1-1-1982

Medium of Payment: An Option in Estate Tax Reform

Anne-Marie Rhodes

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.nd.edu/ndlr/vol57/iss2/3

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
The Medium of Payment: An Option in Estate Tax Reform

Anne-Marie Rhodes*

I. Introduction

A federal estate tax return must be filed within nine months of a decedent's date of death.¹ Unless the decedent's estate qualifies for deferred payment of the tax, the estate must also remit its tax payment within the nine months.² Federal estate taxes may be paid by cash or check.³ For estates composed of non-cash assets, the nine month deadline combined with the cash payment requirement can create severe liquidity problems.

This paper will review statutory payment provisions, three cases of extraordinary private legislation, and state and foreign legislation on the collection of transfer taxes in non-cash form.

II. Payment Provisions

The primary legislative sources governing the actual payment of taxes are found in the internal revenue laws and the debt acts. Because both statutes have been under the supervision of the Treasury Department, there has been consistent, if not quite parallel, development. An examination of these two primary sources is in order.

A. Internal Revenue Laws

Section 6311 of the Internal Revenue Code⁴ provides: "It shall be lawful for the Secretary to receive for internal revenue taxes . . . checks or money orders . . . ."⁵ This basic provision is currently the only provision on the media of payment in the Code. Included in internal revenue laws at least since 1911, it has been gradually refined to its present simple state.

* Assistant Professor of Law, Loyola University of Chicago School of Law, Member Illinois Bar.

¹ I.R.C. § 6075(a).
² I.R.C. § 6151(a).
³ I.R.C. § 6311(a).
⁴ References are to the Internal Revenue Code of 1954, as amended, unless otherwise stated.
⁵ I.R.C. § 6311.
In 1911 it was lawful to receive certified checks for the payment of internal revenue taxes.6 With the advent of World War I, Congress authorized tax collectors to accept “at par and accrued interest, [certain] certificates of indebtedness . . . and uncertified checks in payment of income and excess-profit taxes . . . .”7 The Revenue Act of 1918 provided that certificates of indebtedness issued by the United States and uncertified checks were also acceptable media of payment for “income, War-profits, and excess-profits and any other taxes payable other than by stamps . . . .”8 This legislation was applicable to the estate tax which was established in 19169 and “payable other than by stamp . . . .”

The 1939 Code allowed tax collectors to accept certified checks in payment of internal revenue taxes. Uncertified checks were accepted for income, war-profits and excess profits taxes and any taxes payable other than by stamp.10 A separate section provided that “notes or certificates of indebtedness issued by the United States” could also be used for payment of certain taxes.11 In 1944 the legislation was expanded to authorize the receipt of “cashiers’ and treasurers’ checks and United States, postal bank, express and telegraph money orders” as payment for internal revenue taxes.12 By 1954 this provision was simplified to authorize the receipt of any check or money order for the payment of taxes or stamps.13 A separate provision, section 6312, authorized the receipt of Treasury bills, notes and certificates of indebtedness14 in payment of any internal revenue tax or stamp. These 1954 Code sections, like their predecessors, provided that payment shall be “to the extent and under the conditions provided in regulations prescribed by the Secretary.”15 In general,

---

6 Act of March 2, 1911, ch. 191, § 1, 36 Stat. 965 (1911).
7 An Act to Defray War Expenses and for other purposes, ch. 63, § 1010, 40 Stat. 300 (1917).
11 Id. § 3657.
13 I.R.C. § 6311.
14 Treasury bills, notes and certificates of indebtedness are governmental debt obligations. The chief distinction among them is the length of maturities. Bills are the shortest term issues, with maturities of less than one year. Currently there are 91-day, 180-day, 360-day and tax anticipation bills. Certificates of indebtedness also have maturities of less than one year while notes' maturities vary from 1-5 years. Bonds are generally issued for maturities in excess of five years.
15 I.R.C. §§ 6311 & 6312.
Treasury bills, notes and certificates could be used "only if such certificates, notes, or bills, according to the express terms of their issue, [were] made acceptable in payment of such taxes . . . ." Thus, in order to use Treasury bills or notes as payment, Treasury first had to decree that the bills or notes could be so used.

The legislative history of the Code payment provisions is uninformative. Changes in the accepted mode of payment were made for administrative or taxpayer convenience, but cash payment was always the underlying assumption. An exception, both to the silence of the legislative history and possibly to the assumption of cash payment, is found in the laws concerning United States bonds. An examination of the use of such bonds requires a familiarity with debt legislation as well as with the Internal Revenue Code.

B. Debt Legislation

In 1917 the urgency of the European conflict required the federal government to raise great sums of money quickly. One method was the sale of government bonds—Liberty bonds. From April 24, 1917 to July 9, 1918, four acts authorized $20,000,000,000 in national debt—a staggering sum for a nation whose total revenue in fiscal 1917 was only $1,124,324,795.

After the first two Liberty Bonds were issued (totaling approximately $5.8 billion), the marketability of the third issue of bonds was in doubt. The third issue was seen as unappealing because higher interest rates were available on other securities and the market price of the first two issues had declined to less than par. In an

---

16 Treas. Reg. § 301.6312-1(a).
17 For example, the legislative history for the 1954 changes to § 6311 consists of two lines. The first sentence explains the change "to permit the Secretary . . . to receive any check or money order in payment for any taxes or stamps." The second sentence merely states that the "present law closely limits the type of checks and money orders which may be received . . . ." H.R. REP. NO. 1622, 83d Cong., 2d Sess. 574 (1954), reprinted in [1954] U.S. CODE CONG. & AD. NEWS 4553.
18 The legislative history of the 1917 legislation is even more cryptic: It states simply that "the remaining provisions of this title are administrative." H.R. REP. NO. 45, 65th Cong., 1st Sess. 10 (1917).
19 As previously noted, a bond is a governmental obligation with an original issuance maturity in excess of 5 years. See note 14 supra.
21 Id. at 475.
22 Id. at 123. See also McFadden, Liberty Bonds and the Federal Farm Loan Act, 11 LAW. &
effort to increase the attractiveness of the third issue of Liberty Bonds
the interest rate was increased from 4% to 4½% and the bonds were
made receivable in payment of federal estate taxes.\textsuperscript{23} Section 14 of
the Second Liberty Bond Act\textsuperscript{24} provided:

\begin{quote}
[T]hat any bonds of the United States bearing interest at a higher
rate than four per centum per annum . . . which have been owned
by any person continuously for at least six months prior to the date
of his death, and which upon such date constitute part of his estate,
shall . . . be receivable by the United States at par and accrued
interest in payment of any estate or inheritance taxes imposed by
the United States.\textsuperscript{25}
\end{quote}

Redemptions authorized by this section were self-executing;
they were not subject to Treasury regulations. The issue restriction
(the bond must pay a rate higher than 4%) and the ownership restric-
tion (the bond had to be continuously owned by the decedent for
the six months prior to date of death) were congressionally imposed. If
one met the statutory requirements, the bond had to be received by
Treasury in payment of the estate tax.\textsuperscript{26}

During the same year that Congress mandated this mechanical
receipt by Treasury, Congress also shifted the management of the
nation's debt from itself to Treasury.\textsuperscript{27} Section I of the Third Liberty
Bond Act\textsuperscript{28} provided:

\begin{quote}
BANKER 236 (1918); Hall, \emph{Liberty Bonds, Farm Loan Bonds and the General Market}, 12 LAW. &
BANKER 700 (1919).
\end{quote}

\textsuperscript{23} Smietanka v. Ullman, 275 F. 814, 816 (7th Cir. 1921).

\textsuperscript{24} Section 14 was added to the Second Liberty Bond Act as an amendment by the Third
Liberty Bond Act, ch. 44, § 6, 40 Stat. 505 (1918) (codified at 31 U.S.C. § 765), and was
repealed by Act of Mar. 17, 1971, Pub. L. No. 92-5, § 4(a), 85 Stat. 5 (1971); see text accompa-
nying notes 34-52 \textit{infra}.

\textsuperscript{25} The section was not conceptually novel. Very early, Congress authorized the issuance
of governmental paper designated as "receivable" for specified purposes without being legal
tender for all purposes. See A. Kemp, \emph{The Legal Qualities of Money} 63 (1956). For
example, the Act of June 30, 1812, authorizing five million dollars of Treasury notes,
provided:

\begin{quote}
That the said treasury notes, wherever made payable, shall be every where received
in payment of all duties and taxes laid by the authority of the United States . . .
On every such payment, credit shall be given for the amount of both the principal
and the interest which, on the day of such payment, may appear due on the note or
notes thus given in payment.
\end{quote}


\textsuperscript{26} T.D. 2705 (Apr. 23, 1918).

\textsuperscript{27} \textit{Board of Governors of the Federal Reserve System \& United States
Treasury Department, The Federal Reserve and the Treasury: Answers to
Questions from the Commission on Money and Credit} 231 (1963).

