A NEW LOOK AT OLD MONEY

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ABSTRACT

Taxing wealth—including inherited wealth—is a hot topic, making headlines and generating heated debate. Should millionaires and billionaires face an annual wealth tax, as championed by Senators and former presidential candidates Elizabeth Warren and Bernie Sanders? Should we strengthen the existing estate tax, as former presidential candidate Kamala Harris urged? Or, as opponents argue, are both annual wealth and once-a-generation wealth transfer taxes unfair and impractical? What makes this debate so intractable is not only that the public as a whole is divided on these issues, but that also many individual Americans hold simultaneous beliefs about wealth, opportunity, fairness, desert, and family that seemingly contradict each other. This Article cuts through that debate by proposing a novel solution for inheritance taxation that reconciles these deeply held beliefs with the benefits of wealth transfer taxation.

Our current estate tax treats the self-made millionaire the same as an heiress who has not earned a cent when they pass their fortunes on to their heirs. But this is misguided. Drawing on recent work on the psychology of taxation, this Article makes the case for an innovative inheritance tax system that taxes old money more heavily than new. This approach would allow individuals to bequeath wealth that they have earned—but not wealth that they have inherited—free of tax. Known as a Rignano tax, this proposal harnesses the finding that many Americans "silo" beliefs about wealth, holding seemingly contradictory beliefs that differ in part based on whether wealth is earned or inherited. By leveraging these findings and building on

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experience with the existing transfer tax system, this Article elaborates and advances a set of specific and concrete design recommendations for a Rignano tax.

This comprehensive analysis of a Rignano tax—the first in the law review literature—complements philosophical work that advocates for such a tax but does not address key design and policy questions. Further, it contributes to tax scholarship by advancing our understanding of the relationship between a tax's normative goals and structural design choices. And for both advocates and opponents of the estate tax, it offers a nuanced and fair exploration of the debate surrounding inheritance taxation as well as a potential resolution of the enduring stalemate over taxing wealth.

TABLE OF CONTENTS

Her voice is full of money.

—F. Scott Fitzgerald, THE GREAT GATSBY[1]

They were new money, without a doubt: so new it shrieked. Their clothes looked as if they'd covered themselves in glue, then rolled around in hundred-dollar bills.

—Margaret Atwood, THE BLIND ASSASSIN[2]

INTRODUCTION

Compare *Tom*, who builds a multi-million-dollar business from the ground up, with *Mary*, an heiress who inherits millions and never earns a cent. Both want to leave their fortunes to their children. Although our current estate tax treats *Tom* and *Mary* the same, this approach is misguided. It

1. F. SCOTT FITZGERALD, THE GREAT GATSBY 120 (Scribner Library 2018) (speaking about Daisy Buchanan, who represents "old money").

2. MARGARET ATWOOD, THE BLIND ASSASSIN 242 (Quality Paperbacks Direct London 2000).

ignores that not only is the public as a whole divided on the issue of taxing wealth transfers,[3] but many individual Americans hold simultaneous beliefs about wealth, opportunity, desert, fairness, and family that seemingly contradict each other. Many believe, for example, both that working hard and saving in order to help one's children is as American as apple pie *and* that it is unfair for some children to begin life with a substantial head start.[4]

As a result, the debate over taxing wealth—including inherited wealth—is at a longstanding impasse.[5] Influential legislators including Senators and former presidential candidates Elizabeth Warren and Bernie Sanders champion annual wealth taxes on ultra-millionaires, while opponents passionately contend that even once-a-generation taxes on wealth transfers are unfair and impractical, calling them "expropriation" and "an especially cruel injury."[6] This Article cuts through that debate and reconciles those competing beliefs by proposing a novel inheritance tax system that taxes old money more heavily than new. This innovative approach—known as a Rignano tax[7]—would allow *Tom* to bequeath wealth that he has created free of tax, while taxing *Mary*, who simply inherited her wealth.

Drawing on recent work on the psychology of taxation, this innovation harnesses the finding that many Americans "silo" beliefs about wealth, holding seemingly contradictory beliefs that differ in part based on whether wealth is earned or inherited. A Rignano tax thus reconciles the benefits of wealth transfer taxation with deeply held beliefs about fairness, desert, private property, and family. Because these beliefs—which legal philosophers Liam Murphy and Thomas Nagel call "everyday libertarianism"[8] and which economist Steven Sheffrin terms "folk

3. Joseph Thorndike, *Why Do People Hate Estate Taxes but Love Wealth Taxes*, FORBES (Oct. 30, 2019), https://www.forbes.com/sites/taxnotes/2019/10/30/why-do-people-hate-estate-taxes-but-love-wealth-taxes [https://perma.cc/YC8R-QZLD] (recounting results from recent polls).

4. Stefanie Stantcheva, *Understanding Tax Policy: How Do People Reason?*, 136 Q.J. ECONOMICS 2309 (2021).

5. MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 51–73 (2005); Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469, 502 (2007); Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69 (1990); Lily L. Batchelder, *What Should Society Expect from Heirs? The Case for a Comprehensive Inheritance Tax*, 63 TAX L. REV. 1, 62 (2009); Ari Glogower, *Taxing Inequality*, 93 N.Y.U. L. REV. 1421 (2018); Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283, 291–92 (1994); James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 828–50 (2001).

6. LUDWIG VON MISES, PLANNING FOR FREEDOM, AND SIXTEEN OTHER ESSAYS AND ADDRESSES 32 (Libertarian Press 3d ed. 1974); LOREN E. LOMASKY, PERSONS, RIGHTS, AND THE MORAL COMMUNITY 270 n.19 (1987).

7. Scholars refer to this structure as a Rignano tax because Eugenio Rignano—writing over 100 years ago—is thought to be the first to discuss this type of inheritance tax system. EUGENIO RIGNANO, THE SOCIAL SIGNIFICANCE OF THE INHERITANCE TAX (1924).

8. LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 34–36 (2002).

justice"[9]—generally differ from those of policymakers and academics, they are often ignored. Recent work on the psychology of taxation suggests that this is a mistake.[10] Policymakers who ignore these beliefs do so at their own peril, often undermining their own normative aims.

But taking these beliefs into account does not mean abandoning wealth transfer taxation altogether. People frequently hold views about fairness and morality in different domains that appear to contradict each other, a concept that Zachary Liscow terms "policy silos."[11] A pro-life advocate, for example, may also support the death penalty; someone who opposes redistributive taxation may favor transportation policy that helps the poor. Crucially, evidence indicates that many Americans "silo" beliefs about wealth, holding seemingly contradictory beliefs that depend in part on whether wealth is earned or inherited.

These insights suggest a way out of the morass bogging down the debate over inherited wealth. Supporters of inheritance taxes should not dismiss out-of-hand public attitudes about hard work, thrift, and family, but instead harness the concept of policy silos. By allowing individuals to make tax-free transfers of wealth that they themselves have earned—but not wealth that they have merely inherited—a Rignano tax acknowledges the very real, deeply held value that the public places on hard work, entrepreneurship, and notions of desert while also addressing concerns about inherited wealth.[12]

Although the idea of taxing old money more heavily than new has long fascinated philosophers of all stripes,[13] philosophical literature leaves key design and policy questions unanswered. This Article answers those questions, offering the only comprehensive analysis in the law review literature of a Rignao tax. It first justifies a Rignano tax as a normative matter, delving more deeply into both expert and lay arguments for and against taxing wealth and recent work on the psychology of taxation. Its key normative insight is that a Rignano tax balances the goals of wealth transfer advocates (such as enhancing equality of opportunity and minimizing dynastic transfers of unearned power) with those of opponents of such taxes

9. STEVEN M. SHEFFRIN, TAX FAIRNESS AND FOLK JUSTICE ix–x (2013).

10. *See, e.g.*, SHEFFRIN, *supra* note 9, at ix–xi; Zachary Liscow, *Redistribution for Realists*, 107 IOWA L. REV. 495, 499–500 (2022).

11. Liscow, *supra* note 10.

12. *See, e.g.*, Paul Krugman, Opinion, *Elizabeth Warren Does Teddy Roosevelt*, N.Y. TIMES (Jan. 28, 2019), https://www.nytimes.com/2019/01/28/opinion/elizabeth-warren-tax-plan.html [https://perma.cc/6Y6Y-NY3A].

13. These include socialist Eugenio Rignano, liberal egalitarian Daniel Halliday, and libertarian Robert Nozick. *See* RIGNANO, *supra* note 7; DANIEL HALLIDAY, THE INHERITANCE OF WEALTH: JUSTICE, EQUALITY, AND THE RIGHT TO BEQUEATH (2018); ROBERT NOZICK, THE EXAMINED LIFE: PHILOSOPHICAL MEDITATIONS (1989).

(such as rewarding desert, hard work, and family). By acknowledging both the pros and cons of taxing wealth transfers, a Rignano tax can succeed politically where other proposals fail.

What remains to be resolved are important questions of design and administration. Charting new ground in the literature on Rignano taxes, this Article builds on experience with the existing transfer tax system to elaborate and advance a set of specific and concrete design recommendations for a Rignano tax. These are:

> *Base*: Imposing a tax on gifts and bequests received by an individual when that wealth is the subject of a second transfer;
>
> *Rate*: Levying a rate of 0% on first-generation transfers and 40% on other transfers;
>
> *Valuation*: Using the risk-free rate of return to determine what portion of a gift or bequest is second-generation wealth;
>
> *Frequency*: Taxing generation-skipping transfers;
>
> *Tracing*: Using a first-in-time approach to allocate second-generation wealth;
>
> *Trusts*: Treating distribution as the relevant date for both imposing the tax and "starting the clock" for determining future growth; and
>
> *Transition Rules*: Treating one-sixth to one-third of existing wealth as inherited.

Together, these recommendations build upon the insights of the psychology literature to craft an inheritance tax system that balances how the public actually thinks about taxation with the goals of inheritance tax supporters. Taxing heirs instead of transferors harnesses the insight that people silo beliefs about wealth, distinguishing between inherited and earned wealth. It also lessens the pull of moral mandates about double taxation and hard work. At the same time, it reflects the moral intuitions shared by most supporters of inheritance taxation. For example, many of the concerns raised by inherited wealth—such as equality of opportunity—are best measured by how much wealth a given person inherits, not how much total wealth an individual bequeaths without regard to how that wealth is divided among beneficiaries.

Imposing a zero rate on initial transfers of earned wealth likewise diminishes the attraction of the double taxation and hard work arguments. It also minimizes the threat that people often feel when systems of which they are a part—such as the family or an economy that rewards hard work and entrepreneurship—are undermined. By suggesting a rate of forty percent for later transfers, it acknowledges that repeated wealth transfers raise normative

concerns without breaching the fifty percent threshold that is especially salient in tax debates.

Other recommendations address valuation and liquidity concerns to increase administrability and decrease opposition triggered by those difficulties. For example, even though most normative considerations suggest taxing trust beneficiaries when their interests vest, this Article proposes taxing them at distribution. At that point, accurate valuations—and not just estimates—can be made, and liquidity concerns disappear. This acknowledges the instinct many people have that taxing "paper gains" is unfair. And using the risk-free rate of return to determine what portion of an inheritance's growth is earned versus unearned provides a simple, easy to administer method for distinguishing what portion of a second transfer is old money versus new.

