3545, at 1041-44 (1987)).
84 Id.
85 Id. (citing H.R. REP. NO. 100-795, at 423 (1988)).
87 Id. (statement of Sen. Boren).
88 Dees, supra note 9; Eastland, supra note 81, at 1310.
introducing today [Chapter 14] takes the opposite approach. It says, ‘These specifically identified abuses are impermissible.’ Period. In this way, family business owners who wish to pass the business on to their children gradually during their lifetimes can do so with a clear understanding of those means which are permissible. (Emphasis added).89

Moreover, Chapter 14 still preserves the original compromise behind IRC § 2036(c), which rejects an “across-the-board inclusion rule” for family businesses (“family attribution” rule),90 and protects the traditional minority and marketability valuation discounts.91

The value of property transferred by gift or includable in the decedent’s gross estate generally is its fair market value at the time of the gift or death. Fair market value is the price at which the property would change hands between a willing buyer and willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts (Treas. Reg. §20.2031-1(b)). This standard looks to the value of the property to a hypothetical seller and buyer, not the actual parties to the transfer. Accordingly, courts generally have refused to consider familiar relationships among co-owners in valuing property. For example, courts allow corporate stock to be discounted to reflect minority ownership even when related persons together own most or all of the underlying stock.

... The bill does not affect minority discounts or other discounts available under present law. (Emphasis added)92

90 Dees, supra note 9 (citing Informal Senate report accompanying the Revenue Reconciliation Bill of 1990 (S. 3209), 136 CONG. REC. S15629 (“The [Senate Finance] committee believes that an across-the-board inclusion rule [application of Section 2036(a)] is an inappropriate and unnecessary approach to the valuation problems associated with estate freezes.”)).
91 Id.; see also Wayne L. Warnken & Pamela R. Champine, Securing the Minority Discount for Family Business Transfers, TR. & EST. (Apr. 1993), at 49 (noting that Chapter 14 did not alter the use of discounts in valuing minority stock).
Indeed, Chapter 14 was intended to provide “a well defined and administrable set of rules” that “deter[s] abuse by making unfavorable assumptions regarding certain retained rights.”\(^93\) It \textit{narrowly targets} “provisions added to the organizational documents of a family enterprise that would typically not be found in similar non-family enterprise documents or under default state property law for the sole purpose of lowering the value of a transferred interest in a family enterprise.”\(^94\) It is not intended to subject “standard intra-family transactions” to “severe transfer tax consequences.”\(^95\)

Finally, the structure of Chapter 14 is also instructive as to Congress’s legislative purpose in addressing only specific abuses through a narrow application of the rules. Chapter 14 has only four sections, each providing for certain specific provisions to be disregarded.\(^96\) IRC § 2701 disregards certain put, call and conversion rights of senior equity interests.\(^97\) IRC § 2702 disregards certain retained interest for transfers of property interests in trust.\(^98\) IRC § 2703 disregards certain restrictions on transfers of property interests.\(^99\) And finally, IRC § 2704 disregards “applicable restrictions” on liquidation rights and deals with certain lapsing rights.\(^100\) Except for these specifically disregarded provisions, Congress intended to value interests in family businesses in the same way as interests in non-family businesses, without special adjustment because of family attribution.\(^101\)

The Senate–House conference report provides an example where contractual restrictions on the liquidation of a family partnership are disregarded for transfer tax valuation purposes, but a valuation discount, at least for lack of control, was allowed. See 136 CONG. REC. H12,423 (1990) (“Such value would be \textit{adjusted} to reflect any appropriate \textit{fragmentation discount}.”) (Emphasis added)).

\(^93\) 136 CONG. REC. S15,629 (1990).
\(^94\) Dees, supra note 9; see also Dees, supra note 22 (noting that Chapter 14 was targeted at “partnership restrictions that were more restrictive than state law,” which restrictions were “‘bells and whistles’ added to the agreement”); Bogdanski, supra note 54, at 36-37 (noting that I.R.C. § 2704(b) were designed to narrowly target specific abuses to replace the “sweeping” provisions under I.R.C. § 2036(c)).
\(^95\) 136 CONG. REC. S15,629 (1990).
\(^96\) \textit{See generally} I.R.C. Chapter 14.
\(^97\) \textit{See generally} I.R.C. § 2701.
\(^98\) \textit{See generally} I.R.C. § 2702.
\(^99\) \textit{See generally} I.R.C. § 2703.
\(^100\) \textit{See generally} I.R.C. § 2704.
\(^101\) Dees, supra note 9.
2. The proposed regulations would result in an across-the-board inclusion rule and eliminate traditional valuation discounts.

The proposed regulations in their current form, would undermine, if not completely eliminate, traditional minority and lack-of-marketability discounts. Chapter 14 was enacted “to allow business owners who are not abusing the transfer tax system to freely engage in standard intra-family transactions without being subject to severe transfer tax consequences” (emphasis added). The most severe transfer tax consequence is a complete exposure to transfer tax liability due to the elimination of all valuation discounts. However, this is exactly what the proposed regulations would do.

Indeed, Chapter 14 was only meant to deter abusive arrangements that result in additional valuation discounts beyond the traditional discounts. In contrast, the proposed regulations would eliminate all discounts, both abusive and traditional discounts, thereby rendering meaningless the careful line-drawing by Congress in IRC § 2704.

Moreover, the legislative history of Chapter 14 demonstrates that except as specifically provided, Congress intended to value interests in family businesses in the same way as interests in non-family businesses, without special adjustment because of family attribution. However, by disregarding default state law restrictions on redemption/liquidation right, the effect of the proposed regulations would be to impose precisely this impermissible family attribution rule.

A simple example illustrates this point. Suppose two partnerships are organized using all default state law provisions, one owned by family members while the other owned by unrelated parties. The proposed

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102 See supra Part I.C.3.  
103 See supra note 95 and accompanying text.  
104 See supra note 92 and accompanying text.  
105 See supra note 90; see also ADAMS & SMITH, supra note 14, ¶ 4.02[4], at 12 (noting the fair market value of an entity interest includible in the decedent’s gross estate is determined without family attribution).  
106 See Dees, supra note 9; see also ADAMS & SMITH, supra note 14, ¶ 4.14[5], at 10 (noting that the attribution rules such as those under I.R.C. §§ 267(d), 707(b), and 318 are imposed “more often on the basis of the statute rather than judicially or administratively”).
regulations would disregard default state law restrictions on redemption/liquidation rights in the first but not in the second partnership. In either case, there are no additional restrictions that may indicate any abusive intent. Nevertheless, transferred interests in the second partnership may enjoy substantial valuation discounts while those in the first do not. The difference in transfer tax liability is due solely to the family attribution in the first partnership. Consequently, aside from a horizontal equity issue, the proposed regulations would also be inconsistent with Congress’ intent to narrowly apply Chapter 14 rules and avoid an across-the-board family attribution rule.

D. The proposed regulations may be inconsistent with federalism principles of Federal taxation.

One of the most fundamental principles of Federal taxation is that “[t]he nature of the property interest to be valued for Federal [transfer] tax purposes generally is determined under State law.”\(^{107}\) Indeed, “State law creates legal interests and rights,” and “[t]he federal revenue acts designate what interests or rights, so created, shall be taxed.”\(^{108}\) We shall call this the state law primacy principle.

If one thinks of property interest as a bundle of sticks,\(^{109}\) state law creates and defines the individual sticks, while Federal revenue acts characterize and designate how the resulting bundle should be taxed. Therefore, a tax regulation would be inconsistent with the state law primacy principle if it not only characterizes and designates how the bundle should be taxed but also changes the individual sticks themselves.

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\(^{107}\) Kerr v. Comm’r, 113 T.C. 449, 469 (1999), aff’d, 292 F.3d 490 (5th Cir. 2002).

\(^{108}\) Morgan v. Comm’r, 309 U.S. 78, 80 (1940); see also Kerr, 113 T.C. at 469 (“Once [state law] has determined the nature or character of the property interest in question, Federal law applies to determine how the property interest will be taxed.”); United States v. Bess, 357 U.S. 51, 55 (1958) (noting that I.R.C. § 3670 “creates no property rights but merely attaches consequences, federally defined, to rights created under state law”).

Congressional endorsement of this principle can be found in the legislative history of various revenue acts. See, e.g., Dees, supra note 9, n.19 (describing the legislative history of the 1948 changes in the estate taxation of community property); Eastland, supra note 81, at 1368 n.18.

The following discussion will demonstrate that by disregarding liquidation/redemption restrictions imposed by default state law provisions, the proposed regulations not only characterize and designate how the bundle of sticks should be taxed but also change some of the sticks themselves, thereby violating the state law primacy principle.

1. Distinguishing between state law by their functions: identification v. characterization

One can think of state property law as doing two functions: identification and characterization. In the first function, state law creates and defines the interests and rights in the property. In other words, it identifies the sticks in the bundle. In its second function, state law characterizes the resulting bundle for various purposes, including labeling them as “property” or “nonproperty,” and establishing debtor-creditor rights.

Consistent with the state law primacy principle, for the Federal taxation purposes, state laws that identify the sticks in the bundle should be respected, while state laws that merely characterize the bundle may be disregarded. This is indeed so, as illustrated by two lines of cases.

In one of the earliest income tax cases (predating the spousal joint tax return), Poe v. Seaborn, the Supreme Court held that husband and wife, living in a community property state, could each report one-half of the total family income on each’s separate tax return, even though all the income was earned by one spouse. This reflects the nature of community property law, under which each spouse is deemed to own half of the income earned by the other spouse. Contrast that with a couple living in a separate property state. Back then, each spouse had to report all the income earned by that spouse on his or her individual tax return and could not split the income with the other spouse for income tax reporting.

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111 Id.
112 Id. Professor Johnson’s labeling and debtor-creditor rule functions are grouped together under the “characterization” function here.
113 282 U.S. 101 (1930).
purposes.  Given the progressive structure of the income tax, one-earner household making the same amount of income would have to pay more in income tax in a separate property state than in a community property state. Here, state law defines the nature of the property interest (whether the income being subject to Federal taxation is community or separate property), while Federal tax rules designates how the property interest so created should be taxed. Bundles consisting of different sticks are taxed differently. This is indeed the expected result.

In the second line of cases, state laws that merely characterize, but do not define, the property right bundle may be preempted by Federal tax rules. This is true in both the determination and collection of Federal tax liability contexts.

Morgan v. Commissioner involves a decedent taxpayer who held certain testamentary powers to appoint by will the recipient of assets held in two trusts established by her father. The trust terms permitted her to appoint the assets to any person, including her estate. Under the predecessor to IRC § 2041, “any property passing under a general power of appointment exercised by the decedent . . . by will” (emphasis added) is subject to the estate tax. The executor argued that because the power to appoint was exercisable only at death, such power was labeled as “special” under state law and thus exempt from the Federal estate tax. The Supreme Court rejected this argument, holding that “[i]f it is found in a given case that an interest or right created by local law was the object intended to be taxed, the Federal law must

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116 One can find many other examples in the Tax Code illustrating this principle. See, e.g., I.R.C. § 1014(b)(6) (providing a special rule for community property where both halves of community property receive a step-up in basis even though only one half is included in the decedent’s gross estate; in contrast, if the same property is jointly owned by a married couple in a separate property state, only one half would receive a step-up in basis); Robert T. Danforth, The Role of Federalism in Administering a National System of Taxation, 57 TAX LAW. 625, 632-33 (2004) (discussing the repeal of the rule against perpetuities to minimize exposure to the Generation-Skipping Transfer tax); Mitchell M. Gans, Federal Transfer Taxation and the Role of State Law: Does the Marital Deduction Strike the Proper Balance?, 48 EMORY L.J. 871, 872 nn.2-3 (1999) (providing various other examples of the state law primacy in the Federal taxation context).

117 309 U.S. 78 (1940).
prevail no matter what name is given to the interest or right by state law.”

In other words, the state law in Morgan merely labels the power of appointment that decedent had as “special,” without changing its substance. Thus, it does not control the determination of Federal tax liability.

In Drye v. United States, the insolvent taxpayer disclaimed an inheritance from his mother’s estate, causing the disclaimed interest to pass onto his daughter. The taxpayer owed unpaid Federal income tax, which, under IRC § 6321, attaches to “all property and rights to property” of the taxpayer. “Property” and “rights to properties” are not defined under the Federal statute and are thus presumably determined under state law. Under the applicable state law, by electing the disclaimer, the taxpayer is treated as if he had predeceased his mother and did not receive a property interest in the inheritance. However, the Supreme Court viewed this as merely a “legal fiction,” holding that by surviving his mother, the taxpayer had received “a valuable, transferable, legally protected property right to the property at issue,” in that he was able “either to inherit or to channel the inheritance to a close family member.” In other words, the taxpayer had, in substance, the property right stick of being able to choose between receiving the inheritance and passing it onto his daughter. As such, the taxpayer had a “property or right to property” subject to attachment by the Federal tax lien. The state law “nonproperty” characterization of the bundle does not control for the purpose of Federal tax collection.

2. Do restrictions imposed by default state law provisions actually identify the sticks or merely characterize the bundle?

One way to answer this question is to focus on a common thread among the cases—the substance-over-fiction distinction. If the state law defines the substance of property right, it will control for Federal

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118 Id. at 82.
119 See Danforth, supra note 116, at 628-29, 640-61 (discussing the substance-nomenclature distinction as a limitation to the primacy of state law); see also United States v. Craft, 535 U.S. 274, 294 (2002) (Thomas, J., dissenting) (“careful line between state laws that purport to disclaim or exempt property interests after the fact, which the federal tax lien does not respect, and state laws’ definition of property and property rights, which the federal tax lien does respect” (emphasis added)).
120 528 U.S. 49 (1999).
121 Id. at 60.
taxation purposes and may not be disregarded. For example, in *Drye*, the taxpayer really had a choice of whether to receive the inheritance or to pass it onto his daughter. The state’s Wills Act gave him that choice (by effectuating the decedent’s wishes in transferring the property to the taxpayer) and thus created the property right to which the Federal tax lien attached. In contrast, the state’s disclaimer statute did not define any substantive right but merely labeled the taxpayer’s choice as a “nonproperty,” applying a “legal fiction” that taxpayer had predeceased his mother for the purpose of receiving the inheritance. Thus, the Wills Act controlled while the disclaimer statute did not.

The same distinction is also applicable in *Seaborn*. Spouses living in a community property state had substantive differences in spousal property rights compared to those living in separate property states, including differences in property distribution upon divorce and death.122 The ownership by one spouse of half the income earned by the other spouse has real consequences. It is not merely a “legal fiction.”123

Likewise, default provisions governing dissolution and dissociation rights under a state’s business organization law also create substantive and important legal rights and obligations among the owners of a business, independent of their tax effects. Compare two default rules in the limited partnership context. Under the Uniform Limited Partnership Act, a limited partner may withdraw from the partnership upon a six-month written notice and is entitled to the fair value of his interest in the partnership.124 Under the Revised Uniform Limited Partnership Act, a limited partner has no right to dissociate before the completion of the winding up of the limited partnership and “dissociation does not entitle a person to any

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122 *See Dukeminier & Sitkoff, supra* note 114, at 545-47.
123 *Compare Poe v. Seaborn, 282 U.S. 101 (1930) with United States v. Robbins, 269 U.S. 315 (1926).* In *Robbins*, the Supreme Court did not allow a California couple to split the family income on their separate Federal income tax returns. Unlike the Washington’s community property law at issue in *Seaborn*, under the California’s community property law at that time, “wife, while living with her husband, had a mere expectancy, and not a genuine interest, in community property,” *Robbins*, 269 U.S. at 326-27. Thus, despite the “community property” label under state law, in substance, one spouse did not have a present vested one-half property interest in the other spouse’s income. It is the substance of the property rights, not the “legal fiction” of the state law label, that controls for the purpose of Federal taxation.
124 *Unif. Ltd. P’ship Act §§ 603, 604 (Unif. Law Comm’n 1976) [hereinafter ULPA].*
distribution.”\(^\text{125}\) In the absence of an agreement among the parties, it would matter a lot which default rule applies. Just ask any limited partner who has been “frozen out” because of the RULPA default rule.\(^\text{126}\) These default restrictions define the substance of the property interest and are hardly a “legal fiction,” and thus should not be disregarded for Federal taxation purposes.

3. The proposed regulations represent an unprecedented deviation from the existing case law.

The proposed regulations seek to disregard the default state law provisions because the taxpayer, in effect, has a choice at the outset to follow or to override the default option under state law. The result is that the bundle of rights is not just taxed as what it is but as what it could have been.\(^\text{127}\)

This represents an unprecedented deviation from existing case law. For example, in Seaborn, the community property rule controls, notwithstanding the essentially elective nature of the regime. Presumably, taxpayers can “opt out” of the community property rule by a spousal agreement,\(^\text{128}\) or “opt in” by moving to a community property state.\(^\text{129}\) Similarly, in Drye, the decedent mother had a wide range of choices in deciding how to dispose of her property at death. Instead of using a will, she presumably could have used a discretionary trust whose trustee has discretion in choosing to whom and in what

\(^{125}\) RULPA §§ 601, 602.

\(^{126}\) The risk of freeze-out is even more pronounced in the closely-held corporation and Limited Liability Company contexts. See generally Franklin A. Gevurtz, Squeeze-outs and Freeze-outs in Limited Liability Companies, 73 WASH. U. L.Q. 497 (1995).