\textsuperscript{28} Third Liberty Bond Act, ch. 44, § 1, 40 Stat. 502 (1918) (current version at 31 U.S.C.
§ 752 (1976 & Supp. II 1978)).
ESTATE TAX REFORM OPTION

The Secretary of the Treasury, with the approval of the President, is hereby authorized to borrow, from time to time, . . . for the purposes of this Act, and . . . other public purposes . . . , and to issue therefor bonds of the United States . . . 

The bonds herein authorized shall be . . . subject to such terms and conditions of issue, conversion, redemption, maturities, payment, and rate or rates of interest, not exceeding four and one-quarter per cent per annum, . . . as the Secretary of the Treasury . . . may prescribe.

Treasury determined that this gave it the discretionary power to issue bonds redeemable at par before maturity in payment of estate taxes without the issue and ownership restrictions of section 14. [29]

Treasury generally requires that governmental obligations redeemable at par in payment of taxes may be so used “only if such obligations, according to the express terms of their issue, are made acceptable in payment of such taxes.” [31] If a bond is to be used for estate taxes, it “must have (1) been owned by the decedent at the time of his death, and (2) thereupon constituted a part of his estate.” [32] Hence, Treasury, in exercising its discretion, has imposed its own issue and ownership requirements, the terms of which differ from those of section 14.

In 1963 Treasury stopped issuing bonds which could be used at par to pay estate tax obligations. [33] In 1971 Congress prohibited pre-maturity redemption of future government issues as payment for any tax in an amount above their fair market value. [34] In addition, Con-

29 In addition to this plenary provision, § 20 provided that any obligations issued under the Act which are redeemable on demand could also be used to pay taxes if the Treasury regulations so provide. 31 U.S.C. § 754b(b) (1976).
30 S. REP. NO. 92-28, 92d Cong., 1st Sess. 13, reprint ed in [1971] U.S. CODE CONG. & AD. NEWS 957, 968-69. Over the years Treasury has issued such bonds, e.g., Treasury Department Offering Circular No. 1005 (Feb. 3, 1958), and received such bonds in payment, e.g., Bankers Trust Co. v. United States, 284 F.2d 537 (2d Cir. 1960).
31 See note 16 and accompanying text supra.
32 31 C.F.R. § 306.28(b) (1980).
34 Act of Mar. 17, 1971, Pub. L. No. 92-5, § 4(b), 85 Stat. 5 (1971) (adding 31 U.S.C. § 757c-4). This section specifically exempts tax anticipation bills issued under § 5 of the Second Liberty Bond Act. “Because the period for which these bills are issued is relatively short the discount here is minor and the advantage, in practice, has been limited to not more than 6 days of interest. To foreclose the use of Treasury bills in this case would present difficult financial problems for the Treasury since it . . . even(s) out the flow of cash into the Treasury.” S. REP. NO. 92-28, 92d Cong., 1st Sess. 14, reprint ed in [1971] U.S. CODE, CONG. & AD. NEWS 957, 970.
gress repealed section 14 of the Second Liberty Bond Act\(^3\) and section 6312 of the Code\(^6\) with respect to obligations issued after March 3, 1971.

The use of Government bonds and obligations in the manner cited above has the effect of making it possible to pay estate, income and other taxes with discount obligations which have a current market value substantially below the face or par value at which they are being redeemed . . . . The committee agrees with the House that there is no basis for permitting taxpayers to meet their tax payments with obligations having a value of less than the amount of taxes due. For that reason, it has agreed to the provision added in the House to forestall this tax benefit with respect to U.S. obligations issued after March 3, 1971 (the date the House adopted the provision).\(^3\)

The key to the 1971 Congressional action limiting pre-maturity redemption of government obligations in payment of estate taxes was the increasing discrepancy between the market value and the par value of the obligations. In 1917 and 1918, when Liberty Bonds were introduced, they were sold by the government at par and in the open market. During the war years, the price was patriotically (although artificially) maintained at, or close to, par.\(^3\) Except for 1920 and 1921 when discounts briefly reached up to 19\%,\(^3\) Liberty Bonds generally traded very close to par.\(^4\) Therefore, the bonds Treasury received in payment were usually equal in value to the tax liability.

By 1971, however, the original Liberty Bonds had all been redeemed.\(^4\) The bonds that were being used for payment of estate

---

\(^6\) Id. at § 4(a)(2).

\(^3\) The initial thrust of the selling campaign for the Liberty Bonds was patriotism: "Anybody who declines to subscribe [because of the 3½\% interest rate], knock him down." C. Childs, supra note 20, at 119. Once issued, the bonds should be sold at par, to do otherwise was "unpatriotic": "There are those sympathizers with the enemy who deliberately sell their bonds with a view to the injury they may do to the credit of the United States." Id. at 123. Patriotism apparently had its limits. As market quotes declined below par, Treasury took a more active role and became "a constant buyer of its own bonds in the open market at an average of about $2,000,000 a day, while the supply tendered by the public for sale approximated $10,000,000 a day." Id. at 125-26.

\(^3\) The weak market after the War has been tied to the artificial support given Liberty Bonds. A. Hepburn, A History of Currency in the United States 473 (rev. enlarged ed. 1924).

\(^4\) C. Childs, supra note 17, at 475-86.

taxes were those issued by Treasury under its discretionary authority in section 1. These pre-1971 bonds, issued at annual rates between 3 and 4%, were known as “flower bonds.”\(^{42}\) Flower bonds were often traded on the open market at a substantial discount because of the general rise in interest rates.\(^{43}\) In 1969, Congress noted that “the discounts on the average could have ranged from 10 to 20 percent.”\(^{44}\) Therefore the bonds Treasury received in payment were often worth less than the tax liability. Congress estimated that this discrepancy between market value and par value cost the government $40 to $80 million in 1969.\(^{45}\)

Contributing to this discrepancy was the lenient ownership requirement imposed by Treasury. In order to use flower bonds to pay estate taxes the decedent was merely required to own the bonds at the time of death.\(^{46}\) This led to the practice of purchasing flower bonds when a person was comatose or otherwise in poor health, sometimes minutes before his death.\(^{47}\) In fact it was a “common practice . . . for individuals of advanced age or declining health who anticipated significant estate tax liability to purchase flower bonds in an effort to lessen the impact of the federal estate tax on their estates.”\(^{48}\)

\(^{42}\) Presumably, these bonds have been dubbed “flower” bonds either because they blossom to face value upon the owner’s death or because of their association with funerals.

\(^{43}\) E.g., in Estate of Stevenson v. Blumenthal, 79-1 U.S. Tax Cas. (CCH) ¶ 13,285, at 87, 055 (D.D.C. 1979), the court noted that the discounts were “often as low as 75 or 80 percent of face value.” See also Edwards, Payment of Estate Tax with U.S. Bonds: Still a Useful Device with a Potential Trap, 37 J. Tax. 141 (1972).

\(^{44}\) S. REP. No. 92-28, 92d Cong., 1st Sess, reprintedin [1971] U.S. CODE CONG. & AD. NEWS 957, 969.\(^{45}\) Id. This congressional estimate, however, fails to account for the increased federal estate tax attributable to the difference between cost and par value. For example, assume a taxpayer had purchased a $1,000 flower bond for a cost of $860 and has a marginal estate tax rate of 41%. At his death the bond will be included in his gross estate at a value of $1,000. The taxpayer’s savings is not $140 but rather $82.60, the $140 “cost” savings less the additional estate tax of $57.40 ($140 x 41%).

\(^{46}\) 31 C.F.R. § 306.28(b) (1980).\(^{47}\) In Stevenson, supra note 43, the purchase of the flower bonds was made by an agent approximately fifteen minutes before the principal died. The Service is reviewing quite closely the question of ownership in these death bed purchase situations. The availability of the bonds for tax payment often depends on whether the agent’s action in purchasing flower bonds while the principal was comatose was, under state law, void at the outset or merely voidable by the estate. See United States v. Price, 81-1 U.S. Tax Cas. (CCH) ¶ 13,412 (S.D. Iowa, May 15, 1981); United States v. Manny, 645 F.2d 163 (2d Cir. 1981); United States v. Stanley, 645 F.2d 163 (2d Cir. 1981); Watson v. United States, 1981 Fed. Est. & Gift Tax Rep. (CCH) ¶ 13,427 (Cl. Ct. Aug. 25, 1981).

\(^{48}\) Pingree v. Blumenthal, 78-1 U.S. Tax Cas. (CCH) ¶ 13,238, at 84,413 (D. Me. 1978); See also Uri, Flower Bonds Remain an Effective, Simple Method to Cut Federal Estate Taxes, 52 J. Tax
Thus, bonds were no longer purchased for patriotic reasons but rather as a medium for the payment of tax. 49 Since the bonds are not generally used in smaller estates 50 the potential savings 51 to the taxpayer are often an important tool in reducing the real impact of estate tax. 52

Congress originally authorized the use of bonds for tax payment in order to promote bond sales. It was hoped that this taxpayer convenience would make the bonds more attractive. This minor convenience, however, gradually became a substantial tax savings. In 1971, Congress reacted, presumably to maintain the integrity of the fisc.