A Rignano tax thus charts a course through the competing beliefs held by both supporters and opponents of inheritance taxation. Although implementing one will require some additional complexity and recordkeeping, these burdens are not insurmountable. Several European countries tax some bequests more heavily than others depending on the relationship between the transferor and transferee.[14] And for the last decade or so, our current system has successfully allowed one spouse's estate tax consequences to turn on the value of the other spouse's property as well as actions taken by the predeceased spouse's executor at his or her prior death. This suggests that tying a recipient's tax burden to the actions of the transferor is feasible. Administrative concerns therefore do not derail a Rignano tax's carefully charted course. What remains is a workable inheritance tax system that can gain traction with the public where other proposals fail.

This Article proceeds as follows. Section I offers an overview of the current estate and gift tax system and common alternatives. Section II explores the arguments for and against taxing wealth transfers. Section III describes the justifications for a Rignano tax, and Section IV details what implementing a Rignano tax would entail. Section V concludes by assessing how well a Rignano tax balances competing intuitions concerning inherited wealth and concludes that the Rignano tax is worth pursuing notwithstanding the potential complexities that attach to its design and implementation.

14. OECD TAX POLICY STUDIES, INHERITANCE TAXATION IN OECD COUNTRIES 7 (2021).

I. AN OVERVIEW OF WEALTH TRANSFER TAXATION

Taxing wealth transfers is a longstanding feature of our federal tax system. Our current estate tax dates from 1916, when Congress imposed a tax ranging from one percent on estates over $50,000 to ten percent on estates over $5,000,000.[15] To prevent individuals from avoiding the tax by making lifetime gifts instead of bequests, Congress permanently added a gift tax a few years later.[16] This system is "unified," meaning that it taxes an individual's gratuitous transfers once they cumulatively exceed a per-transferor exemption amount, whether those transfers are gifts or bequests.[17] For simplicity, this Article refers to this unified structure as the "estate tax."

Due to changes in the exemption and rates, the tax's bite has fluctuated dramatically over the past two decades.[18] As recently as the year 2000, the top rate was 55 percent; by 2013, it had dropped to 40 percent, where it remains.[19] As rates were dropping, the exemption was increasing. Between 2000 and 2017, it grew from a comparatively small $675,000 to over $5,000,000,[20] and in 2017, the Tax Cuts and Jobs Act temporarily doubled the exemption to $10,000,000[21] (adjusted for inflation to $13,990,000 in 2025[22]). Although the exemption was scheduled to return to a benchmark of $5,000,000 in 2026, legislation in the summer of 2025 permanently increased it to $15,000,000, adjusted for inflation, starting in 2026.[23] Given the exemption's size, the estate tax affects only a tiny sliver of the population. In 2020, roughly 4,100 estates were required to file an estate tax return,[24] and of those, only about 1,900 actually owed any estate tax—less

15. *See* JOINT COMM. ON TAX'N, HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM, JCX-52-15 (March 16, 2015). Adjusted for inflation to 2025 dollars, these figures are roughly $1,560,000 and $155,760,000, respectively. *See* Bureau of Labor Stat., *CPI Inflation Calculator*, U.S. DEP'T OF LAB., https://www.bls.gov/data/inflation_calculator.htm [https://perma.cc/ESR2-E45E] [hereinafter *CPI Inflation Calculator*].

16. JOINT COMM. ON TAX'N, HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM, JCX-52-15 (March 16, 2015).

17. The taxes are structured as excise taxes on the transfer of wealth by gift or bequest, instead of a tax directly on wealth, to avoid potential constitutional concerns. *See infra* Section II.A.4.

18. *See* JOINT COMM. ON TAX'N, *supra* note 15, at 39.

19. *See id.*, at 12.

20. *Id.*

21. Tax Cuts and Jobs Act, Pub. L. No. 115-97, §11061, 131 Stat. 2091 (2017).

22. *Rev. Proc*. 2024-40.

23. One Big Beautiful Bill Act, Pub. L. No. 119-21 (2025).

24. An estate must file a return if the gross estate is over the exemption amount. Filing a return, however, does not equate to actually paying any estate tax. An estate over the exemption amount can avoid tax by using the marital or charitable deduction to reduce the size of the taxable estate to under the exemption amount. *How Many People Pay the Estate Tax?*, TAX POL'Y CTR'S BRIEFING BOOK (May 2020), https://www.taxpolicycenter.org/briefing-book/how-many-people-pay-estate-tax [https://perma.cc/XZD7-XDHY].

than 0.1 percent of the estimated 2,800,000 decedents that year.[25] Despite the small number of taxable returns, the tax raises a non-trivial amount of revenue—roughly $16 billion in 2020.[26] Interestingly, the amount of revenue has not decreased as fast as the number of taxable estates has decreased, which suggests that exempting additional transfers from tax (as a Rignano tax would) would not necessarily eviscerate the tax's revenue-raising capacity.[27]

A few features of the estate tax merit mention. First, it focuses on the transferor. This contrasts with recipient-focused taxes, such as the inheritance or accessions tax schemes that are more common abroad.[28] Other than the marital and charitable deductions, the estate tax does not distinguish among recipients. Consider *Anna*, whose wealth totals $15,000,000. She is taxed the same whether she transfers her fortune to one child or splits it among ten cousins.