\(^{127}\) Because the taxpayer had a choice in removing the restrictions, he is deemed to have removed such restrictions under the proposed regulations. By disregarding restrictions imposed by default state law, the proposed regulations effectively change the entity interest into what it could have been, before applying the Federal revenue rules to it.

\(^{128}\) See, e.g., CAL. FAM. CODE § 1612 (West 2002) (“Parties to a premarital agreement may contract with respect to . . . [t]he rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located.”); TEX. CONST. art. XVI, § 15; see also Charlotte K. Goldberg, “If It Ain't Broke, Don't Fix It”: Premarital Agreements and Spousal Support Waivers in California, 33 LOY. L.A. L. REV. 1245, 1254 (2000) (noting “there is universal agreement that spouses may opt out of the community property scheme through a premarital agreement”).

\(^{129}\) See DUKEMINIER & SITKOFF, supra note 114, at 545-47; Danforth, supra note 116, at 634-35 (discussing the consensual community property regimes in Alaska, allowing spouses to “opt in” even without having to move).
amount distribution should be made.\textsuperscript{130} Indeed, had that been the case, the government could hardly attach the inheritance.\textsuperscript{131}

In each instance, Federal tax liability is determined based on what the substance of the property bundle is, not what it could have been. The elective nature of the state law regime that defines the substance of property rights does not negate its control in the Federal taxation context.\textsuperscript{132} The proposed regulations would deviate from this norm, imposing additional tax liability based on what the entity interest could have been.

Furthermore, what is elective is relative. Given the nature of our Federal system, a taxpayer has access to more than one business organization code. Under any particular code, a default provision is indeed elective when compared to a mandatory provision. However, the taxpayer can opt out entirely of a particular code and form the entity in another jurisdiction with more favorable law. Therefore, in that sense, any business organization code is elective. Thus, if tax liability depends on what the entity interest could have been, one has to beg the inevitable question—to which code should the reference be made?

\textbf{E. The proposed regulations may exceed the grant of legislative authority under IRC § 2704(b)(4)}

\textsuperscript{130} Danforth, \textit{supra} note 116, at 641.
\textsuperscript{131} \textit{Id.} at 652-53; Tex. Commerce Bank Nat'l Ass'n, 908 F. Supp. 453, 458-59 (S.D. Tex. 1995) (holding that I.R.C. § 6321 lien does not attach to a discretionary interest in a trust held by the taxpayer); Magavern v. United States, 550 F.2d 797, 801-02 (2d Cir. 1977) (suggesting the same).
\textsuperscript{132} \textit{But see} Comm'r v. Harmon, 323 U.S. 44, 47 (1944). In \textit{Harmon}, the elective nature of the Oklahoma community property system makes the taxpayers’ community property election an "anticipatory arrangement" and ineffective in splitting the family income for Federal income tax purposes. However, \textit{Harmon} can still be distinguished on the ground that the community property regime there does not arise as “an incident of marriage” but requires an affirmative election by the spouses. \textit{Id.} at 46-47. In contrast, the redemption/liquidation restrictions imposed by default state law arise as an incident of the entity formation and require an affirmative act by the taxpayers, i.e., drafting an overriding provision in the entity’s governing document, to opt-out of. Therefore, the “elective” nature of these restrictions is closer to that of the community property regime in \textit{Seaborn} than in \textit{Harmon}.
Congress has the constitutional power to make laws. 133 However, ever since the birth of the nation, Congress has delegated some lawmakership authority to administrative agencies. 134 Nevertheless, the primary lawmakership power still resides in Congress. 135 An administrative agency by itself “does not have power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.” 136 Therefore, without an express delegation of power, an agency does not have the authority to make fundamental policy choices that are reserved to Congress. 137 A regulation is valid only if it is promulgated within the statutory authority Congress has granted to the agency. 138 Thus, a regulation that represents a fundamental change in policy, if made without an express delegation of power from Congress, is invalid.

Here, both the proposed §§ 25.2704-2 and 25.2704-3 are presumably issued pursuant to the specific grant of authority under IRC § 2704(b)(4). 139 This subsection allows the Service to provide by regulations “other restrictions that shall be disregarded . . . if such restriction has the effect of reducing the value of the transferred interest for [transfer tax] purposes but does not ultimately reduce the value of such interest to the transferee” (emphasis added). 140 A fair reading of this provision would give the Service the authority to fill in the gap so as to achieve the result described by Congress, which result is clarified by the legislative history of Chapter 14. Congress already made the fundamental policy choice of preserving traditional valuation discounts and only narrowly targeting specific abuses that create artificial reduction

133 U.S. CONST. art. I, § 8, cl. 1.
135 Id. (“Congress must make basic policy decisions . . . only more particularized policy matters may be assigned to the bureaucracy”).
137 See Johnson, supra note 70, at 304-05 (noting that certain policy decisions are so fundamental that they are a “choice appropriate for Congress only”).
140 I.R.C. § 2704(b)(4).
in value beyond those traditional discounts.\textsuperscript{141} Nothing under IRC § 2704(b)(4) purports to give the Service the authority to deviate from this chosen result.

However, in eliminating traditional valuation discounts and imposing an across-the-board family attribution rule,\textsuperscript{142} the Service is, in essence, making a policy choice “of the most fundamental significance to the statutory scheme.”\textsuperscript{143} Indeed, the proposed regulations would overturn decades of judicial decisions, would recharacterize thousands of transactions, and most importantly, would contradict both the statutory language and the clear Congressional intent as expressed in the legislative history of Chapter 14.\textsuperscript{144} If this does not represent a fundamental change in policy that requires Congressional action, what does? Congress is expected “to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”\textsuperscript{145} IRC § 2704(b)(4) does not even come close to giving the Service this grant of authority.\textsuperscript{146} Given the absence of a clear expression of such delegation, the proposed regulations were likely issued without legislative authority and thus invalid.\textsuperscript{147}

\begin{itemize}
\item See supra Part II.C.
\item See supra Part I.C.3.
\item See Johnson, supra note 70, at 305 (discussing the weaker form of the “too big” principle).
\item While under Mayo, inconsistency with a prior position is not a factor in determining the reasonableness of the new regulation under Chevron’s part-two test, the inconsistency here deals with the Service’s legislative authority. Even if the regulation passes muster under Chevron’s test, it would still be invalid if issued without legislative authority, i.e., the Service has acted ultra vires. Moreover, the inconsistency here is not only with the Service’s prior position but also with prior judicial decisions, the statutory language, and the legislative history.
\item The proposed regulations here would not just only fill in the gap left open by the Congressional enactment but also contradict the legislative purpose of the statute itself. One would expect such regulation to be supported by an extraordinary delegation of authority.
\item This conclusion is further bolstered by the fact that the proposed regulations essentially embody the President’s budget proposal for Fiscal Years 2010-2013, which indicates that at some point, the Obama Administration believed that the proposal could not be issued without Congressional action. See The American Institute of Certified Public Accountants, Comment Letter on Proposed Regulations under Section 2704 Regarding Restrictions on Liquidation of an Interest (REG-163113-02 (8/4/16)), at 20 (Jan. 13, 2017), https://www.aicpa.org/Advocacy/Tax/DownloadableDocuments/aicpa-comments-on-prop-reggs-2704.pdf [hereinafter AICPA comment].
\item There is also another line of delegation attack here based on the content of the specific grant of authority under § 2704(b)(4). This subsection requires that the targeted restriction “has the effect of reducing the value of the transferred interest for purposes of this subtitle but does not ultimately reduce the value of such interest to the transferee.” Therefore, in disregarding restrictions imposed by state law
\end{itemize}
III. POTENTIAL POLICY IMPACT OF THE PROPOSED REGULATIONS

A. Unintended consequences on business organization law: creating a bear trap for the (small?) unwary business

The proposed regulations could prompt undesirable legislative changes in the business organization setting that have serious and wide-ranging economic repercussions far beyond the Federal transfer taxation context. In disregarding restrictions on liquidation and redemption rights imposed by default provisions under state law, the proposed regulations would create incentives for state legislatures to make those default provisions mandatory. Such mandatory provisions would presumably apply to all businesses organized under the state law and would override contrary provisions in the entity’s governing instrument. Business owners may find themselves stuck in undesirable arrangements. Imagine the hapless partner who learns that he cannot withdraw from the partnership, despite having a redemption right under the partnership agreement!

At first blush, it is difficult to imagine that any state legislature would even intimate that kind of drastic changes to its business organization statutes with potential impact to tens of thousands of businesses, in response to an obscure tax regulation. Surprisingly, such tax-driven state legislation is neither a new nor an uncommon phenomenon.148

default provisions, the Service in effect assumes that such restrictions do not reduce the value of the transferred interest to the transferee. This is certainly not true in all cases, at least not when the family members are in discord. See Proposed Regulations Related to Section 2704 and the Case for Applying FLP Valuation Discounts, GIFT AND EST. TAX VALUATION INSIGHTS (Willamette Mgmt. Assoc.), Winter 2016, at 15. Perhaps there should be a family-discord exception. Nevertheless, this is a difficult argument to make. Unlike the “too big a policy change” argument, which is based on separation-of-power principles, this second argument is based on a statutory interpretation of I.R.C. § 2704(b)(4). An agency is entitled to Chevron deference on its interpretation of statutes for which it has primary responsibility to administer. See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984). An agency is entitled to Chevron deference on its interpretation of statutes for which it has primary responsibility to administer. See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984). Therefore, in order to show that a particular regulation falls outside the Service’s scope of authority, the challenger has to show the Service’s interpretation of its scope of authority is unreasonable. Given the seemingly broad language of I.R.C. § 2704(b)(4) and the dearth of case law on this issue, this is not an easy task. See generally Johnson, supra note 70, at 301-02.

148 Gans, supra note 116, at 877.
The modern limited liability company statutes are one such tax-driven legislation. Recall the very first LLC statute, enacted in Wyoming.\textsuperscript{149} It was the product of lobbying by tax lawyers who sought a domestic business organization form that combines limited liability with favorable Federal income tax treatment.\textsuperscript{150} Recall the third-generation LLC statutes. Following the promulgation of the check-the-box regulations that allow for flow-through income taxation without regard to partnership classification requirements, many state legislatures amended their LLC statutes to eliminate all statutory dissociation rights.\textsuperscript{151} Under these statutes, LLC members no longer have dissociation rights unless provided for by the LLC agreement.\textsuperscript{152} And guess who lobbied for that change? Yes, tax lawyers, specifically estate planners who sought valuation discounts precisely through the use of the LLC form as a vehicle for intra-family wealth transfer.\textsuperscript{153}

Going further back in time, following \textit{Poe v. Seaborn}, several states introduced community property legislation to enable income splitting between spouses for Federal income tax purposes.\textsuperscript{154} Some of these laws were then repealed, following the 1948 amendment to the Internal Revenue Code that allowed for the joint spousal income tax return.\textsuperscript{155}

\begin{itemize}
  \item \textsuperscript{149} See Susan Pace Hamill, \textit{The Story of LLCs: Combining the Best Features of a Flawed Business Tax Structure}, in \textit{BUSINESS TAX STORIES} 295, 298-303 (Steven A. Bank & Kirk J. Stark eds., 2005) (providing a timeline of the development of LLC statutes).
  \item \textsuperscript{150} \textit{Id.} at 298-99.
  \item \textsuperscript{151} \textit{See id.} at 314; \textit{see also} Farrar & Hamill, \textit{supra} note 40, at 934-38. Dissociation right is defined as the ability to trigger dissolution of the business upon the withdrawal or separation from the business by a member.
  \item \textsuperscript{152} \textit{See, e.g., REVISED UNIF. LTD. LIAB. CO. ACT} § 701 (UNIF. LAW COMM’N 2006) [hereinafter RULLCA]; ALA. CODE § 10A-5A-7.01 (2014).
  \item \textsuperscript{153} \textit{See Farrar & Hamill, supra} note 40, at 934-38; Hamill, \textit{supra} note 149, at 314-15.
  \item \textsuperscript{154} \textit{See DUKEMINIER & SITKOFF, supra} note 114, at 547 (noting that Michigan, Nebraska, Oklahoma, Oregon, and Pennsylvania adopted community property regime in the 1940s, only to switch back to separate property following the 1948 amendment of the Internal Revenue Code).
\end{itemize}
More recently, to attract additional trust businesses, many states have enacted legislation to amend or repeal the common law Rule Against Perpetuities. \(^{156}\) Generation-skipping-exempt trusts created under these states’ laws, the so-called dynasty trusts, can now last forever and enjoy limited exposure to Federal transfer taxation. \(^{157}\) Absent the transfer tax drag, an astronomical amount of wealth could be accumulated in these trusts. \(^{158}\)

Admittedly, making immutable default provisions as fundamental as restrictions on liquidation and redemption rights, is difficult to fathom. But then again, tax considerations have also led to other groundbreaking developments such as the adoption (and repeal) of community property regimes and the creation of the limited liability company—the now fastest-growing form of business organization. \(^{159}\)

What happened before might just happen again. \(^{160}\) Presumably, only one state needs to make immutable the redemption/liquidation restrictions to defeat the proposed regulations. \(^{161}\) Estate planners from other states can then form entities under that state law.

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\(^{157}\) See Danforth, *supra* note 116, at 633.

\(^{158}\) Id.


\(^{160}\) See Adcock, *supra* note 1 (“States would again have an incentive to tinker with their statutes, this time with the business formation statutes.”).

\(^{161}\) An interesting idea is that a state could simply choose to make immutable the redemption/liquidation restrictions for only one particular form of business organization such as limited partnership or a newly invented entity. That way, the state can attract additional business while avoiding harm to its residents, who presumably can use a non-estate planning entity. However, this theory is potentially foreclosed by the proposed §§ 25.2704-2(b)(4)(ii) and 25.2704-3(b)(5)(iii), under which “a restriction is not imposed or required to be imposed by . . . state law if that law also . . . provides a different statute for the creation and governance of the same type of entity that does not mandate the restriction, makes the restriction optional, or permits the restriction to be superseded” (emphasis added). Only the three types of entities described in § 25.2701–2(b)(5) are recognized for the purpose of this provision—corporations, partnerships (including limited partnerships), and other business entities. It would be interesting to see whether an LLC will be considered a partnership or “other business entity” under this definition.

More practically, residents of a state that has changed its law could simply form business entities under the law of another state that has not done so. As such, they can avoid the immutable redemption/liquidation restrictions under the law of their home state. The only party that suffers harm is
Moreover, the additional business flowing to the first state that changes its laws may incentivize other states to follow suit. This “race for the bottom” has been especially true in related contexts such as the repeal of the common law Rule Against Perpetuities, the adoption of domestic asset protection trust legislation, or the relaxation of fiduciary duties in the business organization setting. The initial impact within the first state may thus be exacerbated to other states through this chain reaction. One has to ask whether the marginal increase in revenue from the proposed regulations could justify the economic cost from this potential disruption to tens of thousands of businesses, especially those small businesses that do not have access to advice from sophisticated counsel.

B. Introducing unnecessary uncertainties into a well-settled area of law

In its current form, the proposed regulations would raise a number of difficult questions in the application of the valuation rules that disregard restrictions imposed by default state law. Conceptually, one can think of three main types of default rules that affect liquidation/redemption rights—(i) those that restrict such rights, (ii) those that provide for affirmative liquidation/redemption rights, and (iii) those that are silent, i.e., neither provide for nor restrict such rights but give effect to the parties’ contractual

likely the unsophisticated business owners in the first state who unknowingly fall into the legal trap of forming non-estate planning entities under the law of their own state.


163 See infra note 177 for statistics on the contribution of transfer tax receipts to the Federal revenue.

164 See, e.g., RULPA §§ 601, 602 CMT (limited partner has no right to dissociate before the completion of the winding up of the limited partnership and “dissociation does not entitle a person to any distribution”); RULLCA § 603(a)(3) CMT (“dissociation does not entitle a person to any distribution”).

165 See, e.g., ULPA §§ 603, 604 (unless provided otherwise by the partnership agreement, a limited partner may withdraw from the partnership upon six-month written notice and is entitled to the fair value of the limited partner’s interest in the partnership).
Presumably, the default rules of the first type are disregarded and the transferred interests are valued as if the restrictions did not exist.\textsuperscript{167} That \textit{seems} easy enough. However, difficulties abound in applying the proposed regulations to the other two types of default rules.

Suppose the default corporation law neither provides for nor prohibits a shareholder’s right to demand the redemption of his shares by the corporation, but allows for the shareholder and the corporation to contract for such right between themselves. Does the absence of an affirmative right allowing the shareholder to liquidate/redeem his shares nevertheless constitute a disregarded restriction? The proposed regulations do not answer this question.\textsuperscript{168}

In addition, what if the default state law does provide for an affirmative right to redeem individual interests, but which right is not as generous as the 6-month put right as described under the proposed regulations?\textsuperscript{169} Does that mean such affirmative right would still be disregarded? Presumably yes, because such state law is (i) a default rule (ii) that is more restrictive than the proposed § 25.2704-3 standard, and (iii) that does constitute a “provision.”\textsuperscript{170} But if such affirmative right is disregarded, are we back into the silent state law arena described above?

\textsuperscript{166} See, \textit{e.g.}, MODEL BUS. CORP. ACT § 6.01(c)(2) (2006) (shares may be redeemed in accordance with the articles of incorporation).

\textsuperscript{167} Even if these restrictions are removed, there are still uncertainties involved in the exact impact on valuation. \textit{See supra} notes 49, 54 and accompanying text.