III. Private Legislative Action

The United States has accepted non-cash payment of estate taxes in at least three instances: in 1968, 1976, and most recently, in 1981. Each of these payments was the result of special authorizing legislation.

A. Lilly Estate

Josiah K. Lilly died on May 4, 1966, leaving a substantial estate with a reported net tax liability of over $30 million. 53 One asset included in Mr. Lilly's gross estate was a rare coin collection consisting of approximately 6,125 gold coins valued at $5,534,808. 54 The Lilly collection has been described as "a collection which is without any doubt the largest and historically most important of its kind in private hands." 55 Regardless of the superlatives used to describe the collection, the executor of the Lilly estate faced a very real problem. The executor was in possession of a non-income-producing asset

---

49 "Essentially, the buyer of a flower bond is anticipating a maturity at par well ahead of the normal maturity . . . ." Uri, supra note 48, at 214.
50 For example, the asserted use of flower bonds in recently reported cases ranges from a low of $100,000 to a staggering $16,206,500. Estate of Stevenson v. Blumenthal, 79-1 U.S. Tax Cas. (CCH) ¶ 13,285 (D.D.C. 1979); Girard Trust Bank v. United States, 602 F.2d 938 (Ct. Cl. 1979).
51 See note 45 supra for example of savings that accrue. Although no flower bonds have been issued since 1963, they are still available in the market. The last maturity date is November 15, 1998. The taxpayer whose mortal life is at least coterminous with the bonds can obtain substantial savings.
52 For other tools in reducing the impact of estate tax see Cooper, A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance, 77 COLUM. L. REV. 161 (1977).
54 Id. at 1.
55 Id. at 2 (statement of Dr. V. Clain-Stefanelli, Smithsonian curator of numismatics).
worth several million dollars which under Mr. Lilly's will had to be disposed of promptly for its fair market value. The estate also had to pay a tax bill of some $30 million within fifteen months of death. While the two sides may seem to balance out—a sale for cash to pay the taxes—the "sale" would have to be spread out over several years in order not to depress the market.

As preparations for the sale began, the Smithsonian Institution approached the executor and requested that the estate donate the collection. While the estate would have preferred that the Lilly collection be preserved intact for the benefit of the public, Mr. Lilly's will left no discretion. The estate was under a legal obligation to obtain fair market value for the coins.

Undaunted and motivated by this "treasure of national significance," the Smithsonian asked Treasury if the coins could be tendered in partial payment of the estate tax and then transferred from Treasury to the Smithsonian. Treasury responded negatively. The estate and the Smithsonian then sought the aid of Congress through private legislation.

After hearings in September and November of 1967, the House Committee on the Judiciary, as well as the Senate Committee on the Judiciary, reported favorably on the Smithsonian's proposal. An act for the Relief of the Estate of Josiah K. Lilly was signed by President Johnson on June 4, 1968. It provided direct relief: on delivery of the coin collection to the Smithsonian, the estate was credited, as of the return's due date, $5,523,808 on its estate tax obligation.

Treasury in its report to the Committee took no position on the bill but pointed out that since the "revenue loss of $5,534,808 plus interest . . . approximately equals the fair market value . . . of the

---

56 Id.
57 Prior to 1971, the estate tax return was due fifteen months after the date of death. I.R.C. § 6075 (amended 1971).
58 In disposing of large collections, it is common to dispose of the property by auction and to spread the sale over a number of years. See Estate Administration in the 1980's, 67 A.B.A.J. 54, 55 (1981) ("the only true value for a work of art is its auction value").
59 The executor's primary common law duties are to gather the assets, to pay the expenses and to distribute the remaining assets to the beneficiaries. T. ATKINSON, LAW OF WILLS § 103 (2d ed. 1953).
60 Letter from Treasury Department to Senator James Eastland (Sept. 29, 1967), reprinted in H. R. REP. NO. 1375, 90th Cong. 2d Sess. 4-6 (1968).
61 Id.
property which the U.S. Government will obtain through the acquisition of the coin collection by the Smithsonian Institution the advisability of the bill depends upon the desirability of that acquisition.\textsuperscript{65} The report noted that Treasury had been informed by the Smithsonian that the acquisition of the collection would be beneficial to the government and that the Bureau of the Budget had no objection to Treasury's report.\textsuperscript{66} As far as Treasury was concerned, it was quite literally a matter of shifting coins from one pocket to another.

B. \textit{Redfield Estate}

Eight years later, Senators Laxalt and Cannon of Nevada jointly offered "noncontroversial"\textsuperscript{67} amendment 320 to the Tax Reform Act of 1976. The purpose was to allow Treasury to accept land held by an estate in payment of its estate tax liability.

LeVere Redfield had died in September, 1974, owning more than 50,000 acres of forest land in the Lake Tahoe Basin bordering The Toiyabe National Forest.\textsuperscript{68} The Redfield estate was valued at more than $60 million\textsuperscript{69} and the estate tax amounted to more than $10 million.\textsuperscript{70} Like the Lilly executor, Mr. Redfield's executrices were faced with the unhappy prospect of selling the property. The disposition of the property was necessary because there were insufficient liquid assets to pay the tax.\textsuperscript{71} The estate knew, however, of the Forest Service's longstanding interest\textsuperscript{72} in acquiring these particular lands. The estate asked Treasury if a portion of the land could be used as the medium of tax payment. The Department of Agriculture lobbied Treasury to accept the Redfield proposal. Treasury responded that it was without authority to accept the property as payment and then to transfer that property to another branch of

\textsuperscript{66} Id.
\textsuperscript{67} 121 CONG. REC. 25957 (1976) (remarks of Sen. Long).
\textsuperscript{68} Id. (remarks of Sen. Laxalt).
\textsuperscript{69} N.Y. Times, Feb. 22, 1976, § 2, at 37, col. 4.
\textsuperscript{70} 122 CONG. REC. 25957 (1976) (remarks of Sen. Laxalt).
\textsuperscript{71} Id. Mr. Redfield's estate also included a substantial coin collection which was sold at auction on January 27, 1976, for $7.3 million. N.Y. Times, supra note 69. One can only assume that this $7.3 million infusion of cash still did not solve the estate's liquidity problem.
\textsuperscript{72} "Federal interest in acquisition of the lands is longstanding. In the Baker Act of February 20, 1925, as amended, and the McCarren Act of February 12, 1938, Congress provided specific direction for the acquisition of these lands . . . . Congress continues to recognize the desirability of acquiring these lands." Letter from Earl L. Butz, Secretary of Agriculture, to William E. Simon, Secretary of the Treasury, February 11, 1976; \textit{reprinted in} 122 CONG. REC. 25958 (1976).
government. Treasury did intimate, however, that congressional action might be fruitful.73 Faced with the administrative regularities and armed with an invitation, the interested parties sought congressional assistance.

The amendment affecting the Redfield estate became law with the enactment of the Tax Reform Act of 1976.74 While the Lilly relief was a concise one-sentence act, the Redfield amendment was an involved provision with six subsections. In general, the provision took the form of a credit against the Redfield estate taxes for the transfer of the land to the United States. The amount of the credit equalled the estate tax value of the property transferred and was available "only if" the land was accepted by the Secretary of Agriculture and added to the Toiyabe National Forest.75

The Redfield estate provision was merely a common sense solution to a real problem. The estate had insufficient liquid assets to pay the tax and the land would have to be sold to raise the funds. The choice was between having the estate sell the land76 and then

   § 2010. CREDIT AGAINST CERTAIN ESTATE TAXES
   (a) IN GENERAL—Subject to the provisions of subsections (b), (c), and (d), credit against the tax imposed by chapter 11 of the Internal Revenue Code of 1954 (relating to estate tax) with respect to the estate of LaVere Redfield shall be allowed by the Secretary of the Treasury or his delegate for the conveyance of real property located within the boundaries of the Toiyabe National Forest.
   (b) AMOUNT OF CREDIT—The amount treated as a credit shall be equal to the fair market value of the real property transferred as of the valuation date used for purposes of the tax imposed (and interest thereon) by chapter 11 of the Internal Revenue Code of 1954.
   (c) DEED REQUIREMENTS—The provisions of this section shall apply only if the executrixes of the estate execute a deed (in accordance with the laws of the State in which such real estate is situated) transferring title to the United States which is satisfactory to the Attorney General or his designee.
   (d) Acceptance as National Forest—The provisions of this section shall apply only if the real property transferred is accepted by the Secretary of Agriculture and added to the Toiyabe National Forest. The lands shall be transferred to the Secretary of Agriculture without reimbursement or payment from the Department of Agriculture.
   (e) INTEREST—Unless the Secretary of Agriculture determines and certifies to the Secretary of the Treasury that there has been an expeditious transfer of the real property under this section, no interest payable with respect to the tax imposed by chapter 11 of the Internal Revenue Code of 1954 shall be deemed to be waived by reason of the provisions of this section for any period before the date of such transfer.
   (f) EFFECTIVE DATE—The provisions of this section shall be effective on the date of the enactment of this Act.
75 Id. § 2010(d).
76 Alternatively, Treasury might have sold the land via its lien and foreclosure powers,
having Agriculture buy it back, if possible, or allowing the land to be used directly to satisfy the estate tax obligation. Congress had no difficulty taking advantage of this "unique opportunity . . . to preserve a tract of land of untrammeled beauty,"77 the forced sale of which would have been a "tragedy justly criticized by future generations."78