Second, individuals may make a number of tax-free transfers. Most importantly, each individual has a single lifetime exemption amount—currently $13.99 million—which applies to her cumulative wealth transfers.[29] Assume that *Anna* gifts her daughter $10 million during life and later dies with an estate of $5 million. The lifetime gift uses up most of her exemption amount, leaving only $3.99 million of it left for later transfers. At her death, $3.99 million of her estate will be shielded from tax by the rest of her exemption amount, and the remaining $1.1 million of her estate will be taxed. She does not get a new exemption for her bequests. In addition, the annual exclusion allows each individual to exclude the first $19,000 transferred to each recipient each year from the above calculations.[30] *Anna* can give as many people as she likes—her whole Tax I class, perhaps—$19,000, and the gifts are simply ignored. *Anna* can do this year after year, and the gifts do not use up any of her exemption amount. Further, there are

25. *Id.* Even in 2001, when the exemption was a much smaller $1,000,000, the tax affected relatively few decedents. Out of over 2,400,000 deaths that year, only 109,600 decedents were required to file an estate tax return and only 50,500—just over two percent—owed any estate tax. Author's calculation based on *id.* and Elizabeth Arias, Robert N. Anderson, Hsiang-Ching Kung, Sherry L. Murphy & Kenneth D. Kochanek, *Deaths: Final Data for 2001*, 52 NAT'L VITAL STAT. REPS. (Sept. 18, 2003).

26. *See How Many People Pay the Estate Tax?*, *supra* note 24.

27. *Id.* at tbl. 1.

28. OECD, *supra* note 14. In an accessions tax, a recipient is taxed cumulatively once the total amount of gifts and bequests received over his or her lifetime exceeds an exemption amount. Inheritance taxes also focus on the recipient but impose a discrete tax on each transfer that often turns on the relationship between the transferor and recipient.

29. *Rev. Proc*. 2024-40.

30. *Id.*; I.R.C. § 2503(b)(1).

unlimited deductions for marital[31] and charitable transfers.[32] If *Anna* bequeaths her entire estate to her spouse, her taxable estate is zero. She does not need to use her exemption amount, and it rolls over to her spouse for later use. Likewise, if *Anna* bequeaths her $15,000,000 to charity, her taxable estate is zero. In this case, however, her unused exemption simply disappears.

Third, the generation-skipping transfer tax precludes families from minimizing their total tax burden by "skipping" generations. If *Anna* bequeaths her estate to her daughter *Bonnie*, who in turn bequeaths the wealth to *Anna*'s granddaughter *Chloe*, the estate tax is imposed twice. But if *Anna* skips *Bonnie* and bequeaths her wealth directly to *Chloe*, the estate tax is imposed only once. To equalize the tax burden in these situations, the generation-skipping tax imposes a tax on transfers that "skip" generations.

Finally, this system is separate from the income tax. Gifts and bequests received are not included in a recipient's income, regardless of size.[33] Later income tax consequences to the transferee depend on whether the transfer is a gift or bequest.[34] Assume that *Anna* buys stock for $100 and transfers it to *Bonnie* when it is worth $1,000. If the transfer is a gift, *Bonnie* takes *Anna*'s basis for income tax purposes and will pay tax on the $900 unrealized gain upon disposition.[35] If *Anna* bequeaths the stock to *Bonnie*, *Bonnie* takes a fair market value basis of $1,000.[36] The $900 gain that accrued in *Anna*'s hands disappears.

A transferor-focused estate tax is just one possible way of taxing wealth transfers. Numerous OECD countries, including Belgium, France, Germany, Japan, Spain, and Switzerland, impose either accessions or inheritance taxes that focus on beneficiaries.[37] Although the two terms are often used interchangeably, they are technically distinct.[38] The former taxes the recipient based on the total amount of gifts and bequests received during her lifetime, while the latter taxes the beneficiary on such receipts annually.[39]

31. I.R.C § 2056 (estate tax marital deduction); I.R.C § 2523 (gift tax marital deduction).

32. I.R.C § 2055 (estate tax charitable deduction); I.R.C § 2522 (gift tax charitable deduction).

33. *Rev. Proc*. 2024-40.

34. I.R.C § 1015.

35. I.R.C § 1015.

36. I.R.C § 1014. For a critique of this rule and a comprehensive set of proposed alternatives, see Calvin H. Johnson, *Cut Negative Tax out of Step-Up at Death*, 156 TAX NOTES 741 (2017); Calvin Johnson, *Step-Up at Death but Not for Income*, 156 TAX NOTES 1023 (2017); and Calvin Johnson, *Gain Realized in Life Should Not Disappear by a Step-Up in Basis*, 156 TAX NOTES 1305 (2017).

37. OECD, *supra* note 14.

38. *See, e.g.*, Alstott, *supra* note 5, at 502 (using both "accessions tax" and "inheritance tax" to refer to a cumulative accessions tax, and "annual inheritance tax" to refer to an annual inheritance tax).

39. *Id.*

Inheritance tax rates often vary based on the relationship between the donor and beneficiary, with transfers between close relatives taxed more lightly than transfers between more distant relatives and unrelated individuals. Finally, both accessions and inheritance tax systems generally exempt transfers between spouses.

An alternative to taxing gifts and bequests through a separate estate, inheritance, or accessions tax system is to change their income tax treatment. Most obviously, gifts and bequests could be included in income, just like salary or lottery winnings.[40] Although this is fairly rare, Latvia and Lithuania do this, and Lily Batchelder's "comprehensive inheritance tax" is essentially an income inclusion scheme.[41]

Another option is to use carry-over basis for bequests as well as gifts so that when transferees sell, they will pay tax on any gain that accrued to the donor regardless of whether the transfer is a gift or bequest (returning to *Anna* and *Bonnie*, *Bonnie* would pay tax on the $900 gain that accrued in *Anna's* hands in both circumstances). The U.S. has briefly experimented with carry-over basis twice before—once in 1976 (although it was repealed before going into effect) and again in 2010 (that year, estates could choose between the regular estate tax or a system without an estate tax but with carry-over basis).[42] And finally, gifts and bequests could be treated as realization events to the donor that trigger tax on unrealized appreciation at the time of transfer.[43] The United Kingdom[44] and Australia[45] treat gifts as realization events. Canada takes this approach at death, and former President Biden and numerous Senators have proposed that the U.S. follow suit.[46] In theory, one could both change the income tax treatment of gifts and bequests and impose a separate wealth transfer tax, but in the real world, they tend to be treated as either/or propositions due to political concerns.