\textsuperscript{168} See Bogdanski, supra note 54, at 35-36 for a discussion of this question. The proposed regulations do not define the term “restriction.” Nevertheless, an argument could be made that silent state law provisions are not “disregarded restrictions.” The statutory text describing the four categories of “disregarded restrictions” all starts out with the term “provision.” A silent statute is not a “provision.” This is an issue similar to whether blockage discount should be disregarded under I.R.C. § 83, which provides that the fair market value of property received as compensation for service is “determined without regard to any restriction other than a restriction which by its terms will never lapse.” The Tax Court reasoned that § 83 refers to the terms of transferability limitations, and blockage discounts have no “terms” and thus should not be disregarded. Perhaps, a silent state statute likewise does not constitute a “disregarded restriction” because of the lack of a “provision” that place restrictions on redemption/liquidation right. \textit{Id}.

\textsuperscript{169} See Prop. Treas. Reg. § 25.2704-3(b)(6) (describing the 6-month put right safe harbor).

\textsuperscript{170} See supra note 168.

In a way, this issue is conceptually similar to the question of whether putting a fixed term on an entity creates a restriction on liquidation to be disregarded under IRC § 2704(b), or a limitation on \textit{not}
C. Questionable revenue impact

1. Questionable impact on transfer tax revenue

The revenue impact of the proposed regulations may be limited by taxpayers’ ingenuity. The proposed regulations operate by disregarding certain restrictions on the redemption and liquidation right. Therefore, conceptually, only those discounts that arise from such restrictions are affected. Other non-restriction-based discounts should still be available. Indeed, some commentators have alluded to the possibility of justifying such other discounts through the use of non-restriction-based valuation methods. Nevertheless, it is still too early to tell how well these alternative valuation discounts may stand up against a challenge by the Service.

In addition, the proposed regulations may also adversely affect the Federal gift tax revenue. Given the estate tax debacle during the last decade, some taxpayers are hesitant to make inter vivos gifts for fear of being the last gift tax payor. By increasing the immediate gift tax liability, the proposed regulations further disincentivizes wealthy taxpayers from making taxable lifetime transfers. One may very well expect to see a reduction in gift tax revenue, at least in the short term, following the finalization of the proposed regulations.

2. Any increase in transfer tax revenue may be offset by reduction in income tax revenue

liquidating and thus not to be so disregarded. See S. Stacy Eastland, Family Limited Partnerships: Transfer Tax Benefits, 7 PROB. & PROP. 59, 62-63 (July/Aug. 1993).

See Doug Peterson & Patrice Radogna, Is This The End Of Valuation Discounts For Family-Controlled Businesses?, 97 PRAC. TAX STRATEGIES 196, 198-200 (2016) (arguing that adjustments to fair market value of closely held businesses or securities may still be applicable based on valuation factors other than transferability restrictions).

See Dees, supra note 9 (noting the use of alternative valuation methods such as the Non-Marketable Investment Company Evaluation Method).

See id.
Given the convergence between the income tax rate and the transfer tax rate, commentators have questioned the net revenue impact of the proposed regulations.\textsuperscript{174} A higher valuation of the entity interests held at death will presumably create a higher basis for income tax purposes under IRC § 1014 and thus result in less income tax revenue upon their later disposition.\textsuperscript{175}

It is important to note that the proposed regulations operate on both estates that are subject to the estate tax and those that are not. Therefore, the proposed regulations would not only decrease income tax revenue from estates subject to the estate tax but also from the remaining majority of estates that are not.\textsuperscript{176} Consequently, it is an open question whether the increase in transfer tax revenue will outweigh the loss of income tax revenue, especially when transfer tax receipt makes up only a miniscule portion of the Federal revenue when compared to income tax receipt.\textsuperscript{177}

\textbf{D. Definite Economic Cost}

At the very least, the proposed regulations will most certainly instigate a lot of costly litigation,\textsuperscript{178} at great expense to both the government and the taxpayers.

Furthermore, the proposed regulations will undoubtedly impose additional economic burden on family businesses. There are valid non-tax reasons for imposing restrictions on the right to redeem or

\begin{footnotes}
\item[175] See generally I.R.C. § 1014. \textit{But see} Bogdanski, \textit{supra} note 54, at 37-38 (noting the uncertainties about the effect of the proposed regulations on the basis of the transferred interest for income tax purposes).
\item[176] Schirripa, \textit{supra} note 174.
\item[178] See Dees, \textit{supra} note 9 (recounting the costly litigation history of Chapter 14); Beers & Minnigh, \textit{supra} note 54 (“we anticipate challenges to the Treasury Department's authority to finalize them in their current form”).
\end{footnotes}
liquidate interests in closely-held businesses. 179 Absent such restrictions, individual members would have an incentive to “bail out” of the business, thereby getting at least the net asset value of the interest while avoiding the risk associated with running the business. 180 By valuing family-owned businesses as if these restrictions do not exist, the proposed regulations would impose higher transfer tax liability on owners of family-owned businesses. Identical businesses that are not family-owned, do not have this additional expense. From a tax policy perspective, a serious horizontal inequity would arise.

Moreover, even if no additional tax is due, the proposed regulations would still impose additional planning and compliance costs for family businesses. At the very least, a disclosure statement would have to be attached to every gift tax return when the valuation of the gift is inconsistent with the proposed regulations. 181 In addition, the uncertainties introduced by the proposed regulations would likely create “unnecessary burdens to all parties regarding valuation.” 182 In any case, someone has to bear the additional economic burden, which may lead to job losses 183 and certainly makes it harder to pass on the family business from one generation to the next. 184 Given Congress’ manifest goal to facilitate the intergenerational transfer of family businesses under Chapter 14, 185 one has to wonder if the proposed regulations are really a good idea.

IV. CONCLUSION

179 AICPA comment, supra note 147, at 3.
180 Versprille, supra note 5.
181 AICPA comment, supra note 147, at 5.
182 Id. at 8.
183 Versprille, supra note 5 (noting that “one percent increase in corporate tax rate reduces employment by between 0.3 percent and 0.5 percent,” and the effect of an increase in transfer tax liability is similar to that of an increase in corporate tax liability); see also Robert J. Shapiro, An Economic Analysis of Proposals to Limit the Recognition of Valuation Discounts for Transfers of Interests in Large Family Businesses 25 (Sonecon, May 2017), www.rer.org/WorkArea/DownloadAsset.aspx?id=16012 (estimating that if finalized, the proposed regulations would slow job creation by 105,900 jobs and reduce real GDP by $153.5 billion over the next decade).
184 Id. (citing an estimate that while 70 percent of closely held business owners want to pass on their businesses to the next generation, only about 30 percent will succeed in doing so, and arguing that the proposed regulations will make such transition even harder).
185 See supra note 89 and accompanying text.
In eliminating most, if not all, of the traditional valuation discounts for interests in family-owned businesses, the proposed regulations would substantially change the landscape of Federal transfer taxation. While the current Regulations may no longer be as effective as they once were, the proposed regulations would swing the pendulum too much in the other direction. A critical examination of the proposed regulations reveals that it may be inconsistent with the statutory language of IRC § 2704, the legislative history of Chapter 14, the state law primacy principle, and Congress’ delegation of legislative authority to the Service. Moreover, the proposed regulations might also prompt undesirable legislative changes at the state level with serious and wide-ranging economic repercussions far beyond the Federal transfer taxation context, introduce needless uncertainties into a well-settled area of law, and impose additional economic burden on family businesses, while having a questionable impact on the Federal revenue. The Service should take a hard look at the proposed regulations and should not finalize them in their current form.
The San Jose Inclusionary Zoning Law, its Comparison to the *Mount Laurel* Doctrine, and the Future of Takings and Inclusionary Zoning in the United States
I. Introduction

When the 1949 Housing Act was passed, one of its objectives was to provide “a decent home and suitable living environment for every American family.”¹ Sixty-eight years later, that goal has not yet been realized. The United States is experiencing a severe housing crisis,² and those with low income bear the heaviest burden, caused partially by the fact that the federal minimum wage has not grown in line with the rising cost of housing.³

In 2016, a full-time minimum wage worker could not afford⁴ a “modest two-bedroom” apartment at the fair market rate in any U.S. state or county.⁵ In only twelve counties and one metropolitan area could such a worker afford a “modest one-bedroom” apartment.⁶ Those of extremely low-income⁷ and of very low-income⁸ are particularly affected. The shortage of affordable and available housing units nationwide⁹ has left the majority of these households with few feasible housing options, forcing them to choose between exorbitant living costs or sleeping

¹ 81 P.L. 171.
² The United States Department of Housing and Urban Development’s (HUD) 2015 “Worst Case Housing Needs” report highlights the magnitude of the shortage of affordable housing for those with modest incomes. There, households with “worst case needs” are defined as those who either pay more than one-half of their income on rent – which is the more common issue – or those whose housing conditions are “severely inadequate,” as characterized by serious issues with plumbing, heating, or the like. The HUD report uses data from 2013, when 7.48 million households in the United States fit the “worst case” criteria. Worst Case Housing Needs: 2015 Report to Congress, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT 1–2 (2015), https://www.huduser.gov/portal//Publications/pdf/WorstCaseNeeds_2015.pdf (hereinafter “Worst Case Needs”).
⁴ The use of the word “afford” here is based on Out of Reach’s definition of a “Housing Wage,” which is “the hourly wage that a full-time worker must earn to afford a modest and safe rental home without spending more than 30% of his or her income on rent and utilities.” Out of Reach uses the HUD-estimated Fair Market Rent to make this determination. Id. at 1.
⁵ Id.
⁶ Id.
⁷ These persons are defined as earning equal to or less than 30 percent of the “Area Median Income” (AMI). AMI is used to determine income eligibility for affordable housing programs, and is set according to family size and varies by region.” Id.
⁸ These persons are defined as earning less than 50 percent of the AMI. Worst Case Needs, supra note 2, at vii.
⁹ One report estimates that there exist only 2.8 million units for the nation’s more than 10 million extremely low-income families. Out of Reach, supra note 2, at iii. Another found that, though there are 65 affordable units for every 100 extremely low-income renters, only 39 are actually available. Further, a “significant portion” of those affordable and available units is “physically inadequate and may pose threats to occupants.” Id. at 11.
in their cars,\textsuperscript{10} for example. Families who choose to live in market-rate units in spite of the cost often devote more than half of their income to housing costs, and are left with little to spend on food, transportation, and other basic necessities.\textsuperscript{11}

Furthermore, 10,000 federally subsidized public housing units are lost each year.\textsuperscript{12} Those that remain are in extremely high demand, causing renters to spend years, and sometimes decades, on waiting lists.\textsuperscript{13} The Center for Housing Policy’s 2016 Housing Landscape notes that the need for federal housing assistance is so far greater than the program can currently accommodate that only one in four eligible households ultimately receives aid.\textsuperscript{14} The report further indicates that coastal states tend to have a higher proportion of severely cost burdened households,\textsuperscript{15} which is due in part to high costs caused by a lack of housing supply.\textsuperscript{16}

California is one of the states most significantly affected by the crisis, as its cost of living is high and its housing costs have been rising rapidly for a number of years.\textsuperscript{17} Most low-income California residents receive little or no assistance through affordable housing programs,\textsuperscript{18} and according to \textit{Out of Reach}, a California resident would need to work a staggering 114 hours per week at minimum wage—which is $10.00 per hour in California—to afford a two-bedroom rental unit.\textsuperscript{19} Additionally, California has the highest percentage of residents living in poverty of any

\begin{enumerate}
\item \textit{Id.} at iii.
\item \textit{Id.}
\item \textit{Id.} at 5.
\item Mindy Ault, \textit{Housing Landscape 2016}, CENTER FOR HOUSING POLICY 4, (February 2016) http://media.wix.com/ugd/19cfbe_5eb6819b54454941ac58ce5b6aa38b9d.pdf.
\item \textit{Id.} at 3.
\item Nancy Conk, \textit{An Uncertain Future for Inclusionary Housing Programs in California}, 44 NO. 3 REAL ESTATE REVIEW JOURNAL (2015).
\item \textit{Id.}
\item \textit{Out of Reach, supra} note 2, at 31.
\end{enumerate}
Since most households living in poverty rent rather than own their homes, the shortage of affordable units “contributes substantially” to the state’s high poverty rate. A 2015 report by the California Housing Partnership Corporation estimates that more than 1.5 million affordable rental homes are needed to resolve the problem.

In an attempt to ameliorate these issues, the city of San Jose enacted an inclusionary zoning ordinance in 2010. San Jose, which is one of over 170 California municipalities to adopt such a policy, continues to be faced with severe housing affordability issues. The ordinance, which was challenged in California Building Industry Assn. v. City of San Jose (“CBIA”), requires developers to set aside a small portion of units in projects of a certain size to be sold at an affordable price. The United States Supreme Court declined to review the case in early 2016, a decision that left the ordinance intact, but left open significant questions about the future of inclusionary housing.

This comment will discuss relevant background information in Part II, including the negative consequences of a lack of adequate housing and the importance of inclusionary zoning programs in overcoming the current housing crisis in the United States. Part III will discuss the Supreme Court of California’s decision in CBIA, as well as the United States Supreme Court’s decision to deny certiorari. Part IV will focus on the takings issue in CBIA at the California and

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21 Id. at 2–3.
22 Id. at 3.
23 California Building Industry Assn. v. City of San Jose, 61 Cal. 4th 435, 440 (Cal. 2015) (hereinafter “CBIA”).
24 According to the Silicon Valley Competitiveness and Innovation Project, in 2016, less than 25% of workers and 40% of households in the San Jose area were able to rent or buy average-priced housing. http://www.mercurynews.com/2015/07/20/report-silicon-valleys-housing-affordability-crisis-worsens/. In 2015, 23.9% of households in the San Jose area faced a severe housing cost burden. Ault, supra note 14, at 8.
25 CBIA, 61 Cal. 4th at 442.
United States Supreme Court levels – the most significant issue in the case with the greatest potential to become consequential in the future. This section will set up the discussion in Part V, which will touch upon the traditionally divergent treatment between legislatively and administratively imposed takings.

Specifically, Part V will argue that legislative takings should be subject to the same standard of review as administrative takings, but that both should be decided under a lenient standard of review (akin to the one currently applied to legislative takings) rather than the “special scrutiny” that has applied to administrative takings thus far. This section will explain that the San Jose inclusionary zoning law would not constitute a taking under this standard, as well as how incorporating a less stringent standard serves important public policy concerns. Finally, this section will invoke New Jersey’s “Mount Laurel” doctrine, discussing the benefits of a constitutionally imposed affordable housing program and the benefits that other states could reap by modeling their affordable housing programs after it, which include sidestepping the takings issues that commonly arise in the context of inclusionary zoning laws.

II. Background

A. Consequences of a Lack of Affordable Housing

As the California Housing Partnership Corporation explains, “[h]ousing costs play a critical role in the economic stability of lower-income families as well as their physical and psychological wellbeing.”  

27 California’s Affordable Housing Crisis, supra note 19, at 2.
hindering economic growth in their communities. Such families are also left with less to spend on personal expenses, including food, medical care, transportation, and childcare, which can propel more households into poverty. Additionally, a lack of affordable housing causes modestly paid, but essential members of the workforce—such as childcare workers, housekeepers, and nursing assistants—to be priced out of the community in which they work, making it more difficult to retain such employees and thereby jeopardizing the local economy.

The physical health consequences that stem from inadequate housing may be the most significant and disturbing. Households that devote a large portion of their income to housing have, unsurprisingly, less to spend on healthcare and food. Children living in families that receive subsidized housing are more likely to have access to nutritious food and meet “well child” criteria than their peers on waiting lists for affordable units. Adults with cost burdens related to housing are more likely to fail to fill a prescription or obtain healthcare treatments solely due to cost. There is also evidence to suggest that stable, affordable housing may positively help those living with chronic diseases, such as diabetes or hypertension.

Mental health, too, is greatly affected by housing stability. Though it is well known that homelessness is linked to numerous psychological issues, characteristics described as “less extreme housing instability” may also lead to higher levels of depression and stress. Frequent

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29 Worst Case Housing Needs, supra note 2, at 2.
30 California’s Affordable Housing Crisis, supra note 19, at 2.
31 Id. at 6.
32 Ault, supra note 14, at 2.
33 Id.
34 Id. at 5.
35 This may include “frequent moves, living in doubled-up housing, eviction, and foreclosure.” Id. at 3.
36 Id. Additionally a 2012 University of Michigan study found that those behind on rent were more likely to meet criteria for depression; that those who moved for cost reasons in the past three years were substantially more likely to experience an anxiety attack; and that homeowners who had recently gone into foreclosure were more likely to have poor self-rated health and to have experienced a recent anxiety attack. Meredith Horowski, Housing Instability
moves before the age of three may place children at greater risk for developmental problems,\textsuperscript{37} and in adolescents, moving four or more times before the age of sixteen is associated with drug use.\textsuperscript{38} In adults, those whose incomes force them to live in disadvantaged areas may experience greater psychological distress due to safety concerns, and may be deprived of the social cohesion in neighborhoods that is associated with mental wellbeing.\textsuperscript{39} For those families, homes may also be substandard, putting them at risk for lead poisoning or asthma, to name a few.\textsuperscript{40}

It is clear that, both at the individual level and beyond, much is at stake when affordable, stable housing is not plentiful and accessible. To prevent and improve upon these consequences, governments often must act affirmatively to ensure that there is adequate housing in their community for those of all income levels.