C. Kunhardt Estate

Dorothy Meserve Kunhardt, author of children's books and noted Lincoln scholar, died in Massachusetts on December 23, 1979.79 Included in her gross estate were over seven thousand original glass plate negatives80 of Mathew Brady, a noted pioneer in the history of American photography, as well as the famous last portrait print of Lincoln by Alexander Gardner. The collection was received81 by Mrs. Kunhardt from her father, Frederick Hill Meserve. The Meserve collection was considered "irreplaceable."82

The estate was interested in disposing of the collection, valued at nearly $1,300,000,83 and the Smithsonian was interested in acquiring it. Unfortunately the estate's fiduciaries were not free to donate the collection and the Smithsonian could not afford to buy it. The parties nonetheless reached an agreement.84 The estate agreed to transfer the collection to the Smithsonian, if the Smithsonian could persuade Congress to enact the necessary legislation authorizing a credit against the Kunhardt federal estate tax bill.

On July 16, 1981, Senator Goldwater, a regent of the Smithsonian, proposed an amendment85 to the Economic Recovery Tax Act of 1981. The one-sentence amendment provided that the Kunhardt estate would be entitled to a credit against its federal estate tax (effective as of the return date) upon the transfer of the collection to the Smithsonian. The amount of the credit was limited to

---

78 Id.
85 Id. The actual offering of the amendment was by Sen. Dole on behalf of Sen. Goldwater. Sen. Goldwater was joined in his amendment by the two other Regents of the Smithsonian, Sens. Jackson and Garn.

There is little legislative history on this section but it was suggested that there may have been some initial opposition to the credit. In a statement made at the subcommittee hearings, Treasury opposed the use of the tax system to “appropriate” funds for acquisition of the Merserve collection.

D. Common Features

The Lilly, Redfield, and Kunhardt legislation merely altered the form by which the estate tax obligation was satisfied. In each of these three cases non-cash property was used as the medium of payment; it was not a charitable contribution. Unlike flower bonds, the

86 The credit is limited to the lesser of the estate’s tax, the fair market value of the property transferred, or $700,000.

87 Sec. 429. CREDIT AGAINST ESTATE TAX FOR TRANSFER TO SMITHSONIAN

Upon transfer to the Smithsonian Institution, within thirty days following the date of the enactment of this Act, of all right, title, and interests held by the Dorothy Meserve Kunhardt trust and estate of Dorothy Meserve Kunhardt in the collection of approximately seven thousand two hundred and fifty Mathew Brady glass plate negatives and the Alexander Gardner imperial portrait print of Abraham Lincoln, there shall be allowed as a credit, effective as of the date upon which the return was due to be filed, against the tax imposed by section 2001 (relating to the imposition of estate tax) on such estate and amount equal to the lesser of—

(1) such tax,
(2) the fair market value of such negatives and such print, or
(3) $700,000.

88 Besides the statements in the Congressional Record the legislative history is quite limited, because committee reports on private bills are not printed. There was no floor debate on the proposal; the sense is that once it reached the Senate floor, it was a fait accompli.

89 See also Wall St. J., Aug. 5, 1981, at 1, col. 5.


91 Statement of David G. Glickman, Deputy Assistant Secretary (Tax Policy), Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary (July 29, 1981) (on file at the Notre Dame Lawyer Office). Treasury made quite clear that its opposition to H.R. 2009 did not relate “to the desirability of the acquisition but only to the use of a private relief tax bill . . . .” Id. at 2. Three reasons were given for Treasury’s opposition:

(1) Appropriation of funds to the Smithsonian through the regular budgetary appropriations process would better enable Congress to weigh the merits of the acquisition;
(2) Concern for “use of the tax system to accomplish aims totally unrelated to the collection of taxes,” and
(3) Concern about the precedential effect of the bill.

92 This point is straightforward. However, in practice it is often assumed that the tax-
property transferred by the estate and received by the government was at least equal in value to the tax liability.\textsuperscript{93}

Of equal importance is the exceptional nature of the property used as payment: rare coins, forest land, and historic photographic plates. These were all of singular importance—"national"\textsuperscript{94} treasures, incapable of duplication. The benefits of the arrangement were not unilateral. The coins, the land, and the plates were retained by the government for public use.\textsuperscript{95} Society at large was the primary beneficiary. Quite simply, the government was buying property it wanted;\textsuperscript{96} it was not acting as a broker for the conversion of illiquid assets.\textsuperscript{97}

Finally, in all of these cases, the legislation was reviewed by the payer is making a gift to the government. "Is . . . the tax liability . . . going to be wiped out because of the gift?" 121 CONG. REC. 25958 (1976) (remark of Sen. Abourezk). \textit{See} notes 125 & 161 and accompanying text \textit{infra}.  \textsuperscript{93} By inference in \textit{Lilly} and by statute in \textit{Redfield}, it is apparent that the amount of the credit equaled the estate tax return value of the property. Since estate tax value is determined either at date of death or six months thereafter and payment is made nine months after date of death, there may be fluctuation in value, with the government bearing the risk of a decrease. Given the extraordinary nature of the property, the practical risk was minimal. Of course, the estate bears the risk of appreciation. Since an executor is under fiduciary obligation to dispose of assets at their fair market value, can the executor be surcharged for a breach of duty for selling assets to the government at lower price? \textit{See} note 59 \textit{supra}.

In \textit{Kunkardt}, the maximum credit of $700,000 is less than the estate tax return value of the property, approximately $1.3 million. The difference, up to $560,000, is to be paid by the Smithsonian to the estate. Wall St. J., Aug. 5, 1981, at 1, col. 5. The statute authorizing the \textit{Kunkardt} credit limits the credit to the lowest of the estate's tax, $700,000 or the "fair market value" of the property. There is no indication, however, as to the time for valuing the property. Is it the date of death, alternate valuation date, the return due date, or the transfer date? If it is the transfer date, the risk of depreciation would be not on the government, but on the estate. In this instance, the risk of appreciation also seems to be borne by the estate, since the maximum credit is $700,000 and the Smithsonian is to pay up to $560,000.

In both \textit{Lilly} and \textit{Redfield}, no interest was charged either estate for the period of time between the normal due date of the tax and the date the property was in fact transferred. \textsuperscript{94} "The estate of Josiah K. Lilly . . . includes a numismatic collection of national importance." H.R. REP. NO. 1375, 90th Cong., 2d Sess. 2 (1968).


\textsuperscript{95} The Redfield land has in fact been added to the Toiyabe National Forest. The Lilly Collection is part of the Smithsonian's permanent collection. The Meserve Collection has been transferred to the Smithsonian and an exhibit is expected to be mounted before the year's end.  \textsuperscript{96} \textit{See} note 72 \textit{supra}; the Smithsonian approached the Lilly estate. H.R. REP. NO. 1375, 90th Cong., 2d Sess. 5 (1968).

\textsuperscript{97} The United States was not buying to sell; it bought to retain. \textit{See} note 150 \textit{infra}. This notion (limiting in-kind estate tax payment to property which will be retained) has an analogue on the income tax side. An income tax deduction for the market value of an in-kind donation to charity without including capital gains in the donor's income is only available where the use of the property is "related" to the charity's operations. Anthoine, \textit{Deductions for
agency which would be maintaining the property and by Treasury, the agency responsible for tax collection. The former actively supported the proposals, the latter was effectively neutral. An independent party, Congress, then made the final policy determination.

These four characteristics—tax payment, uniqueness of property, public benefit and dual agency review—should form the basis of statutory procedures for in-kind payment of death taxes.

IV. Statutory Procedures

A. Foreign Provisions

1. France

The French system of transfer taxation has two components: succession taxes levied on transfers at the time of death and an inter vivos gift tax. The French system resembles the U.S. system in that the two taxes are integrated: lifetime transfers are cumulated and added to those at death in order to determine the appropriate tax. The French succession tax is an inheritance tax in that the tax liability is determined by reference to the property each recipient receives. The tax on each share will depend on the relationship between the decedent-donor and the beneficiary: property received by a decedent’s surviving spouse, parents and children is taxed at a maximum of 20%.

In December 1968 the French Parliament passed legislation allowing the recipients of transferred property to pay French succession...
taxes in works of art. While the provisions are broadly worded, it is clear that this is an exceptional procedure. The framework for dation—the payment of succession taxes in works of artistic or historic value—is well defined.