40. I.R.C § 61(a) (compensation); I.R.C § 74 (prizes).

41. Specifically, Batchelder proposes that once cumulative gifts and bequests received exceed an exemption amount of $1.9 million, they be included in income and taxed at the beneficiary's ordinary rate plus 15%. Batchelder, *supra* note 5, at 62.

42. Richard Schmalbeck, Jay A. Soled & Kathleen DeLaney Thomas, *Advocating a Carryover Tax Basis Regime*, 93 N.D. L. REV. 109, 111–12 (2017); *What is the difference between carryover basis and a step-up in basis?*, TAX POL'Y CENTER (Jan. 2024), https://taxpolicycenter.org/briefing-book/what-difference-between-carryover-basis-and-step-basis.

43. Joseph M. Dodge, *A Deemed Realization Approach Is Superior to Carryover Basis (and Avoids Most of the Problems of the Estate and Gift Tax)*, 54 TAX L. REV. 421, 431 (2001); Lawrence Zelenak, *Taxing Gains at Death*, 46 VAND. L. REV. 361 (1993).

44. *Capital Gains Tax: What You Pay It On, Rates and Allowances*, GOV.UK, https://www.gov.uk/capital-gains-tax/gifts [https://perma.cc/M7CS-S24A].

45. *Tax On Gifts and Inheritances*, AUSTRALIAN TAXATION OFFICE (Aug. 14, 2024), https://community.ato.gov.au/s/article/a079s0000009GnFAAU/tax-on-gifts-and-inheritances.

46. JANE G. GRAVELLE, CONG. RSCH. SERV., IF11812, TAX TREATMENT OF CAPITAL GAINS AT DEATH (2021).

II. THE STATE OF THE DEBATE OVER ESTATE TAXES

Taxing wealth transfers is extremely controversial. As the foregoing history demonstrates, opponents have successfully pursued legislation that has drastically weakened the estate tax over the past two decades. In spite (or perhaps because) of this political history, taxing wealth transfers (as well as wealth itself) remains popular with a substantial portion of the public.[47] Supporters of wealth transfer taxation focus on egalitarian and welfarist justifications, while opponents generally rely on libertarian arguments. This Article's goal is not to evaluate the strengths and weaknesses of those arguments in depth, which an extensive body of work does elsewhere. Instead, it is to provide an overview of this debate so that readers can better understand how people think about the estate tax so that they can evaluate the attractions of a Rignano tax.

A. ARGUMENTS IN FAVOR OF WEALTH TRANSFER TAXATION

1. Equality of Opportunity

Perhaps the most popular argument for taxing wealth transfers stems from the principle of equality of opportunity.[48] This ideal holds that each individual—regardless of arbitrary characteristics such as race or gender—should have an equal shot at pursuing her vision of the good life, while still bearing responsibility for her decisions.[49] In tax and legal scholarship, the most common instantiations require "redistribution from those with greater means and opportunities to those with less."[50]

47. *See* Thorndike, *supra* note 3.

48. *See, e.g.*, Alstott, *supra* note 5, at 470; Ascher, *supra* note 5, at 87–89; Barbara H. Fried, *Compared to What? Taxing Brute Luck and Other Second-Best Problems,* 53 TAX L. REV. 377, 385–95 (2000); Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 274–78 (1983); McCaffery, *supra* note 5, at 291–92; Eric Rakowski, *Can Wealth Taxes Be Justified?*, 53 TAX L. REV. 263, 264–65 (2000) [hereinafter Rakowski, *Wealth Taxes*]; Eric Rakowski, *Transferring Wealth Liberally*, 51 TAX L. REV. 419, 430 (1996) [hereinafter Rakowski, *Transferring Wealth*].

49. WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 58 (2d ed. 2002); Alstott, *supra* note 5, at 476–77. Although most Americans subscribe to this ideal, *see, e.g.*, BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY 1 (1999); Marjorie E. Kornhauser, *Choosing a Tax Structure in the Face of Disagreement*, 52 UCLA L. REV. 1697, 1728 (2005), the meaning of the principle is contested. *See infra* Section II.B.1.

50. Rakowski, *Wealth Taxes*, *supra* note 48, at 265.

These "liberal egalitarian" theories[51] rest on two arguments. First, the financial circumstances of birth impact one's ability to develop one's talents. An intelligent child born to poor parents generally does not have the same educational opportunities as one born to wealthy parents.[52] Well-off parents can afford private school tuition or a house in a high-quality school district,[53] tutors, and challenging after-school programs. Parents of athletes pay for private coaches, travel teams, and expensive summer camps. Well-off children do not have to work to help pay the rent but can instead spend time on their studies and resume-building activities like internships. And once a child is grown, wealthy parents can provide seed money for a business, pay for graduate school, or cover the down payment on a house. Second, these circumstances are arbitrary. A child does not choose to be born into a rich or poor family, just as she does not choose her race.

Equal opportunity therefore requires some *ex ante* equalization of resources so that a poor child with an IQ of 150, Mozart's musical genius, or a keen business sense has the same shot at success as a richer child. In theory, taxing wealth transfers both reduces their size (in turn diminishing the advantages of being born into a rich family) and creates revenue to fund redistribution to those with fewer opportunities.[54]

51. In legal scholarship, the two most commonly invoked liberal egalitarian theories are Rawls's democratic equality and resource egalitarianism (sometimes called "luck egalitarianism"). Many readers are likely familiar with Rawls's difference principle, which forms a key part of his conception of democratic equality. *See* JOHN RAWLS, A THEORY OF JUSTICE 63 (rev. ed. 1999). For more on resource egalitarianism, *see also* KYMLICKA, *supra* note 49, at 53; Rakowski, *Transferring Wealth*, *supra* note 48, at 430; Miranda Perry Fleischer, *Equality of Opportunity and the Charitable Tax Subsidies*, 91 B.U. L. REV. 601, 624–32 (2011).