B. Inclusionary Zoning

Inclusionary zoning laws are one avenue that a local government may take to alleviate the affordability issues and their consequences described thus far. Inclusionary zoning programs, which are relatively new,\textsuperscript{41} “use local control over the regulation of land use to require or incentivize the production of affordable housing as part of market rate housing development.”\textsuperscript{42} The vast majority of programs have modest affordability requirements, requiring that between 10 and 20 percent of units in a development are priced affordably.\textsuperscript{43} Over eighty percent of inclusionary zoning programs are mandatory, but often, developers are offered incentives such as...
“a density bonus or an expedited permitting process” in exchange for their compliance.44 Programs usually require units to be affordable to low- to moderate-income households – that is, those whose incomes are between 51 and 80 percent of the local median income. Unfortunately, very few programs target those of very-low income.45

The positive consequences of inclusionary housing programs are numerous. In addition to the elimination of a significant financial burden for many families, affordable units are not outwardly distinguishable from those sold at market rate, helping residents to avoid the stigma that often goes hand-in-hand with affordable housing.”46 The integration of lower income households also “creates opportunities for households with diverse socioeconomic backgrounds to live in the same developments and have access to [the] same types of community services and amenities.”47 One study found that such integration is associated with significant academic achievements in children, for whom such programs provide not only the opportunity to attend a low-poverty school, but also residential stability in a low-poverty neighborhood.48 Thus, inclusionary zoning programs have psychological and cultural benefits that are arguably equal in importance to their financial benefits.

One criticism of inclusionary zoning programs is that, particularly in the case of mandatory programs, they force individual developers to bear the financial burden of a nationwide problem.49 However, most programs provide “some type of cost offset” to developers50 which helps to balance

44 Ault, supra note 14, at 1–2.
45 Id. at 3.
49 California Association of Realtors, supra note 45.
50 Ault, supra note 14, at 2.
this issue. Developers also sometimes have the option to employ other means of complying, such as building affordable units off-site or contributing to a local affordable housing fund.\(^{51}\) And, as San Jose demonstrates, inclusionary zoning is often vital to ensuring that those of modest incomes are able to live in communities and have access to a quality of life that would otherwise be cost-prohibitive to them.

### III. The San Jose Case: *California Building Industry Assn. v. City of San Jose*

The San Jose law challenged in *CBIA* requires developers to set aside 15 percent of units in projects of 20 or more units to be sold at an affordable price.\(^{52}\) The ordinance provides developers with several alternative choices should they wish not to include affordable units on the same site as units sold at market rate,\(^{53}\) but the use of one of those alternatives will require the developer to set aside no less than 20 percent of the total units, rather than the 15 percent that is required on-site.\(^{54}\) Additionally, those who choose to construct units on-site are eligible for a number of monetary incentives, such as a density bonus, a reduction in minimum set-back requirements, and financial subsidies and assistance from the city.\(^{55}\) The law requires the affordable units to have comparable exterior design, square footage, and amenities as market rate units, though certain interior finishes and amenities may be different.\(^{56}\) The stated purposes of the ordinance were “to meet the city’s regional share of housing needs” as well as to integrate

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\(^{51}\) *Id.* at 3.

\(^{52}\) *CBIA*, 61 Cal. 4th at 442. The ordinance requires the 15 percent of affordable units to be made up of 9 percent that are affordable to moderate-income households, and 6 percent that are affordable to very-low-income households. *Id.* at 449 n.6. As touched upon previously, this is unique because a great deal of inclusionary zoning laws make no provision for very-low income families. *See Ault, supra* note 14 at 3.

\(^{53}\) *CBIA*, 61 Cal. 4th at 449.

\(^{54}\) *Id.* at 450.

\(^{55}\) *Id.* at 451.

\(^{56}\) *Id.*
households of various socioeconomic levels through “dispers[ing] inclusionary units throughout the city where new residential development occurs.”

The city gathered a great deal of statistics prior to enacting the ordinance. One finding provided that inclusionary zoning laws are reasonably related to “protecting the public welfare.” They found that requiring developers to abide by the ordinance’s parameters was necessary to serve this goal and related to the impacts of their projects because “[n]ew market-rate housing uses available land and drives up the price of remaining land” and “[n]ew development without affordable units reduces the amount of land development opportunities available for the construction of affordable housing.”

Plaintiff, California Building Industry Association (CBIA), challenged the ordinance as invalid on its face. CBIA argued that the law would be valid “only if the city produced evidence demonstrating that the requirements were reasonably related to the adverse impact on the city’s affordable housing problem that was caused by or attributable to the proposed new developments that are subject to the ordinance’s requirements.” The city, they maintained, did not meet this burden.

57 Id. at 449.
58 Id.
59 CBIA, 61 Cal. 4th at 449. The court defended their actions further, explaining that

“[n]ew residents of market-rate housing place demands on services provided by both public and private sectors, creating a demand for new employees. Some of these public and private sector employees needed to meet the needs of the new residents earn incomes only adequate to pay for affordable housing. Because affordable housing is in short supply in the city, such employees may be forced to live in less than adequate housing within the city, pay a disproportionate share of their incomes to live in adequate housing in the city, or commute ever increasing distances to their jobs from housing located outside the city. These circumstances harm the city's ability to attain employment and housing goals articulated in the city's general plan and place strains on the city's ability to accept and service new market-rate housing development.” Id. See also California’s Affordable Housing Crisis, supra note 20, at 6.

60 Id. at 442.
61 Id. at 442–3 (emphasis in original).
62 Id.
CBIA relied on the takings clauses of both the United States and California constitutions, arguing that the ordinance constituted an “exaction” for their purposes.\textsuperscript{63} The trial court ruled in favor of CBIA and enjoined the city from enforcing the ordinance.\textsuperscript{64} The Court of Appeal, however, reversed.\textsuperscript{65} In part, the court concluded that the trial court had erred in finding that the ordinance required a developer to dedicate property in a manner that violated the takings clause.\textsuperscript{66} The Court of Appeal held that the ordinance should be judged by the standard put forth in past California decisions, which required only that “the ordinance bears a real and substantial relationship to a legitimate public interest.”\textsuperscript{67} Thus, the Court of Appeal’s decision to overturn the lower court’s judgment turned on the standard of review applied.\textsuperscript{68}

The Supreme Court of California upheld the Court of Appeal’s decision.\textsuperscript{69} The court framed the ordinance as a use restriction, focusing on the fact that the condition “limit[s] the price for which the developer may offer some of its units for sale.”\textsuperscript{70} The condition stands in contrast to one that requires a developer to “give up a property interest for which the government would have been required to pay just compensation,”\textsuperscript{71} which would be an exaction for purposes of the takings clause. The court also emphasized that the conditions serve a constitutionally legitimate purpose in both increasing the number of affordable housing units in the city as well as assuring that new units are distributed throughout the city, in order to avoid the creation of isolated low-income communities.\textsuperscript{72}

\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} \textit{CBIA}, 61 Cal. 4th at 443.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{69} \textit{CBIA}, 61 Cal. 4th at 443.
\textsuperscript{70} Id. at 460.
\textsuperscript{71} Id.
\textsuperscript{72} Id. at 443–4.
IV. Takings Issue

A. California Supreme Court

The most significant issue that the California Supreme Court faced is whether the conditions imposed by the San Jose ordinance are “exactions” under the takings clause of either the California or United States constitutions. On that issue, the California court said that “there can be no valid unconstitutional conditions takings claim without a government exaction of property, and the ordinance in the present case does not effect an exaction. Rather, the ordinance is an example of the municipality’s permissible regulation of the use of land under its broad police power.”73

The court distinguished San Jose’s ordinance, which places a restriction on the use of private property, from the United States Supreme Court’s decisions in *Nollan* and *Dolan* (discussed below), which require landowners to dedicate a portion of their property to public use.74 While the issues in those cases constituted exactions requiring compensation, the California Supreme Court found that San Jose ordinance more appropriately falls into the municipalities’ discretion to regulate the use of property.75 The court compares this power to the power of municipalities to enact traditional zoning ordinances, which they may freely do if there is just reason.76 The court noted further that an exception to this explanation would be “unusual,” and would occur only in a situation where the restriction is so encompassing as to constitute a

73 *CBIA*, 61 Cal. 4th at 460. See also *Conk*, supra note 16.
74 *Id.* at 457.
75 *Id.*
76 *Id.*
“regulatory taking” under the United States Supreme Court’s decision in *Penn Central*. CBIA appealed this decision to the United States Supreme Court.

B. United States Supreme Court

The Takings Clause of the United States Constitution states, in relevant part, that a person will not “be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” The United States Supreme Court expressed potential disagreement with the Supreme Court of California’s conclusion that no taking occurred in *CBIA*. In his concurring opinion in denial of certiorari, Justice Thomas opined that *CBIA* “implicates an important and unsettled issue under the Takings Clause” of the Fifth Amendment.

Thomas noted that, while the dual-standard derived from *Nollan v. California Coastal Comm’n* and *Dolan v. City of Tigard* would have governed had San Jose’s law been administratively imposed, lower courts are divided over whether those standards apply to legislatively imposed conditions. The standard, which is known as the “unconstitutional conditions doctrine,” is derived from a combination of the holdings of two aforementioned cases. In *Nollan*, the Supreme Court reinforced its long-held view that a land-use regulation will not constitute a “taking” if “it substantially advances legitimate state interests and does not deny an owner economically viable use of the land.” In *Dolan*, seven years after, the Court took their

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77 Id. at 462. See also *Penn Transp. Co. v. New York City*, 438 U.S. 104 (1978).
78 *CBIA*, 136 S. Ct. at 928.
79 USCS Const. Amend. 5. This clause applies to the states through the Fourteenth Amendment. See *CBIA*, 61 Cal. at 456 n.10.
80 *CBIA*, 138 S. Ct. at 928.
81 Id.
82 *CBIA*, 61 Cal. 4th at 492.
decision in *Nollan* one step further, holding that, after the “essential nexus” test from *Nollan* is met, there must also be a “rough proportionality” between the exaction and the impact of the proposed development.84

Justice Thomas’ opinion correctly suggests that this test is stricter than the standard of review traditionally applied to legislatively imposed conditions.85 Thus, applying it to legislatively imposed ordinances would necessarily result in fewer of them being upheld. This divergence in treatment of two types of “takings” is almost certain to play a prominent role in the Supreme Court’s decision when it has the opportunity to revisit the matter.

V. Going Forward: the Future of Takings and Affordable Housing

Justice Thomas implied that the takings issue in *CBIA* remains live for future decision, explaining that he “continue[s] to doubt that ‘the existence of a taking should turn on the type of governmental entity responsible for the taking’” and that there are “compelling reasons for resolving this conflict at the earliest practicable opportunity.”86 Though he agreed with the Court’s decision to deny certiorari for technical reasons,87 his concurrence suggests that it is likely, rather than possible, that the Supreme Court will weigh in on this issue when given the opportunity. His concurrence suggests further that the current divergence in treatment of the two types of takings is untenable.

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85 See *CBIA*, 138 S. Ct. at 928-929.
86 *Id.* at 929.
87 *Id.*
Because the Supreme Court of California did not find a taking, San Jose’s ordinance was not subject to the “special scrutiny” required by the *Nollan* and *Dolan* standard. Additionally, Justice Thomas pointed out that the petitioners in *CBIA* did not rely on *Nollan* and *Dolan* in the lower proceedings, which weighed in favor of the Court’s decision to deny review. However, the United States Supreme Court may, when faced in the future with a factually similar case, be faced with the decision to apply the “special scrutiny” that the *Nollan* and *Dolan* standard entails. The choice that the Court makes will have profound consequences on the lifestyle and future of millions of Americans.

A. Legislative versus administrative “takings”

The distinction between legislative and administrative, or adjudicative, takings originated in *Dolan*, where the Supreme Court drew a distinction between “essentially legislative determinations classifying entire areas of the city” and “an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel.” The *Dolan* Court applied heightened scrutiny to the administrative taking at issue in that case, but did not specify whether their decision would extend to legislative distinctions as well.

Accordingly, courts have reached conflicting conclusions as to whether the *Dolan* holding is limited to administrative conditions. Despite the historical disparity in the analyses of legislative and administrative takings and the tendency of courts to judge more strictly administrative

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88 *CBIA*, 61 Cal. 4th at 457-458.
89 In *CBIA*, the court held that “local jurisdictions were not required to conduct nexus studies demonstrating the direct correlation between the proposed development and a new need for affordable housing which it created.” Conk, *supra* note 16.
90 *CBIA*, 138 S. Ct. at 929.
91 *Dolan*, 512 U.S. at 385.
92 *Id.*
93 See *Dolan*, 512 U.S. 374.
94 See *CBIA*, 138 S. Ct. at 928.
conditions, a handful of state and lower courts have applied the *Nollan* and *Dolan* standard to legislative conditions as well.95 More frequently, others, like the California Supreme Court in *CBIA*, have not.96

A disparity in the level of scrutiny applied is problematic in that it necessarily results in the decision to uphold a law or not to depend more prominently on a formality than on the substance or effects of the ordinance itself. As *CBIA*’s procedural history—with two forms of scrutiny used throughout the lower court proceedings and, unsurprisingly, two opposing outcomes—indicates, the current method discourages predictability in cases involving alleged takings. Uncertainty regarding how a law will withstand challenge can, in turn, discourage municipalities from enacting inclusionary zoning ordinances. More importantly, the distinction between the two types of conditions is often arbitrary and difficult to assess.97 Thus, it is imperative that the current framework is replaced with one that is both more uniform and allows state and local governments to feel confident in their efforts to address affordable housing issues. To do so, both administratively- and legislatively-imposed conditions should be subject to the less stringent form of scrutiny that has typically been applied only to the latter.

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95 One example, pointed out by Justice Thomas in *CBIA*, is Home Builders Ass’n of Dayton v. City of Beavercreek. There, the Supreme Court of Ohio applied the *Nollan/Dolan* test to a Beavercreek ordinance which “impose[d] an impact fee on developers of real estate” to be used toward the cost of constructing new roadways necessitated by the establishment of the new developments. Though the impact fee ordinance at issue there was distinguishable in some ways from an inclusionary zoning law, both stare the characteristic of “affect[ing] the manner in which a parcel of land is developed.” The Ohio court concluded that the *Nollan* and *Dolan* test was satisfied. In order to meet the first prong, the city demonstrated through methodology that a relationship existed between the new development and the need for roadway improvements. The city demonstrated further a reasonable relationship between the fees imposed on and benefits given to the developer—that is, that each paid its share of the costs to construct the roadway—thus satisfying the second prong. For these reasons, the court found that the ordinance did not constitute an illegal taking under either the Ohio or United States Constitutions, and upheld the law. *See* Home Builders Ass’n of Dayton v. City of Beavercreek, 89 Ohio St. 3d 121 (Ohio 2000).

96 *See CBIA*, 61 Cal. 4th 435.

97 *See* Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U.L. Rev. 242 (arguing that it is difficult to “draw a line” between the two types of conditions).
As previously discussed, the appellate level courts in California did not subject the San Jose ordinance to the *Nollan* and *Dolan* test, in part because they interpreted it as a use restriction rather than an exaction, as well as because CBIA did not rely upon it in their pleadings. The *CBIA* case is unique in that not only did the court not apply the *Nollan* and *Dolan* test, but it also did not require a reasonable relationship between the ordinance’s means and end. Arguably, had the ordinance in *CBIA* been analyzed under the “special scrutiny” that *Nollan* and *Dolan* require, it would not have passed its muster. Though a residential complex that is cost-prohibitive to those of low- to moderate income certainly contributes to affordability problems, it does not directly cause them. Thus, the second part of the “special scrutiny” test is problematic, and fails in many instances. Again, this analysis demonstrates the inconsistent conclusions that can result from a review of the same ordinance, depending on the government entity that imposed the condition and the views of the court that is reviewing it. More than that, it brings to mind the real-life negative consequences that an arguably arbitrary distinction can produce—it is only because of the manner in which the courts chose to frame the ordinance that scores of San Jose residents are able to afford a decent home.

One might argue that both legislative and administrative “takings” should be subject to heightened scrutiny under *Nollan* and *Dolan* for several reasons. A lower standard will result in

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98 *CBIA*, 61 Cal. 4th at 460.
99 *See CBIA*, 138 S. Ct. at 929.
100 That is, between the private activity that gives rise to the exaction or ordinance, and the public activity to which it is applied. Previously, California courts have required this “reasonable relationship” test to be met by legislatively-imposed conditions to which the *Nollan* and *Dolan* test did not apply. David Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 WASHBURN L.J. 43, 59 (2014). *See San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643 (Cal. 2002) (applying the “reasonable relationship” test to legislatively-imposed impact fees).
101 Callies, *supra* note 99, at 55 (explaining that inclusionary zoning programs “programs satisfy the nexus test only if the municipality can show that downtown development contributes to the housing problem the linkage exaction is intended to remedy.”).
102 *Id.* at 56 (“only when the local government requiring such exactions provides sufficient incentive to offset all or a substantial portion of the cost of the mandatory affordable housing set-asides.”).
an increased number of affordable units and thus increased costs on developers, and it is arguably unfair to impose on them alone that financial burden. This slippery slope is easily refuted, however, by the provision of incentives to developers,\(^\text{103}\) similar to those in CBIA,\(^\text{104}\) which help to offset the financial imposition as well as the more rigorous scrutiny that the Nollan and Dolan standard brings.\(^\text{105}\)

An additional argument against the use of a less rigorous standard is that it weakens Fifth Amendment protections. Indeed, the Fifth Amendment protects citizens from the taking of private property “for public use, without just compensation”\(^\text{106}\) and of course, makes no mention of the legislative versus administrative distinction discussed here. Not only does the offering of incentives, as discussed above, help to ameliorate this concern, but further, as explored below, affordable housing programs have successfully existed for decades in spite of Fifth Amendment concerns.