Initially, the taxpayer makes an offer to the government describing the object to be used for dation. This offer is forwarded to an Interministerial Consultative Commission which issues an opinion on the artistic or historic interest of the work as well as an estimate of its monetary value. Upon receipt of its opinion, the appropriate minister makes a recommendation to the finance ministry. The finance ministry then determines the final government position on the proposed dation, and the taxpayer is notified of the government’s decision.

If the government agrees to the taxpayer’s offer, the taxpayer has a period of time to consider the conditions imposed by the finance ministry and the legal tender value of the work. The taxpayer must notify the finance ministry of this decision within a year of receiving the offer. If the taxpayer fails to give timely notice the offer is deemed rejected.

The French also have a system called donation, which allows for the inter vivos transfer of future interests to the government. The procedure for donation is the same as that for dation. Accordingly, donation is limited to works of high artistic merit. A taxpayer can offer works as donations while reserving a life estate for himself, and a successive life estate for his spouse. The effect of this inter vivos transfer of a future interest is to remove the work from the inheritance tax base at the taxpayer’s death, because the recipient is an

---

102 C. Gen. Imp. art. 1716 bis. This legislative authorization is credited with the establishment of the Picasso Museum in Paris in 1981. Picasso, in turn, is often cited as the inspiration for the legislative mechanism. Newsweek, Oct. 22, 1979, at 126. See P. Schneider, A Revealing Look at the Master’s Private Collection, Smithsonian, Mar. 1980, at 59.

103 C. Gen. Imp. art. 1716 bis. E.g., “Tout héritier peut acquitter les droits de succession par la remise d’œuvres d’art . . . de haute valeur artistique ou historique.”

104 “Cette procédure exceptionnelle.” Id.

105 C. Gen. Imp. art. 310 G.

106 C. Gen. Imp. art. 310 G(II). Only works of high artistic or historic value may be used as dation. Id.

107 Id.


109 C. Gen. Imp. art. 384A.

110 More precisely, the mechanics of donation are applied to dation. C. Gen. Imp. art. 384A.

111 “La donateur peut stipuler qu’il conservera, sa vie durant, la jouissance du bien donné. Il peut également stipuler que la réserve de jouissance bénéficiera après sa moitié a son conjoint.” C. Gen. Imp. art. 1131(I).
exempt organization.\textsuperscript{112} The French system has the four characteristics of the ad hoc American legislative actions. Dation is clearly tax payment;\textsuperscript{113} it is distinguished from charitable contribution or donation.\textsuperscript{114} The only property that may be accepted is work of "high artistic or historic value." The determination of exceptional property is made after study by an Interministerial Consultative Commission composed of members designated jointly by the prime minister, the finance ministry, ministry of education and the ministry of cultural affairs.\textsuperscript{115} The final decision to accept or reject the in-kind payment of taxes is made by the finance ministry. This dual agency review emphasizes the conservative financial underpinnings of the procedure, often to the frustration of the art world.\textsuperscript{116} Finally, the purpose of the legislation is to preserve the national heritage.\textsuperscript{117} The emphasis is on public benefit and public access. Numerous exhibits open to the public have been held using works received as dation.\textsuperscript{118} If a work is affixed to realty, the statute requires arrangements be made to insure public access.\textsuperscript{119}

It is to be noted that the French system is not limited to artists or their estates. It is available to any one with works of high artistic or historic value. In fact, three currently pending cases involve internationally prominent art dealers.\textsuperscript{120} The procedure is not formulated to encourage artists but to preserve the national heritage without jeop-

\textsuperscript{112} \textit{E.g.}, C. Gen. Imp. art. 795-1, 6. In the United States, the lifetime creation of a charitable split interest must meet rigid requirements to qualify for a gift tax deduction, I.R.C. § 2522(c). The value of the property would still be included in the donor's gross estate as a transfer with retained life estate. I.R.C. § 2055.

\textsuperscript{113} “Cette procedure exceptionnelle de reglement des droits . . . . Tout heirier . . . . peut acquitter les droits de succession par la remise d'oeuvres d'art . . . .” C. Gen. Imp. art. 1716 bis.

\textsuperscript{114} \textit{See} notes 110-13 and accompanying text supra.

\textsuperscript{115} C. Gen. Imp. art. 310 G(II).

\textsuperscript{116} J. Michel, \textit{Modern Works Given Scant Regard}, Manchester Guardian Weekly, Jan. 18, 1981, at 14, col. 1:

\begin{quote}
In other words, [the Commission] endorses only historic works whose value has been established.
\end{quote}

It is a conception quite consistent with the spirit prevailing at the budget ministry, which takes a poor view of tax evasion through the device of ceding works of art whose worth is not always proved. So it is apparently the fear of being had which determines an acquisition policy where the final say is with the budget ministry and the Commission's role purely consultative.

\textsuperscript{117} \textit{Id. See also} Newsweek, Oct. 22, 1979, at 126; ARTnews, Summer 1978, at 84.

\textsuperscript{118} Michel, supra note 117.

\textsuperscript{119} C. Gen. Imp. art. 1131(I).

\textsuperscript{120} Michel, supra note 117.
ardizing the integrity of the tax system.\textsuperscript{121}

2. United Kingdom

An English statute authorizes the acceptance of works of art or items of historical merit in payment of the capital transfer tax.\textsuperscript{122} The Commissioners of Inland Revenue, (the Board),\textsuperscript{123} may accept in satisfaction of the tax any work of art which Treasury determines is "pre-eminent for aesthetic merit or historical value."\textsuperscript{124} The English provisions do not explicitly define the mechanics of the system; they merely give the Board discretion to accept a taxpayer's offer of in-kind payment. Nonetheless the four characteristics—tax payment, uniqueness of property, dual agency review and public benefit—are implicit in the English statute.

This is clearly a tax payment, not a contribution. The statute provides: "Where a person has power to sell any property . . . for the payment of tax, he may agree with the Board for the property to be accepted in satisfaction of that tax . . . and, . . . any such agreement shall be treated for all purposes as a sale."\textsuperscript{125} Only works of art of "pre-eminent" aesthetic or historical value may be the subject of the in-kind payment. That determination is made by Treasury.\textsuperscript{126}

\textsuperscript{121} See notes 163 & 164 and accompanying text infra.
\textsuperscript{122} Finance Act, 1975, c. 7, § 19(2), sched. 4, ¶ 17(1). This system, however, is not limited to works of art. It also considers land, buildings, and associated objects. \textit{Id.} ¶ 17(2)-(4). For a general discussion of the British tax system, see Maudsley, \textit{The British Capital Transfer Tax}, 13 \textit{San Diego L. Rev.} 779(1976).
\textsuperscript{123} Finance Act, 1975, c. 7, § 51(1). The Board is responsible for the administration of direct taxation. Treasury is separate and distinct from the Board and is responsible for finance, including taxation policy and the provision of funds for public services. \textit{Arthur Andersen & Co., Tax & Trade Guide: United Kingdom} 6 (3d ed. 1976).
\textsuperscript{124} Finance Act, 1975, ch. 7, § 19(2), sched. 4, ¶ 17(1),(4)(a). In addition, "any picture print, book, manuscript, scientific object or other thing" or collection of such items may similarly be offered in payment of the tax as long as Treasury is satisfied that the item or the collection is "pre-eminent for its national, scientific, historic or artistic interest." \textit{Id.} ¶ 17(4)(b)&(c).
\textsuperscript{125} \textit{Id.} ¶ 18(1). Interestingly, this procedure for in-kind payment is often referred to as the "in lieu" system. Jones & Stary, \textit{Current Tax Intelligence, 1978 Brit. Tax Rev.} 397, 409.
\textsuperscript{126} Finance Act, 1975, c. 7, § 19(2), sched. 4, ¶ 17(4). While the statute speaks only of Treasury's determination, Treasury's official administrative practice for conditional exemption status is to seek "advice . . . from the relevant national museum or gallery, asking whether the object is good enough to be displayed in a public collection." Jones & Stary, \textit{Current Tax Intelligence, 1977 Brit. Tax Rev.} 393, 466. Presumably the practice is the same for the acceptance of works in satisfaction of tax liability since the standard for acceptance ("pre-eminent for aesthetic merit or historical value") is similar to the standard for conditional exemption ("of national, scientific, historic or artistic interest"). Moreover, Treasury's working standard for acceptance seems to imply consultation with public museum officials: "Works of art must be of such quality as would make them pre-eminent additions to public collections." \textit{Id.} at 467.
The Board then has the final say on acceptance of the offer. This constitutes a moderate form of dual agency review. As for public benefit and use, it may be presumed by the high standard and the administrative practice, and is reinforced by reference to their system of conditional exemption.\textsuperscript{127}