52. HARRY BRIGHOUSE, JUSTICE 48 (2004); RAWLS, *supra* note 51, at 62–63; Alstott, *supra* note 5, at 486.

53. Ann Owens, *Inequality in Children's Contexts: Income Segregation of Households with and Without Children*, 81 AM. SOCIO. REV. 549, 565–67 (2016); Emily Badger, *The One Thing Rich Parents Do for Their Kids That Makes All the Difference*, WASH. POST (May 10, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/05/10/the-incredible-impact-of-rich-parents-fighting-to-live-by-the-very-best-schools [https://perma.cc/BTG3-UQWR].

54. As many have acknowledged, a recipient-focused inheritance tax would better reflect these principles. *See, e.g.*, Alstott, *supra* note 5, at 485–89; Ascher, *supra* note 5, at 71, 87–91; Miranda Perry Fleischer, *Divide and Conquer: Using an Accessions Tax to Combat Dynastic Wealth Transfers*, 57 B.C. L. REV. 913 (2016); MURPHY & NAGEL, *supra* note 8, at 157, 160; David G. Duff, *Taxing Inherited Wealth: A Philosophical Argument*, 6 CAN. J.L. & JURIS. 3, 26–27 (1993). For a detailed exploration of an inheritance tax reflecting these ideals, see Alstott, *supra* note 5.

2. Dynastic Power

A related justification is to minimize the intergenerational transmission of power.[55] As our founders recognized, rejecting hereditable power is one of our fundamental values.[56] Yet great wealth often brings economic and political power over others.[57] Those favoring wealth transfer taxes on these grounds point to the following.

First, money enables one to make substantial political donations. Donors become *de facto* gatekeepers and agenda setters, influencing who more easily stays in the race and which issues gain prominence.[58] Substantial contributions plausibly increase access to elected officials[59] as well as influencing legislative behavior.[60] Large contributors often obtain influential positions such as ambassadorships or bureaucratic posts.[61] Having a lot of money also makes it easier to run for office. Consider recent presidential candidates Tom Steyer[62] and Michael Bloomberg[63] as well as President

55. As with equality of opportunity concerns, however, the current estate tax only loosely addresses these principles because it focuses on transferors instead of transferees. *See, e.g.*, Ascher, *supra* note 5, at 87–99; Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223, 235–36, 258–59; Fleischer, *supra* note 54, at 918–20; Repetti, *supra* note 5, at 828–50.

56. *See, e.g.*, 1 THOMAS JEFFERSON, THE WORKS OF THOMAS JEFFERSON 58 (Paul Leicester Ford ed., 1994).

57. Miranda Perry Fleischer, *Charitable Contributions in an Ideal Estate Tax*, 60 TAX L. REV. 263, 278–79 (2007).

58. Thomas Christiano, *Money in Politics*, *in* THE OXFORD HANDBOOK OF POLITICAL PHILOSOPHY 241, 244–45 (David Estlund ed., 2012).

59. As Donald Trump explained in 2016, "I give to everybody. When they call, I give. And you know what, when I need something from them two years later, three years later, I call them. They are there for me." *See* Jill Ornitz & Ryan Struyk, *Donald Trump's Surprisingly Honest Lessons About Big Money in Politics*, ABC NEWS (Aug. 11, 2015), https://abcnews.go.com/Politics/donald-trumps-surprisingly-honest-lessons-big-money-politics/story?id=32993736 [https://perma.cc/Y6M5-ACBR]. This instinct is both widely held and confirmed by some recent empirical work. *See* Joshua L. Kalla & David E. Broockman, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, 60 AM. J. POL. SCI. 545, 546–50 (2016); Laura I. Langbein, *Money and Access: Some Empirical Evidence*, 48 J. POL. 1052, 1060 (1986). *But see* Michelle L. Chin, Jon R. Bond & Nehemia Geva, *A Foot in the Door: An Experimental Study of PAC and Constituency Effects on Access*, 62 J. POL. 534 (2000).

60. *See, e.g.*, Tara Siegel Bernard, *A Citizen's Guide to Buying Political Access*, N.Y. TIMES (Nov. 18, 2014), https://www.nytimes.com/2014/11/19/your-money/a-citizens-guide-to-buying-political-access-.html [https://web.archive.org/web/20240507101251/https://www.nytimes.com/2014/11/19/your-money/a-citizens-guide-to-buying-political-access-.html]; Amy Melissa McKay, *Fundraising for Favors? Linking Lobbyist-Hosted Fundraisers to Legislative Benefits*, 71 POL. RSCH. Q. 869, 869–76 (2018). Empirical evidence on this point is mixed, however. *Cf.* Christiano, *supra* note 58, at 244 with Kalla & Broockman, *supra* note 59, at 546–48; McKay, *supra*, at 869–70, 871–75.

61. Ryan M. Scoville, *Unqualified Ambassadors*, 69 DUKE L.J. 71, 73 (2019); Christiano, *supra* note 58, at 247.

62. *2020 Presidential Race: Tom Steyer*, OPENSECRETS (MAR. 22, 2021), https://www.opensecrets.org/2020-presidential-race/candidate?id=N00044966 [https://perma.cc/W8LE-3BXC].

63. *2020 Presidential Race: Michael Bloomberg,* OPENSECRETS (MAR. 22, 2021), https://www.opensecrets.org/2020-presidential-race/candidate?id=N00029349 [https://perma.cc/3KHB-PXT5]. *See also* Michael Barbaro, *Bloomberg Spent $102 Million to Win 3rd Term*, N.Y. TIMES (Nov.