Public policy concerns, too, must take precedence over those arguments. As the CBIA opinion correctly notes, “the significant problems arising from a scarcity of affordable housing have not been solved over the past three decades. Rather, these problems have become more severe and have reached what might be described as epic proportions in many of the state’s localities.”\(^\text{107}\) In many states and cities, current approaches to affordable housing—if any exist at all—are simply inadequate. State and local governments should be able, and should be encouraged, to adopt policies to remedy their city’s affordable housing issues before they reach “epic proportions”\(^\text{108}\) as they have in San Jose and numerous other cities, especially on the east

\(^{103}\) See id.

\(^{104}\) CBIA, 61 Cal. 4th at 451.

\(^{105}\) See supra note 102.

\(^{106}\) USCS CONST. AMEND. 5.

\(^{107}\) CBIA, 61 Cal. 4th at 441.

\(^{108}\) Id.
and west coasts. Courts, in turn, should encourage local governments to take such actions by providing wider, rather than narrower, avenues to do so.

Holding administrative actions to a less stringent standard of review would give state and local governments greater flexibility to meet their citizens’ housing needs as well as embolden them to do so without the hesitation or concerns that an arbitrary distinction can foster. Any other conclusion would not provide municipalities with the necessary means to create and maintain an affordable housing market, nor to curtail growing affordability issues prior to their reaching what can only be described as unconscionable levels. Finally, Chief Justice Cantil-Sakauye emphasized in the CBIA opinion that the city had undertaken “considerable study and outreach to all segments of the community”\(^\text{109}\) before enacting their inclusionary zoning ordinance. This type of outreach helps states and municipalities implement programs that are tailored to their citizens and their needs, and should be encouraged—whether its ultimate aim is through a legislative or an administrative process.

B. An Alternative Approach: the Mount Laurel Doctrine

Nevertheless—or, in the event that the Supreme Court ultimately goes in the other direction, holding that both legislative and administrative conditions are subject to heightened scrutiny under the “unconstitutional conditions doctrine”—state governments have an alternate opportunity to justify the creation of affordable housing: by following New Jersey’s lead in implementing the Mount Laurel doctrine.

Briefly, the Mount Laurel doctrine mandates that all municipalities in New Jersey take “affirmative actions to provide realistic opportunities for their ‘fair share’ of the region’s need for

\(^{109}\) Id. at 442.
affordable housing” for those of low- and moderate-income.110 These actions are generally taken through municipalities’ zoning powers.111 The doctrine is derived primarily from *S. Burlington County NAACP v. Mt. Laurel* (“Mount Laurel I”), where the New Jersey Supreme Court was faced with the question of whether a developing municipality could virtually exclude those of low and moderate incomes from their community.112

There, plaintiffs challenged an ordinance in Mount Laurel, New Jersey, which, in the wake of a “desperate need for housing,”113 prohibited attached townhomes, apartments, or mobile homes throughout the township.114 The court found that the ordinance’s requirements permitted only “high priced, single-family detached dwellings on sizeable lots.”115 This virtually eliminated those of ethnic minorities, young and elderly couples, and other groups from residing in the township, as the ordinance “realistically allow[ed] only homes within the financial reach of persons of at least middle income.”116 In response, the Court held that all municipalities “must, by [their] land use regulations, presumptively make realistically possible an appropriate variety and choice of housing,”117 save for those that “can sustain the heavy burden of demonstrating peculiar circumstances which dictat[e] that it should not be required to do so.”118

Eight years later in a case bearing the same name (“Mount Laurel II”), the Court expanded the doctrine to include all municipalities, rather than only developing ones.119 Further, the Court defended the doctrine’s origins in the New Jersey State Constitution as “a corollary of the

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111 *Id.*
113 *Id.* at 158.
114 *Id.* at 163.
115 *Id.* at 159.
116 *Id.* at 164.
117 *Id.* at 174.
constitutional obligation to zone *only in furtherance of the general welfare*"\(^{120}\) and as a humanitarian obligation to avoid undesirable and preventable consequences.\(^{121}\) The doctrine was the first of its type in the United States, and the Fair Share Housing Center describes it as “widely regarded as one of the most significant civil rights cases in the United States since Brown v. Board of Education.”\(^{122}\)

In response to these decisions, in 1985, the New Jersey State Legislature enacted the Fair Housing Act.\(^{123}\) The Act created the Council on Affordable Housing (COAH), which was responsible for “assess[ing] the statewide need for affordable housing, allocat[ing] that need on a municipal fair share basis, and review[ing] and approv[ing] municipal housing plans aimed at implementing the local fair share obligation.”\(^{124}\) COAH’s initial forays were problematic\(^{125}\) and resulted in lengthy litigation. Thus, it is now the responsibility of the courts to reviews municipalities’ “fair share plans” in New Jersey.\(^{126}\)

Because the Mount Laurel doctrine is derived from an interpretation of the New Jersey state constitution, its status as solid, established law differs from those inclusionary zoning laws that are legislatively or administratively derived. It reframes possible constitutional challenges in

\(^{120}\) *Id.* at 209 (emphasis added).

\(^{121}\) *Id.* at 209–10. In his opinion, Chief Justice Wilentz invited readers to

"...imagine what this state could be like were this claim never to be recognized and enforced: poor people forever zoned out of substantial areas of the state, not because housing could not be built for them but because they are not wanted; poor people forced to live in urban slums forever not because suburbia, developing rural areas, fully developed residential sections, seashore resorts, and other attractive locations could not accommodate them, but simply because they are not wanted. It is a vision not only at variance with the requirement that the zoning power be used for the general welfare but with all concepts of fundamental fairness and decency that underpin many constitutional obligations.” *Id.*

\(^{122}\) Fair Share Housing Center, *supra* note 103.

\(^{123}\) *Id.*

\(^{124}\) *Id.*

\(^{125}\) Initially, many of COAH’s regulations were found unconstitutional. For example, one provision allowed municipalities to “restrict half of their units to seniors and transfer half of their obligation to a poor municipality, thus entirely excluding families with children.” *See id.*

\(^{126}\) *See In re N.J.A.C. 5:96 & 5:97, 221 N.J. 1 (N.J. 2015)* (hereinafter "*Mount Laurel IV*”) (declaring COAH defunct).
a different light: rather than focusing primarily on whether the ordinance violates the State and/or United States Constitution’s takings clauses, the issue becomes one of interpretation. As such, it is both more stable as well as not susceptible to the challenges and uncertainty that come with the legislative and administrative distinction. Additionally, it is arguably more difficult to overrule or supersede—a successful challenge would likely require the plaintiffs to demonstrate that New Jersey’s constitution does not require municipalities to “zone only in furtherance of the general welfare,” rather than demonstrate that the Nollan and Dolan test is not met, for example. This would be a much heavier burden to bear, and thus helps to solidify the Mount Laurel doctrine’s place in New Jersey’s jurisprudence.

At this point, it is noteworthy to mention that the United States Supreme Court has previously decided government takings issues under rational basis review. Therefore, it is reasonable to assert that a challenge to constitutionally-derived affordable housing and inclusionary zoning laws—even at the state level—should be decided under this test as well. Under this test, which is traditionally used for economic regulations, a law will be upheld only “if it is rationally related to a legitimate government purpose.” One who seeks to challenge the constitutionality of such a law bears the burden of proving that “there is no conceivable legitimate purpose or that the law is not rationally related to it.” Under rational basis review, such an ordinance—even if characterized as a taking—should nevertheless be upheld, as it necessarily serves legitimate interests and relates to the fulfillment of those interests.

127 Mount Laurel II, 92 N.J. 158 at 209 (emphasis added).
128 See Kelo v. City of New London, 545 U.S. 469 (2005) (holding that, in the context of the transfer of private land from one private owner to another, the rational basis test was satisfied, as the transfer of land was deemed to further economic development).
129 Rational basis review applies to challenges to state law under the Fourteenth Amendment. See USCS CONST. AMEND. 14.
130 Rational Basis Test, Legal Information Institute, https://www.law.cornell.edu/wex/rational_basis_test.
131 Id.
Considering this standard as applied to the San Jose ordinance, for example, demonstrates the ease with which other states and municipalities could permissibly enact similar laws. The allocation of a certain percentage of new housing units for those of low income is necessarily related to the government’s legitimate purposes of preventing further aggravation of the city’s affordable housing issue, providing more affordable units, and integrating socioeconomic communities, just to name a few. To overcome this presumption, CBIA would bear the burden of proving that there is no legitimate purpose or that the law is not rationally related to such a purpose. Neither of these arguments seems likely to be successful. It can hardly be contended that ensuring the affordability of housing is not a legitimate government purpose—one can hardly imagine more important government purposes than ensuring adequate housing for the poor—or that the ordinance in question is not related to that purpose. Additionally, a consideration of evidence demonstrating the success of similar programs in other states would provide further support for the legitimacy and relatedness, respectively, of such an ordinance.

The doctrine has enjoyed much success in the years since its enactment. As previously discussed, the great majority of inclusionary zoning laws make do not accommodate the provision of housing that is affordable to those of very low-income. Through the Mount Laurel doctrine, however, provisions were made in 2008 to secure housing for those whose incomes are between $7,430 and $22,290, through the signing of the A-500 bill. The bill, which was considered by an urban policy expert to be “the most important housing reform legislation enacted in the nation in the past two decades,” is said to have made progress in furthering the doctrine’s racial

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132 Ault, supra note 14, at 3.
134 Fair Share Housing Center, supra note 104.
135 Separate Is Never Equal, supra note 127, at 8.
and economic integration goals as well as in gathering funds to create additional affordable housing.\footref{136}

Additionally, a Princeton sociologist explained that as of 2013, the doctrine had led to the creation of 60,000 homes, including the Ethel Laurel Homes community in Mount Laurel, New Jersey.\footref{137} The community is a direct result of the doctrine and houses predominantly African-American and Hispanic residents, many of whom are “from urban areas plagued by generations of concentrated poverty,”\footref{138} such as Camden, New Jersey. The sociologist’s study, which compared those who lived within the community versus those who had applied for housing but lived elsewhere, found that

[T]he development’s residents had higher rates of employment and family income and significantly lower rates of welfare dependency. They were also more closely involved in educating their children, who did well academically, even though they had moved to more competitive schools. Surrounding property values did not go down, and taxes did not go up. The development blended in so well with the surrounding area that many people were not aware that it existed.\footref{139}

Moreover, the doctrine appears to be withstanding the test of time, and the New Jersey Supreme Court has reinforced its importance in multiple subsequent cases. In March 2015, in Mount Laurel IV, the Court reaffirmed the constitutional obligation it set forth in the preceding cases.\footref{140} More recently, in January 2017, the Court again stood behind its decisions in the Mount Laurel line of cases in In re Declaratory Judgment Actions Filed By Various Municipalities.\footref{141} The case arose in the context of a sixteen-year “gap period” during which the state failed to

\begin{itemize}
\item \footref{136} Id. at 4.
\item \footref{138} Separate Is Never Equal, supra note 127, at 3.
\item \footref{139} The Mount Laurel Doctrine NYT, supra note 131.
\item \footref{140} See Mount Laurel IV, 221 N.J. 1.
\item \footref{141} 227 N.J. 508 (N.J. 2017).
\end{itemize}
calculate certain municipalities’ “fair share” housing obligations. The Court held that the towns at issue are “constitutionally obligated to provide a realistic opportunity for their fair share of affordable housing for low- and moderate-income households formed during the gap period and presently existing in New Jersey,” and confirmed that those households that were neglected during the gap period were nevertheless entitled to an opportunity, albeit delayed, to access affordable housing. The Court also invited the legislature to give “attention to this important social and economic constitutional matter.” Given the Court’s recent affirmances of the doctrine, it is unlikely that its prominence will diminish any time soon—which should further assure the courts of other states of the viability of a similar enactment.

After considering the abovementioned benefits to the enactment of constitutionally imposed affordable housing laws, it is both surprising and disappointing that other states have not followed New Jersey’s lead. Indeed, many other states could model inclusionary zoning laws in a parallel way. Further, the New Jersey Supreme Court justified their decision broadly, in a way that can easily be applied to the constitutions of other states:

It would be useful to remind ourselves that the basis for the constitutional obligation is simple: the State controls the use of land, all of the land. In exercising that control it cannot favor rich over poor. It cannot legislatively set aside dilapidated housing in urban ghettos for the poor and decent housing elsewhere for everyone else. The government that controls this land represents everyone. While the State may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages. And the same applies to the municipality, to which this control over land has been constitutionally delegated.

142 Id. at 516.
143 Id. at 529.
144 Id. at 531.
145 Id.
146 Mount Laurel II, 92 N.J. at 209.
There is no question that the New Jersey Supreme Court took a rather aggressive approach in the *Mount Laurel* line of cases. Courts typically review, rather than instigate, public policy actions,\(^{147}\) and the doctrine received criticism for being an example of “judicial activism.”\(^{148}\) Arguably, though—as demonstrated by the affordability problems and stagnation in the creation of additional affordable units in other states—such a heavy-handed approach was necessary to achieve the doctrine’s aims\(^{149}\) and ensure that housing affordability issues in New Jersey did not reach “epic proportions.” And, arguably, the Court’s approach worked.

VI. Conclusion

Proper housing is one of the most basic human needs, one that is both indispensable and foundational in order to succeed in other aspects of life. Julián Castro, the then-Secretary of HUD, insightfully explained that “our nation can’t fulfill any of our major goals – whether it’s tackling inequality, improving healthcare, keeping neighborhoods safe, or making sure every child gets a good education – unless we also focus on housing.”\(^{150}\) Indeed, the expansion of affordable housing throughout the country would have far-reaching positive consequences on individuals’ physical and mental health\(^{151}\) and education\(^{152}\) as well as the local economy,\(^{153}\) which would, as Castro noted, propel the United States in the right direction regarding the fulfillment of other positive


\(^{149}\) This is especially true in the context of the *Mount Laurel II* decision because the period between *Mount Laurel I* and *Mount Laurel II* was marked by “massive resistance to the *Mount Laurel* doctrine, judicial stasis, and meager results.” Payne, supra note 138, at 559.

\(^{150}\) *Out of Reach*, supra note 2, at iii.

\(^{151}\) See Ault, supra note 14.

\(^{152}\) See Castro, supra note 28.

\(^{153}\) See California’s Affordable Housing Crisis, supra note 19.
objectives. It is arguably unconscionable that more efforts toward doing so have not been made thus far.

To hold both legislative and administrative actions to a heightened standard of review would have devastating consequences for the millions of low- and very-low-income Americans who already have few feasible options and very little flexibility to obtain decent housing without assistance. A cornerstone of American jurisprudence is the ability of courts to use their far-reaching powers to come to the aid of those without a voice, and the time is ripe for that tenacity to extend to the provision of affordable housing.
OVER MY DEAD BODY:
PREVENTING AND RESOLVING DISPUTES
REGARDING THE DISPOSITION OF THE DEAD
INTRODUCTION

Ronald Booth died on January 7, 1996. At the time, Mr. Booth was living with his girlfriend, Patricia Huff, and was in the process of obtaining a divorce from his wife, Marsha Booth. Five months prior to his death, Mr. Booth had named Ms. Huff as executor of his estate. Despite Ms. Huff’s status as executor and live-in girlfriend, she and Booth’s ex-wife argued over whether Huff had the right to control Mr. Booth’s remains. Mr. Booth’s remains were cremated, a wake was held, and the weeks and months that followed produced a contentious debate regarding the cremated remains. Both sides produced conflicting stories about the decedent’s wishes. Ms. Booth, the decedent’s estranged wife claimed that the decedent requested that family bury his ashes in the family garden or burial plot. On the other hand, Ms. Huff, the decedent’s girlfriend and executor of his estate, claimed that the decedent’s wishes were to have loved ones scatter his ashes in his fishing and hunting spots on the Hudson River. Ten months after the decedent’s death, unannounced and without consent, Ms. Huff scattered the cremated remains in the Hudson River.

This episode illustrates the delicate, sensitive, and often times complex disputes that can arise upon a person’s death. This dispute over the disposition of Mr. Booth’s ashes demonstrates the differing opinions the decedent’s survivors may have and the need to have available means of resolving these disputes. This is especially the case when a decedent expressed wishes as to the disposition of their remains.

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2 Id.
3 Id.
4 Id.
5 Id.
6 Id. at 577.
7 Id. at 576-77.
8 Id. at 576-77.
9 Abby Goodnough, Parties Face Off Over Burial Site for Anna Nicole Smith, THE NEW YORK TIMES (Feb, 21,
This relatively unknown dispute as to Mr. Booth’s remains is but a sample of the complications that arise as to the right to control remains. Other disputes regarding the disposition of human remains have not been so private. Dramatic disputes have played out through the media regarding the disposition of the remains of prominent figures. Such notable, conspicuous disputes include the fight over socialite Anna Nicole Smith’s final resting place,\(^9\) the dispute that led to baseball legend Ted Williams’s head being frozen in Arizona,\(^10\) the squabble over the ashes of another baseball legend, Kirby Puckett;\(^11\) and the clash that resulted in the Godfather of Soul, James Brown’s remains being moved multiple times before finding its final resting place.\(^12\)

Upon the passing of a loved one, the party or parties charged with the responsibility to arrange for the disposition of the remains are faced with a myriad of decisions. These decisions range from major and significant decisions to minor and less substantial decisions. Examples of major decisions include the means of disposition such as burial, cremation, entombment, or donation to science. Another example of a major decision would be the location of the disposition. For instance, in what cemetery should the decedent be buried; to whom should the cremated remains be given; or whether the process of embalming be performed. Major decisions

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\(^10\) David Hancook, Ted Williams Frozen In Two Pieces, THE ASSOCIATED PRESS (Dec. 20, 2002, 10:30 AM), http://www.cbsnews.com/news/ted-williams-frozen-in-two-pieces/ (detailing a dispute between Williams’s children regarding the preservation of Williams’s separated head and body in liquid nitrogen. The dispute arose where there was a will asking to be cremated and a subsequent document requesting the biostasis authorization.).