In addition to the in-kind payment provision, there is a system allowing an individual during his lifetime to petition Treasury for a conditional exemption\textsuperscript{128} from capital transfer taxes at death. This conditional exemption is available for works of art of "national, scientific, historic or artistic interest."\textsuperscript{129} In order to qualify for the conditional exemption, an individual\textsuperscript{130} must promise Treasury that until the person entitled to the property dies, the property will be kept permanently in the United Kingdom and that reasonable steps will be taken to preserve it and to secure reasonable public access.\textsuperscript{131}

If the conditions are fulfilled, transfer of the property at death, even to a private individual, is exempt.\textsuperscript{132} A capital transfer tax is levied on the first chargeable event occurring thereafter. A chargeable event includes disposal of the property by sale or otherwise.\textsuperscript{133} If the disposal of the property, however, is to the Board in payment of the tax, that disposition will not trigger the capital transfer tax.\textsuperscript{134}

\begin{footnotes}
\item[127] See note 116 and accompanying text infra.
\item[128] Finance Act, 1976, c. 40, §§ 76-84.
\item[129] Id. § 77(1)(a).
\item[130] The appropriate person is determined by Treasury. Id. § 76(1)(b).
\item[131] Id. § 77(2). Requiring reasonable public access to the work was a modification of the previous act. In addition to permanent situs in the U.K. and preservation, the previous act only required that "reasonable facilities for examining the object for the purpose of seeing the steps taken for its preservation, or . . . , for purposes of research, will be allowed to any person authorized by the Treasury to examine it." Finance Act, 1975, c. 7, § 31(2)(c).
\item[132] Finance Act, 1976, c. 40, § 76(1). If the promise is broken "in a material respect" that failure is itself a chargeable event for purposes of the capital transfer tax. Id. § 78(2).
\item[133] Id. § 78(1). If, however, there is a new undertaking accepted by Treasury, then the property once again is conditionally exempt from the capital transfer tax. Id. § 78(5)(b).
\item[134] Id. § 78(4)(b). This exemption from the C.T.T. for a sale to the Board may influence the price at which the object trades: "There is reason to believe that . . . its acceptance in satisfaction of tax will be subject to the existing Treasury practice of offering an abated price (taking into account that tax free element) even though the Bill states that such a disposal is not a chargeable event." Ponter, \textit{Capital Transfer Tax Conditional Exemption for Works of Art, Etc.}, 1976 \textit{BRIT. TAX REV.} 148, 150. In fact that is the official practice: The memorandum [Treasury memorandum of guidance on Capital Taxation and the National Heritage, 1977] deals with the advantages to be gained by private owners if they . . . , in the case of pre-eminent works, offer them in lieu of tax. In these circumstances the Government allows the seller to retain 25 per cent of the value of the tax exemption of objects while the public collection gets the benefit of the remainder. These arrangements give public collections a chance to acquire property at a favourable price and, at the same time, help to prevent export which might follow an open market sale.
\end{footnotes}
Consequently a work of art can be excluded from capital transfer taxation at death and thereafter be used as the medium of tax payment without triggering the tax.

B. State Statutes

In 1979 the Maine legislature approved an act entitled "Acceptance of Works of Art from Estates." This act shares the four characteristics evidenced in the French and English statutes and the American ad hoc legislation—tax payment, uniqueness of property, public benefit, and dual agency review.

The Maine Act is broadly worded, providing that an estate may use works of art as payment for any estate tax. To be eligible to make the in-kind payment, however, the Maine State Museum Commission, in consultation with Maine's Commission on the Arts and Humanities, must determine that acceptance of the work is "advantageous" to Maine. The Maine statute provides that acceptance of a work is advantageous if it: (1) encourages the preservation of original or noteworthy works; (2) furthers the preservation and understanding of Maine's fine arts traditions; (3) furthers the people's understanding of fine arts; or (4) aids in the establishment of important state collections. This standard is less stringent than that found in the French or English statutes. The Maine standard gains some credibility, however, by the $100,000 ceiling imposed on the amount of works that may be accepted in any one fiscal year. Presumably, if there are competing works, those of greater merit will prevail.

Jones & Stary, Current Tax Intelligence, 1977 BRIT. TAX REV. 393, 467.
135 ME. REV. STAT. ANN. tit. 27, §§ 91-93 (Supp. 1980-81).
136 "A decedent's estate may pay all or part of any tax owned by the decedent's estate to the State by payment in the form of one or more works of art . . . ." Presumably any estate, including collectors and dealers as well as artists, may use this method of payment if the decedent has so directed in his will or if the personal representative finds it advantageous to the estate. Id. § 92.
137 Id.
138 Id. § 93(1).
139 Id.
140 Id. § 93(5). This $100,000 limit may be exceeded if the State Budget Officer agrees or if the Museum Commission transfers the excess amount to the General Fund. Id. The fiscal limit (set originally at $500,000) was necessary to ensure compliance with Maine's Constitution which requires a balanced budget every two years. Telephone interview with Rep. Tierney, sponsor of the legislation (Sept. 4, 1980).
141 The question is academic. To date only one estate has used Maine's innovative method of payment. Maine received nine works of art valued at $34,000. These works were transferred to Maine museums specializing in contemporary art. Letter from Paul Rivard, Director of the Maine State Museum, to the author (Feb. 10, 1981).
Once an acquisition has been determined to be “advantageous,” the Museum Commission and the estate must agree as to the market value of the work on the date of death. The agreed upon valuation is then sent to the State Tax Assessor, who has 45 days to object. If there is no objection by the Tax Assessor, the State is deemed to have accepted the work of art in payment. When the Museum Commission assumes title to the work of art, the estate receives a credit against its tax liability equal to the work’s agreed upon value. The credit may not exceed the amount of the tax.

The role of the Maine State Tax Assessor is limited to the acceptance or rejection of the valuation. In contrast, the French system gives more autonomy to the finance ministry, which has independent power to accept or reject the dation. Indeed, each step in the French system is designed to promote independent, unilateral determination by the artistic, financial and taxpaying participants.

In Maine, valuation is a two tier process. The taxpayer and the Museum Commission jointly make an initial value determination which is then forwarded to the tax office for approval. In France, the Commission sets the value and the finance ministry decides whether to accept or reject the value. If the finance ministry accepts, it then transmits the government’s offer to the taxpayer. The taxpayer makes the final decision on whether to accept or reject the government’s offer.

142 ME. REV. STAT. ANN. tit. 27, § 93(2). Maine inheritance tax is assessed based on the value of the object on the date of death. ME. REV. STAT. ANN. tit. 36, § 3631. If the value agreed upon between the taxpayer and the Museum Commission is the inheritance tax value, it is difficult to see how the State Tax Assessor could object. Of course, this assumes that the work is part of the decedent’s estate at the time of death. See note 168 infra. If there is an objection, the Museum Commission and the estate may submit a new valuation to the tax assessor, who once again has 45 days to object. ME. REV. STAT. ANN. tit. 27, § 93(2) (Supp. 1980-81). If there is a second objection, the state is deemed not to have accepted the proposed method of payment. Id.

143 Id. § 93(3).

144 Id. § 93(4). The Maine inheritance tax is due twelve months after decedent’s date of death, but the State Tax Assessor may “for cause extend the time of payment.” ME. REV. STAT. ANN. tit. 36, § 3681. The State Tax Assessor may impose interest charges if an extension is granted. 1947-48 Me. Atty. Gen. Rep. 90. The legislation authorizing the in-kind payment is silent on whether interest shall be charged.


146 There are only two decisions to be made: the eligibility of the property and its value. The decision of whether acceptance of the property is “advantageous” (and hence eligible) is the Museum Commission’s and its “decision shall be final and nonappealable.” Id. § 93(1). Valuation as described is a two-tier process.

147 See text following note 108 infra.

ernment’s offer. In terms of institutional integrity the French valuation system is preferable because it presents a single governmental position to the taxpayer. Under the Maine statute one governmental agent may reject a value already agreed upon by the taxpayer and another government agent.

A more immediate concern with the Maine legislation is its effect on the federal estate tax. Section 2011 of the Internal Revenue Code provides a credit against the federal estate tax for the death taxes "actually paid" to any state. This statutory phrase is traditionally associated with the amount of the state tax, not the medium of payment.

Treasury regulations under section 2011 require that evidence of payment be submitted to the district director before the credit will be allowed. The district director may require the state taxing authority to file a statement showing the "amount actually paid in cash." Whether this "in cash" language will be used by Treasury to defeat the credit for state death taxes is unknown. The better position would be to include the in-kind tax payments as taxes "actually paid," thereby giving full credence to the statutory language as well as to the state's policy decision which merely varies the form, not the amount, of tax payment.