Donald Trump.[64] Closer to home, numerous candidates in U.S. Senate and House races[65] and state and local elections[66] have also spent plentiful sums of their own.

Money also allows one to influence public opinion,[67] most directly through unlimited, anonymous contributions to Section 501(c)(4) social welfare organizations that can advocate for and against candidates, lobby, and conduct issue advocacy. The wealthy can shape the media's news and editorial coverage through advertising purchases[68] or from owning media companies directly.[69] And finally, the ability to influence policy (both directly and indirectly) also accompanies wealth.[70] Threats to relocate

27, 2009), https://archive.nytimes.com/cityroom.blogs.nytimes.com/2009/11/27/bloomberg-spent-102-million-to-win-3rd-term [https://perma.cc/X5P5-TRN9]. On criticisms that Bloomberg bought his way into contention, *see, e.g.*, Lisa Lerer, *Michael Bloomberg Is Open to Spending $1 Billion to Defeat Trump,* N.Y. TIMES (Jan. 11, 2020), https://www.nytimes.com/2020/01/11/us/politics/michael-bloomberg-spending.html [https://perma.cc/KKA2-8TW3]; Nathan J. Robinson, *A Republican Plutocrat Tries to Buy the Democratic Nomination*, CURRENT AFFS. (Feb. 9, 2020), https://www.currentaffairs.org/news/2020/02/a-republican-plutocrat-tries-to-buy-the-democratic-nomination [https://perma.cc/6Q9Y-GSHT].

64. Jeremy W. Peters & Rachel Shorey, *Trump Spent Far Less than Clinton, but Paid His Companies Well*, N.Y. TIMES (Dec. 9, 2016), https://www.nytimes.com/2016/12/09/us/politics/campaign-spending-donald-trump-hillary-clinton.html [https://perma.cc/F7W2-BWC2] (although roughly 80% of Trump's funding came from donors, he still spent $65 million of his own money); *2020 Presidential Race: Donald Trump*, OPENSECRETS (MAR. 22, 2021), https://www.opensecrets.org/2020-presidential-race/candidate?id=N00023864 [https://perma.cc/5T8P-XMDS].

65. *See Top Self-Funding Candidates*, OPENSECRETS (MAR. 6, 2019), https://www.opensecrets.org/elections-overview/top-self-funders?cycle=2018 [https://perma.cc/A2QX-EQJX]; Fredreka Schouten, *Trump Effect? Candidates Plow Record Amounts of Their Own Money into Congressional Bids*, CNN POL. (Nov. 5, 2018), https://www.cnn.com/2018/11/05/politics/self-funding-candidates-record-midterms/index.html [https://perma.cc/54U7-GBQ5] (In 2018, 61 self-funders spent almost $213 million, surpassing 2012 record of $166.3 million spent by self-funders).

66. *See, e.g*., Anthony Cotton, *In an Era of Self-Funded Campaigns, Amendment 75 Aims to Even the Odds*, COLO. PUB. RADIO (Nov. 1, 2018), https://www.cpr.org/show-segment/in-an-era-of-self-funded-campaigns-amendment-75-aims-to-even-the-odds [https://perma.cc/58H3-5TBL]; Matt Friedman, *$10M Spent to Self-Fund State Legislative Campaigns Over 30 Years, Analysis Shows*, POLITICO (Sept. 29, 2015), https://www.politico.com/states/new-jersey/story/2015/09/10m-spent-to-self-fund-state-legislative-campaigns-over-30-years-analysis-shows-093323 [https://perma.cc/Y52S-G89B].

67. Christiano, *supra* note 58, at 247–49.

68. *See* James R. Repetti, *Democracy and Opportunity: A New Paradigm in Tax Equity*, 61 VAND. L. REV. 1129, 1158 & n.138 (2008).

69. Think of the Sulzbergers (the New York Times); the Grahams (the Washington Post); and the Murdochs (Fox News, the Wall Street Journal, and various British and Australian outlets). *See* Sydney Ember, *A.G. Sulzberger, 37, to Take Over as New York Times Publisher*, N.Y. TIMES (Dec. 14, 2017), https://www.nytimes.com/2017/12/14/business/media/a-g-sulzberger-new-york-times-publisher.html [https://perma.cc/C5WW-FFK4]; Robert Barnes & David A. Fahrenthold, *The Grahams: A Family Synonymous with the Post and with Washington*, WASH. POST (Aug. 5, 2013), https://www.washingtonpost.com/politics/the-grahams-a-family-synonymous-with-the-post-and-with-washington/2013/08/05/94f26d04-fe1a-11e2-96a8-d3b921c0924a_story.html [https://perma.cc/P96S-K24D]; Jonathan Mahler & Jim Rutenberg, *How Rupert Murdoch's Empire of Influence Remade the World*, N.Y. TIMES (Apr. 3, 2019), https://www.nytimes.com/interactive/2019/04/03/magazine/rupert-murdoch-fox-news-trump.html [https://perma.cc/VWQ9-63GG].