\(^12\) Agreement Reached Over Burial for James Brown, REUTERS (Feb. 21, 2007 6:43 AM) http://www.reuters.com/article/us-usa-brown-burial-idUSN2023495420070221 (detailing a dispute between Brown’s partner and children regarding the burial place, whether the partner was legally married to Brown, and a pending paternity case in which DNA needed to be extracted from Brown’s body).
such as these are significant in nature and tend to be the subject of the majority of the reported cases involving disputes as to the right to control remains.

Although the more major decisions tend to garner more attention and tend to be the subject of more litigation, the subject of most disputes upon the passing of a loved one tend to be more minor in significance. Examples of these less significant disputes are the type of casket; the burial clothes to be worn by the decedent; the selection of the funeral home to provide the services; the selection of the officiator of the funeral or memorial services; the selection of flowers; or even the eulogies, prayers and songs offered. Although these decisions are less significant in nature, they can be very personal to the parties and disagreements can create great contention.

The vast majority of disputes, major or minor, are resolved using self-help by the parties. Many discussions, negotiations, arguments, and concessions regarding the disposition of a loved one are made in funeral homes or living rooms everyday. Experienced funeral directors and clergy are familiar with such disputes and can act as informal and compassionate mediators in arriving at a decision.

Part one of this comment will examine the unique issues that exist with disputes involving the disposition of human remains. Part two of this comment will examine the controlling and varying state laws that address the right to control remains. Part two will address the issues and potential problems that arise with the status-based scheme of determining who has control and what parties have done and can do to overcome or bypass this scheme. Part three of this comment will examine by what means these type of disputes are resolved and the considerations, benefits, and problems that exist in the respective approaches. Finally, part four of this comment will offer suggestions and examine future developments regarding these issues.
I. UNIQUE ISSUES IN DISPUTES INVOLVING HUMAN REMAINS

A number of unique issues distinguish disputes involving human remains from other legal disputes like probate disputes. Unique issues that arise in resolving disputes regarding human remains include, but are not limited to, the unique property status of human remains; the special consideration of timing; and the final and permanent nature of the decisions.

A. The Property Status of Human Remains

The first unique issue that arises in evaluating disputes regarding human remains is the issue of property. Historically, common law has not regarded dead bodies as property.\textsuperscript{13} Disputes involving remains typically arise after a person’s death, so these disputes often end up in probate. It is important to note that “[t]he body of one whose estate is in probate unquestionably forms no part of the property of that estate.”\textsuperscript{14} Courts instead have recognized a quasi-property right to the possession of human remains “for the limited purpose of determining who shall have its custody for burial.”\textsuperscript{15} Courts have explained that these laws operate to achieve policy goals “rather than abandoning [human remains] to the general law of personal property.”\textsuperscript{16} This quasi-property right gives the next of kin or person with the right to control the remains the right to possess the remains for burial or other disposition purposes, to oppose disinterment, to refuse autopsy and organ donation, and to seek damages for improper treatment of the body of the deceased.\textsuperscript{17}

\begin{footnotes}
\item[16] Moore v. Regents of University of California, 51 Cal.3d 120, 137 (1990).
\end{footnotes}
The Texas Supreme Court held, consistent with decisions in other jurisdictions, that a person’s property rights of human remains does not include the right to transfer or the right to exclude, but only includes the right of possession for purpose of burial or final disposition. In *Evanston Ins. Co. v. Legacy of Life, Inc.*, the plaintiff previously consented to the harvesting of her mother’s tissues. The plaintiff brought suit after she found out the tissues were transferred to other companies and sold for profit. The plaintiff asserted claims, including a property claim, arguing that the insurance policy includes coverage for her “loss of use of her deceased mother’s tissues, organs, bones and body parts.” The court held that the plaintiff had no property rights in the tissues other than for burial or final disposition. The court reasoned that the plaintiff did not have many of the rights that are associated with the bundle of property rights including the right to transfer and the right to exclude. Because of these limited rights, the court held that human remains or tissues are not property of the next of kin.

A person’s property rights in human remains is enormously different from their property rights in personal property. The quasi-property rights an individual has in human remains essentially ends with the right to control remains for the purpose of disposition.

**B. Timing**

Another unique issue in disputes involving human remains is that of timing. In the case *Sherman v. Sherman*, the plaintiffs, children of the decedent, pursued a temporary restraining
order in order to stop the burial of the decedent, directed by the defendant, the decedent’s estranged wife. The plaintiffs filed the restraining order eight days after the decedent’s death. The court reasoned that an eight-day delay is typically not abnormal, however in this context, “it strikes the court as an unusually long period of time.” This case illustrates that there may be more of a sense of urgency when it comes to disputes regarding the disposition of remains.

There are, perhaps, three reasons why there exists a sense of urgency in resolving disputes as to the control and disposition of remains. The first reason involves the fact that shortly after death, the human body begins the decomposition process. Efforts are often taken to slow the decomposition process, such as embalming or refrigeration. However, these procedures merely slow the decomposition process, not stop it. Funeral services and memorials that involve viewing the decedent are of course most time sensitive. Significant disputes can disrupt the timetable for memorial services and viewing the decedent may no longer be an option.

The second reason why there is a sense of urgency in resolving disposition disputes is that death most often is accompanied by intense grief of those left behind. Disputes regarding the disposition of a loved one can cause unnecessary and additional emotional angst. These types of disputes can hinder the grieving process and delay the important closure that often comes with the memorialization and disposition of a loved one.

The third reason there exists a sense of urgency in disposition disputes is logistics. Generally, funeral homes do not have the capability or space to store human remains for an extended period of time. Most states have statutes in place that dictate what must happen with human remains after death. Many state regulations declare that a body must be interred, cremated, entombed, refrigerated, or embalmed within a certain time period after death, often

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28 Id. at 653.
29 Id.
twenty-four or forty-eight hours after death.\textsuperscript{30} Therefore, while waiting for a decedent’s family to resolve a prolonged dispute regarding the decedent, the funeral home would need to either embalm the body or place it in refrigeration. Not only could this be costly for the funeral home, but funeral homes charge for embalming and most often charge a daily rate for use of refrigeration.\textsuperscript{31} Extended storage of remains in funeral homes can be costly, a hassle, and a source of liability for the funeral home.

\textit{C. Finality}

The decision regarding the disposition of remains is more often than not final and cannot be undone. Because of this permanency regarding the disposition of remains, decisionmakers have added pressure to reach a just resolution. Generally, an authorized person “may direct any lawful manner of disposition of a decedent’s remains by completion of a written instrument.”\textsuperscript{32} This authorization usually gives the funeral home instructions for burial, cremation, entombment, donation or other means of disposition.

On December 7, 2007, Theodore “Ray” Kennedy, 59, passed away in Las Vegas, Nevada.\textsuperscript{33} Mr. Kennedy was survived by a son and sisters who contracted with Palm Mortuary to handle the disposition of his remains.\textsuperscript{34} Mr. Kennedy’s remains were to be buried following a

\textsuperscript{30} See CAL. BUS. & PROF. CODE § 7712.6 (West 2016) (stating that a cremation should not take place more than 24 hours after delivery of the remains, “unless the remains have been preserved in the interim by refrigeration or embalming”); 1956 R.I. GEN. LAWS ANN. § 5-33.2-12 (West 2016) (stating that “[h]uman dead remains shall not be held more than forty-eight (48) hours without embalming or without refrigeration for the purpose of maintaining public health.”).

\textsuperscript{31} “Some funeral homes have a daily charge for storing the body even if it is embalmed. Some funeral homes price this fee on a per day basis others price it as a lump sum amount for a set number of days. Storage fees are approximately $35 per day up to $100 per day.” Funeral Costs, FUNERALRESOURCES.COM https://funeralresources.com/resources/storage-and-refrigeration-fees/ (last visited Mar. 13, 2017).

\textsuperscript{32} OR. REV. STAT. § 97.130(2) (2016).


\textsuperscript{34} Id.; Kennedy v. Carriage Cemetery Services, Inc., 727 F. Supp. 2d 925, 928 (D. Nev. 2010).
funeral service. During the arrangements, Mr. Kennedy’s family expressed their objection to the practice of cremation. Before the services, the funeral home informed the family that they had made a grave mistake and had cremated Mr. Kennedy’s remains. Mr. Kennedy’s family brought suit against the funeral home. The suit concluded with a settlement and judgment in the plaintiff’s favor.

This issue of finality is further illustrated with the case discussed in the introduction, Booth v. Huff, where the decedent’s ashes were scattered in the Hudson River. In both of these cases, the permanent and final actions could not be undone and the only remedy left for the injured parties was to sue for damages. Courts and other parties involved in disputes regarding the right to control remains must be mindful of the permanent and final implications to their decisions and actions.

II. The Status-Based Scheme Used in Controlling Remains

A. Priority of Decision Laws

Currently, there is no uniformity among the states regarding the disposition of remains. Some states use the common law to settle disputes concerning the disposition and controlling of remains. Meanwhile, other states have adopted laws that designate which of the decedent’s relatives, and in what order, determine the disposition of the decedent’s remains. These statutes are often referred to as Priority of Decision laws. Both common law and statutes look to an individual’s status or relationship to the decedent to determine who controls the disposition of remains.

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35 Id.
36 Id.
37 Id.
38 Id.

While approximately twenty-four states have statutes concerning the disposition of human remains, only fifteen states have in place these Priority of Decision laws.\footnote{Murphy, \textit{supra} note 13 at 400-01.} These statutes provide a list and priority of persons who have the authority to control the disposition. Generally, these statutes provide that the decedent has the highest priority to determine the disposition of their remains. The weight and procedure of determining the decedent’s wishes will be discussed in a subsequent section.

Oregon and New York are two examples of states that have adopted these Priority of Decision laws.\footnote{OR. REV. STAT. § 97.130 (2016); N.Y. PUB. HEALTH LAW § 4201(2)(a) (McKinney 2017).} Oregon and New York’s statutes are identical in most respects listing in order of priority the decedent’s spouse, children, parents, siblings, guardian, and personal representative.\footnote{OR. REV. STAT. § 97.130 (2016); N.Y. PUB. HEALTH LAW § 4201(2)(a) (McKinney 2017).} One major difference between the Oregon and New York statutes is New York’s insertion of “the decedent’s surviving domestic partner” near the top of the list.\footnote{N.Y. PUB. HEALTH LAW § 4201(2)(a) (McKinney 2017).} This addition is an example of a statutory evolution and departure of the traditional status-based scheme and will be discussed later in this comment.

Another major difference between Oregon and New York’s statutes is that New York’s priority list has a “person designated in a written instrument” as the party with the highest priority.\footnote{N.Y. PUB. HEALTH LAW § 4201(2)(a)(i) (McKinney 2017).} At first glance, this would seem like a major divergence of the two statutes, however, functionally, the statutes operate the same. Oregon, despite the absence from the list above, still
gives priority to a party designated by the decedent. The Oregon statute reads: “The decedent . . . may delegate such authority [to direct the manner of disposition of the decedent's remains] to any person 18 years of age or older. Delegation of the authority to direct the manner of disposition of remains must be made by completion of [a] . . . written instrument.”

In a statutory jurisdiction, to determine what party has authority to direct disposition of a decedent a court adheres closely to the statute. Michael A. Trinidad tragically perished in the September 11, 2001 terrorist attacks on the World Trade Center in New York City. At the time of his death, Mr. Trinidad was divorced, had two infant children, and a number of siblings. Through efforts at the disaster site and through DNA testing, a portion of Mr. Trinidad’s remains were identified and recovered. Mr. Trinidad’s ex-wife and his eldest sibling both desired to receive the remains and control the method of disposition. The court, looking closely at the statutory language, held that given the decedent passed away without a spouse and because his children were under 18 years of age, the party with priority to control disposition was his eldest sibling.

States that do not have Priority of Decision laws or other statutes governing the disposition of remains look to judicially-produced common law to settle disputes and set forth the order of persons entitled to control the disposition of remains. In the highly publicized case of Anna Nicole Smith, the court ultimately relied on common law to determine the proper party with the right to control her remains for the purpose of disposition. The parties in dispute were

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46 OR. REV. STAT. § 97.130(3) (2016).
48 Id.
49 Id.
50 Id.
51 Id.
Smith’s mother and Smith’s daughter. Smith’s daughter was not yet six months old at the time and was appointed a guardian ad litem, who was to act in the best interest of the infant daughter. Although there existed statutes in the State of Florida regarding disposition disputes, the court of appeals ultimately relied on common law to resolve the dispute because the court found that the statutes were intended to guide funeral home operators or medical examiners in determining liability for a decision regarding the disposition of remains. The court found that in the absence of desires expressed previously by the decedent, “the spouse of the deceased or the next of kin has the right to the possession of the body for burial or other lawful disposition.” The court, through common law, determined that the daughter was the legal next of kin and, permitted the guardian ad litem to decide that Smith’s remains were to be buried in the Bahamas next to her son.

B. Overriding the Status-Based Scheme with Decedent’s Wishes

Historically, English and American courts held that a decedent could not control the disposition of their remains. Courts have now recognized a decedent’s right to dictate the disposition of their remains. Enabling individuals the ability to make decisions controlling their disposition is important, otherwise a party given the right to control remains, under either a common law or statutory scheme, may act contrary to what the decedent wanted. Such was the unfortunate case of Jennifer Gable, a Boise, Idaho native who died suddenly from an aneurysm.

53 Id. at 1164.
54 Id.
55 Id. at 1165.
56 Id. at 1166.
57 Id.
58 See Williams v. Williams, L.R. 20 Ch. Div. 659 (1882) (denying a claim to recover expenses when a body was buried contrary to the decedent’s will and holding that a person, by will or other instrument, cannot dispose of their dead body); Enos v. Snyder, 63 P. 170, 171 (Cal. 1900) (holding that one has no property in his dead body and that disposition cannot be controlled by will).
at the age of 32. Gable was a transgender individual who changed her name from Geoffrey in 2007 and who was known as a female by friends and acquaintances in recent years. Nevertheless, friends and acquaintances attending Gable’s open-casket funeral were shocked to find Gable with a short haircut and wearing a men’s suit. The obituary refers to the decedent as Geoffrey and Geoff and uses the pronouns “he” and “his”. The obituary makes no mention of Jennifer, her transition, or her female identity. During the memorial service meant to honor Gable’s life, neither Jennifer nor her female identity were mentioned. The funeral director’s hands were essentially tied as he had to follow the directions of the individual who held the legal right to control the disposition of Gable’s remains.

Generally speaking, there are perhaps three reasons why an individual would want to direct their own disposition. First, an individual may not have family. Without close, trusted family members to make a decision regarding disposition that authority would default to someone who knows very little about the decedent or even a perfect stranger such as a public health officer. The second generalized reason why an individual would desire to direct their own disposition is because of dislike or distrust of family members. An individual who has a shaky relationship with family may not be comfortable with the authority defaulting to those they do not trust. The third reason why someone would want to direct their own disposition is because of the individual’s beliefs. An individual with strong beliefs, be it religious, non-

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61 Id.
62 Id.
63 Geoffrey Gable Obituary, PARKE’S MAGIC VALLEY FUNERAL HOME & CREMATORY, http://www.magicvalleyfuneralhome.com/memsol.cgi?user_id=1435181 (last visited Mar. 13, 2017) (using phrases such as “He was born in . . . .” and “Geoff and his brother . . . .” and “He is survived by his father . . . .”).
64 Id. (using phrases such as “He was born in . . . .” and “Geoff and his brother . . . .” and “He is survived by his father . . . .”).
65 Dutton, supra note 60.
66 Id.
67 See OR. REV. STAT. § 97.130 (2016).
religious, or otherwise, may want assurance that certain actions or ceremonies do or do not take place.

This recognition of a decedent’s right to dictate the disposition of their remains is often reflected in statutory Priority of Decision laws. Oregon’s law, for example, states that an “individual . . . may direct any lawful manner of disposition of [their] remains.”68 States that have not adopted Priority of Decision statutes also give deference to a decedent’s wishes by looking to common law.69

An individual may use one of a number of tools to dictate the control and disposition of their remains upon death. The Oregon Priority of Decision law states that a decedent may direct the disposition of their remains by a written, signed instrument or by prearranging with a funeral service practitioner.70 Generally, there are four types of instruments an individual may employ to control their own disposition upon death: a will, other written instruments, a proxy or agent, and a preneed funeral plan. Practitioners generally refer to these instruments as “Disposition Directives.”