149 See notes 105-09 and accompanying text supra.
150 I.R.C. § 2011(a).
151 The origins of the phrase may be the early practice by some States of giving discounts from the inheritance tax for early payment. E.g., Smith v. Commissioner, 59 F.2d 553, 558 (7th Cir. 1932) ("We think petitioner's contention with relation to credit for the state taxes which he has paid is erroneous. The statute is clear and unambiguous, and we think it does not warrant a credit to petitioner for a discount which he never paid."); Commonwealth Trust Co. v. Driscoll, 50 F. Supp. 949, 952, aff’d per curiam, 137 F.2d 653 (3d Cir. 1943), cert. denied, 321 U.S. 764 (1944) ("credit should be given only for the exact amount of tax actually paid, and not for the full amount of the assessment"). Alternatively, the origin may be the practice of requiring deposits to be made if the amount of the tax is unascertainable at the due date. See, e.g., In re Damon, 49 T.C. 108 (1967).
153 Id. § 20.2011-1(c)(2)(iv). This language has been in the regulations since the 1936 Regulations. From 1953 to 1958, these technical provisions were replaced by regulations dealing with the United States estate tax credit for foreign death taxes. Since 1958, however, the regulations have been in force continuously. Fed. Tax Reg. § 81.9(1954). There is no illuminating legislative history. H.R. REP. No. 8300, 83d Cong., 2d Sess. reprinted in [1954] U.S. CODE CONG. & AD. NEWS 4017, 4451.
154 If in-kind payments are disallowed, a subsidiary concern is raised. Many states impose a "pick-up" tax if the inheritance tax is less than the maximum federal credit. If the maximum credit is not obtained because the in-kind payment is disallowed that may trigger the operation of the pick-up tax. The overall tax burden on the estate would then be increased. Cf. Aronauer v. United States, 37-1 U.S. Tax Cas. (CCH) ¶ 9052 (S.D.N.Y. 1937) (court
C. Federal Proposals

In recent years, legislative proposals designed to alleviate the tax problems of artists have been both abundant and unsuccessful.155 The estate tax proposals may have failed because they reflected an attitude of noblesse oblige rather than neutral tax collection. Senate Bill 1078,156 sponsored by Senator Javits in 1979, is an example.

Bill 1078 proposed a credit against the estate tax for "literary, musical or artistic property, or similar property" included in the gross estate which is transferred to a department of the government. The government recipient is required to sign a statement that the property is of "significance" and that it will be available to the general public.157 This "eligible" property is valued for credit purposes at its estate tax return value.158

While Bill 1078 insured that the property received would be used for public benefit, it failed to meet two, and arguably three, of the four characteristics shared by the French and English statutes and the American ad hoc legislation. First, it did not limit the in-kind payment to unique property of high national merit: its standard was "artistic, musical, or literary significance."159 Second, the proposal did not call for dual agency review. Treasury, the agency responsible for the collection of tax, played no part in the decision; it

allowed credit only for the amount paid in cash, without reference to a deposit of securities to secure the payment of the tax in the transfer of the ultimate remainders).

155 The majority of legislative proposals on artists and taxation have generally focused on the charitable deduction for income tax purposes. E.g., S. 851, 97th Cong., 1st Sess. (1981); H.R. 148, 97th Cong., 1st Sess. (1981); H.R. 444, 97th Cong., 1st Sess. (1981); S. 3175, 96th Cong., 2d Sess. (1980); H.R. 8305, 96th Cong., 2d Sess. (1980). The "evil" supposedly being remedied is that of allowing most taxpayers a fair market value deduction for charitable contribution of art but limiting the artist to a basis deduction. As pointed out by many commentators, there really is no tax injustice to the artist since nothing has been included in income. In fact, perhaps the proper income tax perspective is to rewrite the charitable contribution laws for purchasers of art. See Speiller, The Favored Tax Treatment of Purchasers of Art, 80 COLUM. L. REV. 214 (1980).

There has been a marked decrease in the contribution level of original manuscripts and works from artists to museums, or other public institutions. This decline may be partially attributed to the current treatment of artist's charitable deductions. See Note, Tax Treatment of Artists' Charitable Contributions, 89 YALE L.J. 144 (1979). The question is whether we want the tax system to bear the cost of museum's acquisitions? Or rather, at what point do we wish the tax system to bear the cost?

157 Id. § 2(c).
158 Id. § 2(b).
159 To a certain extent this criticism is a matter of semantics. The standard of "significance" denotes some degree of uniqueness. The question is at what point in the range of "significance" should we allow the extraordinary in-kind payment?
merely credited the taxpayer's account. Limiting Treasury's role to that of a bookkeeping entry made this proposal more a charitable donation with a desirable tax effect than a method of tax payment. It is no surprise that Treasury opposed this bill.

Additionally, the proposal was limited to artists' estates. This created a preferred class of taxpayers and violated principles of tax neutrality. At the senate hearing, this preferred status drew Treasury criticism. "We think the idea of paying your taxes in-kind is one that can't be confined to artists . . . ."

This class limitation, the "significance" standard, and the limited role of the Treasury, all indicate that the proposal was intended to provide special relief to artists. The sponsors of the proposal felt it was unfair to tax unsold works in an artist's estate at fair market value and to require cash payment within nine months. The pro-

160 "A credit against the tax . . . shall be allowed . . . ." S. 1078, 96th Cong., 1st Sess. § 2 (1979). This feature is the most objectionable. Bypassing Treasury renders the system unaccountable.

161 S. 1078 was characterized as creating a "credit against estate tax for donations" of artists works to the government. Miscellaneous Tax Bills III: Hearings on S. 1021, S. 1078, S. 1433 and S. 1467 Before the Subcomm. on Taxation and Debt Management Generally of the Senate Comm. on Finance 536, 96th Cong., 1st Sess. 294 (1979) (statement of Authors League of America)(hereinafter cited as HEARINGS). The same confusion, however, has been seen elsewhere. See notes 92 & 125 supra. In fairness to the Authors League, the sponsors of the bill also spoke in terms of donation. CONG. REC. S5435 & S5438.

162 HEARINGS, supra note 161, at 293 (statement of Donald C. Lubick, Assistant Secretary of the Treasury for Tax Policy).

163 A basic tenet of American tax policy is that similarly situated taxpayers should be treated similarly. This tenet, however, is more often honored in the breach. Concern about the disposal of works of art is not limited to artists alone; collectors also share their concern. See Base, Rocky at 70: Setting a Royal House in Order, Chi. Tribune, Nov. 26, 1978, Magazine at 26; see also, R. LERNER, REPRESENTING ARTISTS, COLLECTORS, AND DEALERS (P.L.I. 1979).

164 HEARINGS, supra note 161, at 293.

165 Valuation is the crux of the problem. When an artist dies, he typically leaves behind many unsold works of art. Picasso, for example, left behind "1,876 paintings, 11,748 drawings, 18,095 engravings, 6,112 lithographs, 3,181 linocuts, 1,355 sculptures and 2,880 ceramic works." Paul, The Picasso Estate: Unangling the 'Inheritance of the Century,' ARTNEWS, Summer, 1978, at 81. Those works must be valued as of his date of death. Typically, the I.R.S. will consider the market price of the latest work sold as the starting point to arrive at a date of death value. This in itself is not objectionable; the problem is that the Treasury's limited staff is not capable of fine tuning the valuation process. Spiller, supra note 155, at 234-35. The Treasury's crude approach often mandates a similar approach by the taxpayer. See, e.g., In re David Smith, 57 T.C. 650 (1972), aff'd, 510 F.2d 479 (2d Cir. 1975), cert. denied, 423 U.S. 827 (1975) (I.R.S. valuation of $5,256,918 answered by a taxpayer valuation of $0; the Court settled on $2.7 million). See also Sloane, Valuing Artists' Estates: What is Fair? ARTNEWS, Apr., 1976, at 91.

The effect of the valuation approach in an estate that consists mostly of unsold works of art can be devastating (especially when coupled with the exclusion of artists from the deferral provisions).
posed credit was an attempt to address the valuation and liquidity problems of a particular group.

The devastating impact that these tax laws have on an artist's family cannot be overstated. Families of artists, who are unable to sell their creative works, have had to live on limited, moderate incomes, and find that, at the moment of the artist's death, they suddenly become "wealthy" because of that same unsold art. But that wealth is illusory for all but tax purposes.

Many times, even the sale of the art work will not bring in enough money to pay off the tax bill. Other assets must then be sold to raise the needed additional capital—and sometimes this means selling the family home. This is exactly what happened to the widow of "Pogo" creator, Walt Kelly.

125 Cong. Rec. S17,515 (1979) (remarks of Sen. Baucus). The self-help estate planning response of some artists has been horrific: Arizona artist Ted DiGrazia burned his paintings valued at $1.5 million rather than "bankrupt" his family through estate taxes. Wall St. J., May 21, 1976, at 12. Others have apparently followed his lead: e.g., Thomas Hart Benton (statement of James Rosenquist to Rep. Richmond) reprinted in 125 Cong. Rec. E 315 (1979); Robert Motherwell, supra note 160, at 438 (statement of Cleve Gray). Still others have included in their wills directions to destroy unsold works, e.g., Charles Saxon, 125 Cong. Rec. E 315 (1979) (remark of Rep. Richmond). Whether or not a testamentary direction to destroy will have any impact on value may well depend on whether such a direction is valid. It is arguable that such a testamentary direction is invalid as contrary to public policy. See, e.g., Eyerman v. Mercantile Trust Co., 524 S.W.2d 210 (Mo. Ct. App. 1975).