One common instrument for an individual to control their disposition is a will. Generally, the wishes and preferences expressed by a decedent in a will is preferred over the wishes and preferences of any other person.71 Wills have been used as a means of controlling one’s disposition and are relatively inexpensive and efficient. Generally, an individual may direct their disposition using a will by doing one of two things. First, the directions for final arrangements may be a provision within the will. The second option in using a will to express final arrangements is to attach a form as a sort of addenda to the will that expresses the testators

68 OR. REV. STAT. § 97.130(1) (2016).
70 OR. REV. STAT. § 97.130(1) (2016).
wishes for disposition. Using a will to direct disposition may be a good option to ensure this important information is memorialized alongside other important provisions in the will. The downside to this option, discussed further below, is the fact that a will may not be the most practical location to contain these instructions to which responsible parties would need to refer very soon after death. The inclusion of a disposition provision or directive in a will may be out of place because a will traditionally deals with real and personal property and as discussed previously, there is no property right in human remains.

Another instrument or method for an individual to control their own disposition is a non-will written instrument. These instruments are especially advantageous for those whose loved ones are outside of the traditional or conventional meanings of a family. These types of instruments are helpful to those most harmed by the family paradigm often found in probate disputes. These classes of people include unmarried same-sex or opposite-sex cohabitants, nontraditional elders, and other nonconforming testators.

Non-will written instruments generally have a large spectrum of formality. On the more formal end of the spectrum is something like a revocable trust. However, some jurisdictions do not require a decedent’s wishes or preferences to be in a formal instrument such as a will or revocable trust. Utah, for example, requires that a person may direct the preparation, type, and place of disposition through written directions acknowledged before a Notary Public. The instructions given through this more informal instrument are valid so long as the directions are lawful and there are sufficient resources to carry out the directions. In Connecticut, an individual can control their disposition simply through a signed and witnessed written

\footnotesize{\textsuperscript{72} Id. at 1375. \textsuperscript{73} Id. \textsuperscript{74} Id. \textsuperscript{75} \textsc{Utah Code Ann.} \textsection{}58-9-601 (West 2016). \textsuperscript{76} Id.}
The stated goal for this more informal instrument is to ensure that individuals “ha[ve] the ability to make the decisions in advance regarding the disposition of their own remains and their own personal funeral arrangements.”

There are a number of other written instruments that would likely fall on the informal end of a spectrum. One private cemetery in Washington State, the White Eagle Memorial Preserve Cemetery, has made available online a simple form which allows an individual to simply state their desire to either be cremated or buried upon their death. This form, only one page in length, contains a number of check boxes and fill-in-the-blanks that contain all the necessary information for an individual to direct and authorize upon death their remains to be cared for according to their wishes. User-friendly forms such as this one are increasing in popularity and availability. Although forms downloaded from the internet or pamphlets obtained from funeral homes are widely available and easy to navigate, one may still direct their own disposition via an even more informal means such as scribbling on the back of a napkin. In Washington State, as long as the document expresses “the decedent’s wishes regarding the place or method of disposition of their remains, signed by the decedent in the presence of a witness, [it] is sufficient legal authorization for the procedures to be accomplished.”

Another strategy for an individual to ensure their wishes concerning disposition are carried out is to use a proxy or agent. In Utah, a person can designate someone to control disposition through a written instrument so long as it is “acknowledged before a Notary Public or executed with the same formalities required of a will.” In contrast, Oregon’s statute requires

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77 Foster, supra note 71 at 1376.
78 Id.
80 Id.
81 WASH. REV. CODE § 68.50.160(1) (2016).
82 UTAH CODE ANN. § 58-9-602 (West 2016).
less formality. In Oregon, an easy-to-use form is included in the statute.\textsuperscript{83} Use of this form, or a substantially similar form, would grant authority to an individual to direct the manner of disposition.\textsuperscript{84} Important components in this form include a declaration and signature of two witnesses, details of the authorized person including address and phone number, an alternate authorized person, and signature of the person giving authorization.\textsuperscript{85} A power of attorney is likely not a sufficient instrument to give authority because the power of attorney would likely terminate at death.\textsuperscript{86} LQBT groups have advocated for the use of proxies and agents in order to allow individuals to override family default rules and to ensure that “the loved one of their choice will have control of their remains and carry out their wishes after they are deceased.”\textsuperscript{87}

Another very common instrument used in controlling one’s own disposition is a preneed funeral plan. Preneed funeral plans are simply referred to as “preneeds” in the funeral industry and constitute a contractual method for controlling one’s disposition. These plans are prepaid and prearranged with a specific funeral home and allow an individual to make specific decisions regarding their disposition. These preneeds usually encompass major decisions, such as the method of deposition, and more detailed decisions such as the specific casket to be used or hymn to be sung. The preneed is typically a contractual agreement between the individual and the funeral home.\textsuperscript{88} The plan is typically funded through a funeral trust, annuity, or insurance policy.\textsuperscript{89} A third party, usually a trustee or insurance company, assumes responsibility for the

\textsuperscript{83} \textbf{OR. REV. STAT.} § 97.130(7) (2016).
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{See UTAH CODE ANN.} § 58-9-602 (West 2016).
\textsuperscript{89} \textit{Id.}
management of the funds and upon the death of the individual, the funds are released to the
funeral home to provide the designated goods and services.\textsuperscript{90}

Preneeds began as concepts around the 1930s when burial organizations sold burial
certificate plans.\textsuperscript{91} By the 1950s, funeral directors were selling prearranged funeral plans.\textsuperscript{92} Today, the preneed business is a billion-dollar industry as the amount of trust funds held
pursuant to preneeds exceeds $25 billion.\textsuperscript{93} Nearly one quarter of individuals in the United
States have engaged in some sort of prepaying for disposition arrangements.\textsuperscript{94}

Preneeds are favored by many. Idaho, for instance, gave preneeds the highest priority to
control disposition of a decedent’s remains.\textsuperscript{95} Beyond the most obvious advantage of allowing
an individual to control their own disposition, a preneed has many other benefits. Preneeds are
wise financially. Preneeds most often use payment plans and allow an individual to essentially
“lock-in” a price to protect from likely price increases in future funeral costs due to inflation or
other reasons. Another benefit of preneed funeral plans is taking the decision-making burden off
grieving loved ones. Often times, grieving loved ones are left to wonder, “What would mom
have wanted?” A preneed can alleviate the amount of decisions and the stress loved ones often
face upon the death of an individual. Some jurisdictions have endorsed the preneed funeral plans
in the states’ Priority of Decision statutes and some states have even given preneeds the highest
priority to control disposition of a decedent’s remains. Oregon’s statute states that an individual

\textsuperscript{90} Id.
\textsuperscript{91} The Deathcare Industry, AARP Public Policy Institute,
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} “A 2007 telephone survey conducted by the Association for the Advancement of Retired Persons (AARP) found
that a sizeable portion of the 50+ population (34%) has engaged in some preplanning for a funeral or burial, and just
under a quarter of individuals ages 50+ (23%) have prepaid at least a portion of funeral or burial expenses for
themselves or someone else. This translates into approximately 29.5 million individuals ages 50+ in the U.S. who
have prepaid any part of a funeral or burial for themselves or someone else and 20.0 million individuals ages 50+
in the U.S. who have prepaid for funerals or burials.” Id.
\textsuperscript{95} 1994 Idaho Sess. Laws 423, §§ 1-4.
may direct the disposition of their remains “by preparing or prearranging with any [licensed] funeral service practitioner.”

Whether an individual uses a will, other written instrument, a proxy/agent, or a preneed to direct their own disposition prior to death, physical documentation is likely required. Practically speaking, problems may arise with the use of a physical documentation in controlling one’s disposition. These problems may arise with any instrument, but are often related directly to wills. Specifically, out of respect for the decedent or just out of the need to act quickly, a will may not be located or read until several days after death. For instance, there may be a delay in examining the will due to limited access to the safe deposit box where the testator, now decedent, placed the will. This delay in locating or reading a will may lead to decisions inconsistent with the decedent’s wishes regarding the decedent’s disposition. For that reason, no matter the instrument, it is imperative that an individual who uses one of these means to direct their own disposition inform those closest to him or her this documentation exists and parties should refer to it upon the individual’s death. Documentation containing an individual’s wishes are of limited use unless someone knows they exist. A disposition directive should likely be kept in the same location as a Power of Attorney and an Advance Health Care Directive as all three of these instruments are often employed near the end of an individual’s life.

Courts have placed limits on a decedent’s right to dictate disposition of their remains. The Oregon statute states:

If the decedent directs a disposition . . . and those financially responsible for the disposition are without sufficient funds to pay for such disposition or the estate of the decedent has insufficient funds to pay for the disposition, or if the direction is unlawful, the direction is void and disposition shall be in accordance with the

\[\text{OR. REV. STAT. § 97.130(1) (2016).}\]

direction provided by the person given priority . . . and who agrees to be financially responsible.\textsuperscript{98}

There may be other reasons why less deference is given to a decedent’s wishes rather than just legal or financial reasons, such as reverence for the dead. Thomas Moyer, a resident of Phoenix, Arizona, was visiting his mother in Salt Lake City, Utah for Christmas when he unexpectedly passed away.\textsuperscript{99} Moyer’s mother had her son buried at the Salt Lake City Cemetery.\textsuperscript{100} Moyer’s father, the executor of Moyer’s will, petitioned the court to permit exhumation of Moyer’s remains and so that he could proceed with cremation according to Moyer’s wishes expressed in his will.\textsuperscript{101} The court however held that Moyer’s body was to remain buried.\textsuperscript{102} The court reasoned that Moyer’s father, the executor of the estate, waived the right to cremation when he failed to act and permitted the burial to occur.\textsuperscript{103} The court reasoned that society has a reverent regard for loved ones’ remains and “this naturally includes an ardent desire that their remains be treated with respect and allowed to remain in undisturbed peace and rest.”\textsuperscript{104}

\textbf{C. Non-Recognized Relationships}

Professor Susan N. Gary writes that “[i]ntestacy statutes almost uniformly use a formal definition of family: person related by blood, marriage or adoption.”\textsuperscript{105} The reason these intestacy statutes look to the family is either because it strives to approximate the decedent’s wishes or “because society has decided that intestacy statutes should benefit and strengthen

\begin{itemize}
\item \textsuperscript{98} \textit{Or. Rev. Stat.} § 97.130(6) (2016).
\item \textsuperscript{99} Matter of Moyer’s Estate, 577 P.2d at 110.
\item \textsuperscript{100} \textit{Id.}
\item \textsuperscript{101} \textit{Id.}
\item \textsuperscript{102} \textit{Id.} at 111.
\item \textsuperscript{103} \textit{Id.} at 110.
\item \textsuperscript{104} \textit{Id.}
\item \textsuperscript{105} Susan N. Gary, \textit{Adapting Intestacy Laws to Changing Families}, 18 L. & INEQ. 1, 27 (2000).
\end{itemize}
families if a decedent does not express a contrary wish in a will.”

Right to Control Remains laws are not unlike intestacy statutes in that they look to a formal, traditional status-based scheme. As in intestacy, the law on the right to control remains is based on the presumption that persons related by blood, marriage or adoption will know best what the decedent’s wishes were as to the disposition of their body. This conventional view can cause dire affects for those in unconventional relationships and can create disputes at to the right to control remains.

Notably, the spouse of the decedent is at the top of the list in the status-based scheme. Because of the narrow definition of spouse, unmarried partners can be denied the right to control the disposition of their loved one. Traditionally, the harm this creates has been focused on same-sex partners. However, it is applicable as well to unmarried different-sex partners. Nearly 10% of coupled households consist of unmarried different-sex couples who would stand at risk of being harmed by a traditional status-based scheme of determining the authorized party to direct disposition.

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106 Id.
107 Horan, supra note 18 at 424.
108 OR. REV. STAT. § 97.130(2) (2016).
109 Foster, supra note 80 at 1366.
110 “Same-sex-partner households represented 0.6% of all households and 10.9% of unmarried-partner households in 2000. By 2010, same-sex-partner households rose by 51.8% in numbers and to 0.8% of all households and 11.6% of unmarried-partner households.” Lawrence W. Waggoner, Marriage is on the Decline and Cohabitation Is on the Rise: At What Point, If Ever, Should Unmarried Partners Acquire Marital Rights? 50 FAM. L. Q. 215, 222 (2016).
111 Foster, supra note 71 at 1366.
112 “The amount of cohabitation in the United States has grown at an astonishing rate in the last four decades--from fewer than 500,000 opposite-sex cohabiting couple households in 1960 to 4.9 million (almost ten million individuals) in the most recent census (2000). This is an increase of almost 1000% over forty years, a very rapid social change indeed. Opposite-sex unmarried-partner households now make up at least 9% of all coupled households (coupled households are 57 of all households).” Cynthia Grant Bowman, Social Science and Legal Policy: The Case of Heterosexual Cohabitation, 9 J. L. & FAM. STUD. 1, 7 (2007); “Unmarried couple households represented 5.2% of all households in 2000 and increased to 6.6% of all households by 2010. In 2000, opposite-sex-partner households represented 4.6% of all households and 89.1% of unmarried-couple households. By 2010, opposite-sex-partner households rose by 40.2% in numbers and to 5.9% of all households but decreased to 88.4% of unmarried-couple households.” Waggoner, supra note 110 at 221-22.
There have been legal responses to changes in family structure,\textsuperscript{113} most notably is the Supreme Court decision holding that the fundamental right to marry is guaranteed to same-sex couples.\textsuperscript{114} These changes attempt to fit new forms of relationships into the traditional family model.\textsuperscript{115} However, this status-based model can continue to exclude those who cannot or choose not to enter into such relationships.\textsuperscript{116} Ever-changing family dynamics coupled with reluctance to modernize the definition of the family increases the likelihood of disputes regarding the disposition of the dead.\textsuperscript{117}

Additionally, changes in the traditional family structure are also reflected in states’ Priority of Decision laws. New York’s statute discussed above includes an addition of “domestic partner” in the hierarchy of those who have authority to control the decedent’s disposition which, as can be imagined, is a more inclusive role that of a spouse. This detailed definition of domestic partner is likely an attempt by the New York State Legislature to not exclude an individual closest to the decedent in making decisions and arrangements for the disposition of the decedent. This is an example of a statutory means to overcome issues that may arise within the traditional status-based scheme and is a clear departure from the traditional interpretation of a family.

Parties without recognized relationships would have to overcome a significant burden to usurp a party’s right to disposition to control a decedent’s remains.\textsuperscript{118} In 1993, Drew Stanton passed away in West Virginia from complications of AIDS.\textsuperscript{119} Stanton’s mother and brother took custody of Stanton’s remains and planned an elaborate Jewish Orthodox funeral in New York. However, Stanton’s mother and brother were unable to proceed with the funeral arrangements without court approval.

\textsuperscript{113} Gary, supra note 105 at 32.
\textsuperscript{115} Gary, supra note 105 at 60.
\textsuperscript{116} Foster, supra note 71 at 1368.
\textsuperscript{117} Foster, supra note 71 at 1367-68.
\textsuperscript{119} Id.
York.\textsuperscript{120} Stanton’s partner, Michael Stewart opposed to the proposed actions of the mother and brother and sought to take custody of the body for the purposes of cremation.\textsuperscript{121} Although Stewart was the executor of Stanton’s estate, the court found that that position failed to give Stewart custody for two reasons.\textsuperscript{122} First, the will did not designate a method of disposition and the will did not vest the right to control disposition to the executor.\textsuperscript{123} Second, the decedent’s body was not subjected to delegation under the will because there is no property right in the decedent’s body.\textsuperscript{124} The court in this case ultimately did not render a decision on this case because the parties came to a resolution; the parties agreed to cremate the remains and split the ashes.\textsuperscript{125} Despite the resolution, this case illustrates the complications that arise when a party that seeks to control disposition does not have a recognized relationship with the decedent. Furthermore, this case illustrates the importance and availability of controlling one’s disposition. In this case, Stewart, the decedent’s partner, may have had the right of disposition had the decedent’s wishes for disposition been written in the will or if Stewart was listed as the party to control disposition in the will.

\textit{D. Disagreements within the Status-Based Scheme}

Professor Ann M. Murphy points out a potential problem with status-based schemes and Priority of Decision laws.\textsuperscript{126} Murphy points out that “there is no provision in the event there is an even number of surviving adult children, siblings or parents of the decedent and they disagree in equal numbers as to the disposition.”\textsuperscript{127} Essentially, the question is, what happens when there’s a tie? An example of such a dilemma could be when a decedent leaves no instructions as

\begin{itemize}
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Id.
\item \textsuperscript{123} Id.
\item \textsuperscript{124} Id.
\item \textsuperscript{125} Id.
\item \textsuperscript{126} Murphy, \textit{supra} note 13 at 404.
\item \textsuperscript{127} Id.
\end{itemize}
to the disposition of their remains and the decedent’s parents have the right to control the
disposition of the decedent’s remains. A situation could arise where one parent wants the child
to be cremated while the other parent prefers a more traditional burial. A more common
eexample could be where an even numbered amount of parties with the right to control remains
disagree concerning a more minor decision like the clergy that is to officiate at the service or the
color of the casket. The Oregon Priority of Decision statute does not set forth procedures if such
a tie were to take place.\textsuperscript{128} In such a situation, the parties may have to look to courts or
alternative dispute resolution methods to resolve the dispute.

When multiple people have the right to control remains, a single person alone does not
have the unilateral right to control disposition of the remains, each party with the right has an
equal presumptive say in the disposition.\textsuperscript{129} On October 16, 2009, John M. Gately was killed in
a car accident.\textsuperscript{130} According to New Jersey common law, Gately’s divorced parents held the
right to control remains.\textsuperscript{131} The mother of the decedent took the initiative to arrange for the
services and the disposition of her son.\textsuperscript{132} The mother elected to have her son cremated and
signed a form provided by the funeral home which indicated that she “alone [has] the right [to]
give this authorization and direction for said cremation, and that no other person has such
right.”\textsuperscript{133} The father alleged that he never authorized the cremation and even voiced his
objection to the mother and the funeral home.\textsuperscript{134} This case ultimately came down to a jury
deciding that the father did not prove by a preponderance of the evidence that the mother

\textsuperscript{128} OR. REV. STAT. § 97.130 (2016).
\textsuperscript{130} Id. at 546.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
“negligently violated the law regarding the funeral or disposition of [the son].” On appeal, the Superior Court of New Jersey affirmed the verdict and concluded that in a case such as this, both parents have an equal presumptive say in the disposition of their child and that a funeral director may have a duty to inquire of both parents before assuming that authorization from one parent is valid.

E. The Funeral Home’s Duty to Ensure the Proper Party Controls Disposition

Funeral homes often carry the burden to ensure the individual making arrangements and directing the deposition of the decedent is in fact authorized according to the statute, common law, or controlling instrument. That can be a large burden to carry and can create some dire circumstances if done improperly.

One state statute that is similar to other states’ statutes on the matter reads that a funeral director is permitted to dispose of human remains “on the written authorization of a person who claims to be, and is believed to be, a person who has the right to control the . . . disposition as provided by [statute].” This statute, therefore, gives funeral directors a two-prong requirement before they can dispose of remains according to a party’s wishes. First, the party must claim to be the party authorized to control disposition. Second, the funeral director must believe that person to indeed be a person that is authorized.

The court in Gately held through statutory interpretation that funeral directors do not have an affirmative duty to obtain authorizations from all parties who have a right to control disposition. Funeral directors have qualified immunity from civil liability for the disposition.

135 Id. at 550.
136 Id. at 558.
138 Gately, 442 N.J. Super. at 558.
of remains.\textsuperscript{139} This qualified immunity only applies so long as the funeral director did not have reasonable notice that representations made by the supposed authorized party were untrue or that the party lacked the right to control the disposition.\textsuperscript{140} This “reasonable notice” standard that the court articulates is an objective standard founded upon the notion of a reasonable person in the funeral director’s position.\textsuperscript{141}

Another court stopped short of holding that a funeral home must make a good faith effort, similar to that required for constructive service of process, to locate the next authorized individual according to the statute.\textsuperscript{142} In that case, the funeral home was sued for causing severe emotional distress after cremating the decedent.\textsuperscript{143} The funeral home allowed the decedent’s unmarried partner and brother to act as authorized agents in directing the disposition although, according to the statute, an estranged daughter actually held that right.\textsuperscript{144} The partner and the brother had told the funeral home that they did not know where the daughter was or how to contact her.\textsuperscript{145} The court held that there was no evidence suggesting that the funeral home had any reason to doubt that information and that the state’s disposition authorization statute does not impose a due diligence requirement on funeral homes.\textsuperscript{146}

\textbf{F. Potential Benefits of Sticking with the Status-Based Scheme}

Despite the efforts to overcome the status-based scheme and tools in place to do so, there are benefits to such a scheme that are worth illustrating. One benefit of utilizing a more traditional approach is simply judicial economy. Intestate and priority of decision laws, whether they derive from statutes or common law, can preserve judicial economy by setting forth a

\begin{flushleft}
\begin{footnotesize}
\textsuperscript{139} \textit{Id.} at 559-60.
\textsuperscript{140} \textit{Id.} at 560.
\textsuperscript{141} \textit{Id.}
\textsuperscript{143} \textit{Id.} at 1056.
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Id.} at 1057.
\end{footnotesize}
\end{flushleft}
predefined hierarchy of persons to whom property is distributed or to whom control of
disposition is given.\footnote{147} Breaking away from the traditional status-based scheme could lead to
lengthier proceedings which could burden court systems.\footnote{148}

III. RESOLVING DISPUTES

There are, as discussed previously, many steps individuals can take to control their own
disposition and, as a result, avoid disputes between parties. Generally, it is beneficial to all
parties involved for individuals to take such steps. Taking such steps can save parties money,
grief, and time and would focus attention memorializing the decedent rather than squabbling
over details. However, disputes will continue to arise in context of the disposition of remains.

A. Means to Resolve Disputes

Most disputes regarding the disposition of the dead are likely resolved before a court is
asked to intervene or before more formal dispute resolution techniques are utilized. It is not
unheard of for families of a decedent to engage in an informal vote or an impromptu round of
“rock, paper, scissors” to determine the specific casket in which their loved one is to be buried or
the hymn to be sung at the memorial service. Even with detailed preplanning, it is extremely
rare to have every detail of a disposition or a memorial service planned and thus, those
authorized are undoubtedly left with decisions and choices. These informal decisions and
resolutions are most often made surrounding a kitchen table or in the presence of a funeral
director acting as an impromptu mediator. Resolutions in this manner are ideal. When parties
are able to put differences aside, come to concessions, listen, focus on the desires of the
decedent, and be understanding, unpleasant disputes are often avoided and the focus is
appropriately on honoring and celebrating the life of the decedent.

\footnote{147}{Tanya K. Hernández, \textit{The Property of Death}, 60 U. Pitt. L. REV. 971, 1016 (1999).}
\footnote{148}{\it Id.}
Nevertheless, when the ideal, informal, self-resolution techniques do not produce a consensus, more formal settings and proceedings are needed to resolve the dispute. In these largely rare occasions there are generally two means of resolving such a dispute: (1) judicial resolution and (2) alternative resolution.

1. Resolving Disputes Judicially

A judicial resolution of a dispute regarding the disposition of remains can take many forms. In the case of Anna Nicole Smith, the trial court gave Smith’s daughter (through the Guardian Ad Litem) the exclusive right to control disposition by means of granting a motion. In other cases it takes the form of a probate proceeding. Other probate courts have dismissed such cases holding that these types of disputes are not within the jurisdiction of a probate court and are more appropriately handled in civil courts. In the case of a woman seeking to disinter and move the body of her deceased unmarried companion to a different cemetery, the matter was presented to the court in the form of an order to show cause. In the case of a husband and wife disputing over the cremated ashes of their deceased minor son, the litigation arose from their divorce proceedings. In that case, the father filed a Petition for Special and/or Injunctive Relief concerning the disposition of the ashes of the parties’ deceased son.

In some cases, there is no dispute for a court to resolve, but rather, the court is to determine if a party is liable for actions taken regarding the improper disposition of remains. Such was the case in *Gately v. Hamilton Memorial Home, Inc.* where the father of a decedent brought the tort claims of intentional and negligent infliction of emotional distress and loss of

151 Estate of Jimenez, 56 Cal. App. 4th 733, 740 (Cal. Ct. App. 1997) (holding that because testator’s wishes regarding disposition of her remains were not contained in will itself, dispute over disposition of remains belonged in civil court, not in probate court).
154 Id.
consortium against the funeral home. The father alleged that the funeral home wrongfully released the remains of his son for cremation without his authorization. In that case, the very final act of cremation had already taken place and there was no dispute to be resolved by the court concerning authorization. Instead, the jury was charged with the responsibility of determining the liability of the funeral home.

There are perhaps societal benefits to judicial litigation as opposed to other means of resolving disputes such as alternative dispute resolution. One societal benefit to litigation is the development of the law through its judicial interpretation and the setting of precedent. Precedent such as the cases illustrated in this comment are critical to creating a backdrop that allows the law to progress. Another societal benefit to litigation is the reinforcement of social values through their legal application and pronouncement. Litigation creates a window to allow society to view values applied. This perspective may force reflection of whether to continue with the status quo or whether to push for an evolution of societal values.

2. Alternative Dispute Resolution

Alternative dispute resolution (ADR), instead of a more formalistic approach based on status-based schemes, addresses concerns of the decedent, non family survivors, religious organizations, funeral organizations, the state, and even the decedent’s pets. The default rules that would have to be followed in a judicial proceeding may not account for all these parties that may be involved in a dispute over disposition of a body. ADR techniques “that combine speed
with an ability to entertain viewpoints from many diverse parties” would likely be a better approach for all parties involved instead of judicial proceedings.

One court expressed its disdain of having to get involved and addressed that such disputes would be better resolved affably between the parties:

Litigation of this character fortunately has seldom arisen in legal history, and we cannot refrain from regretting that these parties should have been unwilling, especially in view of facts and circumstances which hereafter must be noted, to amicably settle their differences. However, since the brothers have, by their attitude and conduct, forced the sister to appeal to us to settle the dispute, we will decide the matter with as little exposure as possible of certain events of a personal nature in this dead man's life to which the necessities of a decision compel us regretfully to refer.

Many, if not most, disputes regarding the disposition of the dead are resolved before one or both parties seek other legal assistance or other means to resolve the dispute. However, sometimes parties will leave a dispute unresolved because they believe there is no means through which they could resolve it on their own. As previously discussed, one option to resolve such disputes is to involve lawyers and courts and to use the tool of litigation. Although litigation may be helpful and even necessary in some situations involving disposition disputes, alternative dispute resolutions can be a better route. Alternative dispute resolution can provide a positive alternative to self-help on one side and litigation on the other side.

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161 Foster, supra note 71 at 1384.
164 Id. at 424.
There are many benefits to using alternative dispute resolution techniques, namely mediation, in resolving disputes. Professor Susan N. Gary identifies five benefits of using ADR in probate disputes that are absolutely applicable in the context of disposition disputes.\(^\text{165}\)

The first benefit to resolving disposition disputes through ADR is the ability to preserve privacy and confidentiality.\(^\text{166}\) The matters at issue in a disposition dispute can be extremely sensitive. It is generally beneficial to avoid public knowledge concerning a loved one’s remains. When a litigated case goes to trial, statements made become a matter of public record. Disclosure of these statements regarding these sensitive disputes can be embarrassing for the parties involved. Generally, parties engaging in ADR can stipulate not to disclose. This can allow the parties to feel more able to speak freely, air grievances more openly, and generate solutions without fear of legal consequences.

Second, there are clear emotional benefits to resolving disposition disputes through ADR.\(^\text{167}\) Although some argue that litigation is emotional beneficial because the litigants receive an opportunity to air the grievances in their day in court, often times the venting that occurs in court is irrelevant and rarely provides a sufficient basis to justify the end result of the judicial proceeding. Indeed, animosity in a formal court proceeding can have a long-lasting impact on litigants, and airing dirty laundry in public provides less of an incentive to move forward under a final order.

Alternatively, ADR can be a more appropriate venue for airing grievances. In this more private setting, there can be more of an opportunity to address emotional issues involved in a dispute. ADR can provide an outlet for emotions and can provide an opportunity to resolve

\(^{165}\) Id. at 423-31.

\(^{166}\) Id. at 424.

\(^{167}\) Id. at 425-26.
emotional issues as well as the legal issues.\textsuperscript{168} ADR generally gives the parties greater control over the dispute resolution process and that control over the process and the outcome can increase psychological well-being.\textsuperscript{169}

Third, resolving disputes through ADR can repair, maintain, or even improve ongoing relationships.\textsuperscript{170} Parties who are disputing regarding the disposition of a loved one likely have unresolved issues that existed before the disposition disputed existed. Parties disputing the disposition of a decedent are most often family members and repairing, maintaining, or improving familial relationships is always a worthy endeavor.

ADR can be beneficial to relationships because it requires parties to work together to reach a solution. Professor Gary identifies two beneficial results of working together.\textsuperscript{171} First, the process of understanding the other party’s view, communication can increase between the parties.\textsuperscript{172} Second, by participating in the problem-solving process, the parties may be better apt to work together to resolve future issues.\textsuperscript{173} As the death of a loved one can be one of the most emotional times for an individual, engaging in a more emotionally beneficial process to resolve disputes is healthy for all parties involved.

Fourth, using ADR as a tool to resolve disposition disputes allows parties to create unique solutions.\textsuperscript{174} Litigation often produces a clear winner and a clear loser. ADR on the other hand is more suited to reaching concessions and compromises. Imagine, for example, a difficult dispute where a decedent had not made any wishes concerning her disposition and one party wants the decedent cremated and another party wants the decedent buried. In a judicial

\begin{itemize}
\item \textsuperscript{168} Id. at 427.
\item \textsuperscript{169} Id.
\item \textsuperscript{170} Id. at 428.
\item \textsuperscript{171} Id.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Id.
\item \textsuperscript{174} Id. at 429.
\end{itemize}
proceeding, a court would likely, based on the laws of that jurisdiction, determine the party with the authorization to control disposition and give that party the control to make the decision. Alternatively, in ADR, a compromise can be reached where both sides concede but also arrive at an amicable solution. Such a compromise using this example may take the form of cremation following a traditional viewing and funeral service of the casketed decedent and then perhaps burial of the cremated ashes in a cemetery.

Fifth, avoiding litigation and using mediation to resolve disposition disputes can have significant financial benefits.\(^\text{175}\) It’s no secret that funeral and memorial services can be expensive. Including expenses such as professional services, embalming, cemetery property, opening and closing of the grave, headstone, transportation, death certificates, obituaries, and flowers, the total cost of funeral arrangements can exceed $11,000.\(^\text{176}\) The average cost of a casket alone is slightly more than $2,000, though can be as much as $10,000 for some mahogany, bronze or copper caskets.\(^\text{177}\) During this potentially expensive process, the last thing survivors of a decedent want is added expenses in resolving a disposition dispute. Effective use of alternative dispute resolution in general can significantly reduce litigation-related expenses. Through ADR, costs generated from prolonged litigation can greatly be avoided. The use of ADR may lower costs related with investigation, fact-finding, court filings, oral discovery, and trial testimony.

Another possible benefit to resolving disposition disputes through mediation is the speed at which a dispute can be resolved. A formal judicial proceeding and civil litigation can be a slow process. When a time sensitive dispute regarding the disposition of decedent arises, the

\(^{175}\) Id. at 431.
parties may be at the mercy of a court calendar. In ADR proceedings, the parties can stipulate to discovery schedules (or even limit or eliminate discovery altogether) in order to establish an appropriate timeline.\textsuperscript{178}

IV. SUGGESTIONS AND FUTURE DEVELOPMENTS

Although the law is generally evolving to protect the intent and wishes of the decedent, individuals should not rely on the default scheme of determining the party authorized to direct disposition. Individuals should work proactively to properly express their wishes regarding their disposition. This expression may take the form of a will, other formal or informal written document, an authorization of a proxy/agent, or a preneed plan. Creating a valid expression not only would go towards ensuring an individual’s wishes are fulfilled regarding disposition, but it would also lift a burden from those survivors of the decedent. This expression would likely create a relief for the survivors and allow them to more properly grieve as they would likely be more confident the decedent’s wishes are being fulfilled. Individuals who do take that important step of creating a valid expression directing the disposition of their remains should be sure to communicate with others the fact that that expression exists.

With thousands of deaths per day in the United States, thousands of individuals become authorized to direct the disposition of these decedents. These authorized individuals may receive this authorization through their status or relationship to the decedent or they may receive this authorization through other means such as appointment through an instrument. Regardless of the means of receiving authorization, individuals charged with directing the disposition of a decedent should strive to ensure the wishes of the decedent are carried out as much as feasible. Doing so would ensure a proper decedent-focused funeral service, memorial service, or other disposition event.

\textsuperscript{178} Id.
Funeral directors often have front row seats to disputes regarding the disposition of remains. Funeral directors would be well-served to seek education in conflict resolution. State and national funeral director and funeral service associations should seek to create opportunities for those in the industry to obtain continuing education regarding conflict resolution and laws and developments about controlling disposition. Funeral directors should ensure proper procedures are in place to make sure authorization is received from the appropriate party before any action is taken including removal from place of death, embalming, cremation, etc. Funeral directors would also likely be well-served to consult with legal counsel not only when issues arise, but also to work proactively to prevent future issues.

Attorneys should be zealous advocates for decedents who have passed away and no longer have a voice. Attorneys should work to ensure the wishes of decedents are protected. Lawyers should also be sensitive in serving clients who may be involved in a dispute regarding the disposition of remains. The passing of a loved one is likely one of the most difficult experiences for the survivors. Attorneys should strive for a resolution that has the least amount of negative emotional impact while ensuring the most appropriate outcome for the lawyers’ clients. In that vein, alternatives to litigation should be seriously considered. There are many benefits to ADR, especially when it comes to disputes involving the death of a loved one.

Attorneys should also work proactively in preventing such disputes. A discussion regarding wishes of disposition of remains in estate planning would help attorneys understand if a disposition directive is appropriate for their client. Estate planning attorneys should be familiar with the Priority of Decision laws in their jurisdiction and responsibly advise clients to complete a disposition directive if there are concerns regarding a default status-based scheme.
Legislatures and courts should continue to strive to make and evolve the law that would create a society that would give individuals more access and opportunity to direct their own disposition. Additionally, legislatures and courts should continue a careful and thoughtful shift away from the status-based scheme of determining the party who controls a decedent’s disposition and instead create means that would allow for those closest to the decedent, whatever their status may be, to direct disposition. This continued shift would build towards ensuring the decedent’s true wishes regarding disposition are fulfilled.

CONCLUSION

Benjamin Franklin famously wrote, “in this world nothing can be said to be certain, except death and taxes.”179 It is safe to say that we dread both death and taxes. As for taxes, there are countless tools that make the annual filing more painless. This is evident as we are inundated with advertisements for tax software in the spring. Similarly, there exists helpful tools to make the process of the disposition of the dead easier and more efficient for those involved. Taking advantage of such tools would prevent disputes and build to ensure the decedent’s life is appropriately memorialized. When unresolved disputes do arise, parties would benefit from exploring all means of resolution.