166 A second type of legislative proposal dealing with artists' estate taxes addresses the valuation issue directly. Under these proposals unsold works are valued at their cost or adjusted bases rather than market value. H.R. 2835, 97th Cong., 1st Sess. (1981).


Even more recently, the IRS announced the establishment of a new advisory group to deal with prints:

Abusive tax shelters based on inflated appraisals of art print publishing ventures are receiving closer IRS scrutiny with the help of print industry experts.

A newly created Art Print Advisory Panel will provide the Commissioner of Internal Revenue with information on the market-value of assets in art print publishing tax shelter ventures.

I.R. 81-11.

167 The liquidity issue was addressed by Congress in 1976 and 1981 by amendments to the deferral provisions of the Internal Revenue Code. For decedents dying before 1982, there were basically three deferral provisions in the Code: I.R.C. §§ 6161, 6166 & 6166A. (A fourth deferral provision, I.R.C. § 6163(b), has limited applicability; the Secretary may allow an additional deferral of up to three years for estate tax attributable to a reversionary or remainder interest after the executor has elected to defer the tax until the termination of the preceding interest.) Section 6161(a)(2) gives the Secretary authority to allow the payment of estate taxes in installments over a 10 year period "for reasonable cause." Sections 6166 & 6166A do not involve Treasury discretion but rather provide that if an estate qualifies, it can
One positive innovation in the proposal was the restriction of in-kind payment to property included in the decedent’s estate.\textsuperscript{168} This is consistent with the notion that Treasury is not a broker for unwanted illiquid assets.\textsuperscript{169} An estate should not be able to determine, elect to pay its estate tax in installments over a 10 or 15 year period. The main qualification for both these sections is that a certain percentage of the estate consist of a closely held business. For a general discussion of the deferral sections, see Acker, \textit{Deferred Estate Tax Payments and the Tax Reform Act}, 36 N.Y.U. INST. ON FED. TAX. 301 (1978). The Economic Recovery Tax Act of 1981 has made further changes, among them the repeal of section 6166A and the liberalization of section 6166.

Whether an artist’s estate qualifies for the deferral provisions hinges on whether or not he was engaged in a trade or business. The deferral allowed by § 6166 as well as by the former § 6166A requires that a percentage of the estate consist of an interest in a closely held business. For purposes of those sections an interest in a closely held business means an interest “as a proprietor in a trade or business carried on as a proprietorship” as well as a defined partnership stock interest. Most artists are not incorporated but rather carry on their activities as sole proprietors. A \textit{TAX GUIDE FOR ARTISTS AND ARTS ORGANIZATIONS} 58 (H. Lidstone ed. 1979). Thus, the presumption of a trade or business that corporate solution creates is generally not available. Artists are advised to engage in a little “window dressing” such as business cards with a trade name or using a trade name on Schedule C in order to establish a trade or business for deferral purposes. \textit{Artists and Authors—Estate Planning and Administration}, 14 REAL PROP., PROB. & TRUST J. 45, 52 (1979). See also Acker, \textit{How an Artist, Sculptor, etc., Can Use a Corporation to Maximize his Overall Income}, 6 ESTATE PLANNING 40, 43 (1979). The IRS has stated:

> What amounts to a “trade or business” . . . should not be determined merely by reference to a broad definition of what “business” is or to a case-law definition of the term for purposes of some other section of the Code. . . . but should be found in keeping with the intent of the legislature in enacting section 6166 . . . . [S]ection 6166 was intended to apply only with regard to a business such as a manufacturing, mercantile, or service enterprise.

Rev. Rul. 75-365, 1975-2 C.B. 471. Even if this is not read as a prohibition against the use of deferral in an artist’s estate, the language is certainly chilling. See also Schaaf, \textit{Estate Planning for Authors and Artists A-35} (BNA Tax Mgmt. No. 423 (1981)).

Moreover, assuming an artist’s estate qualifies for deferral, the acceleration provisions could prove troublesome where the primary business remaining after the artist’s death consists of selling artist’s works. Currently, § 6166 states that if one-third or more of the value of the interest is disposed of, deferral is automatically terminated and the remaining unpaid estate tax is due. Acceleration under § 6166A is triggered if one-half or more of the value of the interest is disposed of. The reason for the disposal is irrelevant. In short, deferral, even if available, may not solve the artist’s estate tax problems. Under the 1981 amendments brought about by the Economic Recovery Tax Act of 1981, § 6166 is triggered by a one-half disposal, and § 6166A is eliminated. ERTA, § 422, 95 Stat. 314-16.

\textsuperscript{168} S. 1078, 96th Cong., 1st Sess. § 2(c)(1). Curiously, other legislative mechanisms specifically do not limit the payment to property included within the decedent’s estate. Therefore, it is theoretically possible to have the estate purchase a work of art specifically to use as the medium of payment. An executor who purchases a work to use as payment runs the risk that it will not be accepted. Additionally it is hard to imagine what economic benefit is gained.

\textsuperscript{169} This point seemed to cause some confusion in the hearings. One of Treasury’s objections to the proposal was that “we simply can’t put the Government in the business of buying \textit{and selling} assets in settlement of tax liabilities.” \textit{HEARINGS}, supra note 161, at 294 (emphasis added).
by independent actions, which works the government should acquire.\textsuperscript{170} In-kind payment is an extraordinary measure and should properly be limited to extraordinary circumstances.

V. Conclusion

Criticism of in-kind payment proposals does not mean that any statutory provision on in-kind payments is unacceptable. A statutory mechanism available to all estates which included the four characteristics of tax payment, unique property, dual agency review, and public benefit, could contain sufficient safeguards to be acceptable. In such a system only property of national merit deemed desirable after two levels of review (artistic and fiscal) could be used as payment. The government would not be forced to sacrifice fiscal integrity, as it did with flower bonds. Moreover, the existence of a statutory procedure available to all qualifying property is more even handed than reliance on private legislation.

The estate tax was conceived as a revenue raising measure as well as a device to break up the concentration of wealth.\textsuperscript{171} An in-kind tax payment which requires transfer of ownership from a private individual to the government for the benefit of society is consistent with this spirit of the estate tax.

Such a statutory procedure should not pose severe administrative difficulties. In 1968, Treasury created an Art Advisory Panel to assist it in establishing tax valuations for art objects.\textsuperscript{172} The duties of the Art Advisory Panel could be expanded to include the determination of high artistic merit. The composition of the Panel should be readjusted to require the inclusion of art historians and officials from the nation’s leading public museums in making this determination.\textsuperscript{173} Alternatively, a system more akin to the English might be

\textsuperscript{170} Mr. Lubick, in commenting on the Javits proposal concerning the income tax deduction for in-kind gifts to charities stated:

Again, if we give a credit for this sort of thing, there is no particular reason to limit it to other types of in-kind contribution of services. In effect, you are subverting the appropriations process. You are allowing the artists to appropriate money through the tax credit for the purchase by the Government of art and for its transfer to others.

\textit{Hearings, supra} note 161, at 294. \textit{See also} note 91 \textit{supra}.


\textsuperscript{172} \textit{See} note 167 \textit{supra}.

\textsuperscript{173} The composition of the panel has been criticized for being interested in establishing and maintaining high prices. \textit{See}, e.g., Speiller, \textit{supra} note 155, at 236. A similar criticism might be charged with respect to a determination of national merit. This criticism alone,
considered. This would require Treasury independently to consult officials of national museums to determine the work’s merit as an addition to a public collection.\textsuperscript{174} Whichever system is adopted, Treasury should assume the senior role. The determination of merit should be purely “advisory.” The taxpayer, of course, should have the final word on whether to accept or reject the government’s offer. Each of the three participants should make an independent determination, so that acceptance of the in-kind payment requires unanimity.

As a practical matter, the estate tax provisions affect few decedents,\textsuperscript{175} and this legislation would affect very few taxpaying estates. Opposition to such a proposal, if any, is likely to come from dealers and auction houses who would stand to lose sales commissions. The proper task is to balance a possible loss of commissions against a possible loss of the nations’ artistic heritage.

If the nation wishes to preserve its art, without sacrificing fiscal integrity, a system incorporating the four characteristics of tax payment, unique property, dual agency review, and public benefit should be adopted. The advisability of such a proposal is a policy decision. As expressed by Treasury in regard to the Lilly estate, “the advisability of the bill depends upon the desirability of that acquisition.”\textsuperscript{176}

\textsuperscript{174} This should lessen charges of conflict of interest. \textit{See note 173 supra.}
\textsuperscript{175} The estate tax has never affected the majority of U.S. decedents. As the unified credit is increased, fewer estates should be subject to the payment of death taxes.