70. *See, e.g.*, MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 121 (1983).

businesses, cancel events, or abandon planned openings or expansions can influence elected officials eager to protect local economies, even when the policies in question are not directly business-related.[71] Business leaders are often consulted for advice by policymakers,[72] be it through informal conversations or official advisory councils.[73] And more directly, such leaders are often named to policy-making positions that require special knowledge precisely because of the skills and expertise that made them successful. Lastly, the traits that bring business success often enable business leaders to naturally become civic leaders.[74]

Wealth can also mean having economic power over others, especially in areas where a few families dominate economic life. Although the days of official company towns are long-gone, some influential families still control much of the employment opportunities in certain communities—for example, the Kohler family in Wisconsin.[75] Elsewhere, residents might depend on a small set of firms for groceries, housing or other needs, such as cars. Decisions about what food to stock and at what prices, whether to raise rents or wages, expand or close a firm, and the like directly impact residents'

71. *See, e.g.*, Cindy Carcamo, *Arizona Gov. Jan Brewer Vetoes So-Called Anti-Gay Bill*, L.A. TIMES (Feb. 26, 2014), https://www.latimes.com/nation/nationnow/la-na-nn-arizona-gay-brewer-20140226-story.html [https://perma.cc/K9NA-FYNY]; Dan Levin, *North Carolina Reaches Settlement on 'Bathroom Bill,'* N.Y. TIMES (July 23, 2019), https://www.nytimes.com/2019/07/23/us/north-carolina-transgender-bathrooms.html [https://perma.cc/THP2-PFCD].

72. Christiano, *supra* note 58, at 247.

73. *See, e.g.*, Anita Kumar, *Trump Hands US Policy Writing to Shadow Groups of Business Execs,* MIA. HERALD (Aug. 7, 2017), https://www.miamiherald.com/news/politics-government/article165742702.html [https://web.archive.org/web/20170807124254/https://www.miamiherald.com/news/politics-government/article165742702.html] ("Presidents of both parties have long deployed advisory groups to help develop policy, occasionally running into criticism for failing to disclose more."); *Local Advisory Boards and Commissions*, MUN. RSCH. & SERV. CTR. WASH, https://mrsc.org/explore-topics/engagement/volunteers/advisory-boards [https://perma.cc/93L5-23LT] (offering examples and model practices for citizen advisory boards). Such councils are especially common for schools and neighborhood development issues. *See, e.g.*, *Business Advisory Councils in Ohio Schools*, OHIO DEP'T EDUC., https://www.lresc.org/Downloads/Business-Advisory-Council-Operating-Standards_2025.pdf?v=-244 [https://perma.cc/P762-NXWH]; *Business Advisory Council*, WOOSTER CITY SCH. DIST. https://www.woostercityschools.org/community/business-advisory-council [https://perma.cc/2XLV-L49D]; Gary Rivlin, *A Mogul Who Would Rebuild New Orleans*, N.Y. TIMES (Sept. 29, 2005), https://www.nytimes.com/2005/09/29/business/a-mogul-who-would-rebuild-new-orleans.html [https://perma.cc/2BG2-VXM9] (discussing the influence of businessmen during post-Katrina decisions); Edward Wyatt, *Panel of Politicians Is to Advise in Rebuilding*, N.Y. TIMES (Feb. 1, 2002), https://www.nytimes.com/2002/02/01/nyregion/panel-of-politicians-is-to-advise-in-rebuilding.html.

74. Repetti, *supra* note 68, at 1158; Pete Carlson, *Developing More and Better Regional Business-Civic Leaders*, BROOKINGS (Aug. 28, 2015), https://www.brookings.edu/articles/developing-more-and-better-regional-business-civic-leaders [https://perma.cc/6M9J-566E].

75. Andrew Weiland, *Deloitte Reveals Its Annual List of Wisconsin's Largest Privately-Held Companies*, BIZTIMES (Sept. 27, 2022, 2:52 PM), https://biztimes.com/deloitte-reveals-its-annual-list-of-wisconsins-largest-privately-held-companies [https://perma.cc/J4JK-CZT9]; *Kohler Family*, FORBES (Feb. 8, 2024), https://www.forbes.com/profile/kohler [https://perma.cc/4P5J-FFVS].

lives.[76] Handing the family business (or controlling chunks of publicly traded companies) down to one's heirs is therefore tantamount to handing them economic power over others.

3. Inheritances and Ability to Pay

A third justification for taxing wealth transfers proceeds from the principle that political institutions should maximize welfare.[77] This argument equates welfare with utility and assumes that individuals have identical utility functions that decline as wealth and income increase.[78] Redistribution from an individual with more income or wealth to an individual with less thus increases overall utility. The catch is that taxing higher-income (or higher-wealth) individuals may lead to reduced labor and investment, decreasing overall welfare. The optimal tax literature thus argues that the ideal solution would be to tax ability, which cannot be minimized the way one can choose to work less.[79] But since ability cannot be directly observed, the next best is to tax income as a proxy.[80]

Starting from this premise, some theorists argue that gifts and bequests *received* also reflect well-being and ability and should be taxed as proxies therefore.[81] The reasoning is two-fold. If you are comparing two individuals with identical labor income, ignoring the fact that one receives a large inheritance is nonsensical—just as ignoring any other inflow, such as winning the lottery, would be. Second, the receipt of gifts and bequests is linked to a variety of "nonfinancial inherited assets and traits that powerfully affect earning ability."[82] These theorists generally reject the standard optimal tax account that taxing capital (which an estate tax does) creates too many economic distortions on three grounds.[83] First, they argue that this account overestimates the share of bequests made for reasons that are responsive to

76. For more examples, see Fleischer, *supra* note 57, at 280–81.

77. In the legal and economic literature, welfarism is the predominate approach to the normative analysis of taxes and transfers. *See* Sarah B. Lawsky, *On the Edge: Declining Marginal Utility and Tax Policy*, 95 MINN. L. REV. 904, 910–11 (2011). For more about welfarism, see, e.g., KYMLICKA, *supra* note 49, at 10; MURPHY & NAGEL, *supra* note 8, at 51; RAWLS, *supra* note 51, at 20. For the most complete analysis of the welfarist justification for taxing wealth transfers, see Batchelder, *supra* note 5.

78. Batchelder, *supra* note 5, at 11–12.

79. *Id.* at 12.

80. *Id.* at 12–13.

81. *Id.* at 2, 13.

82. *Id*. at 23.

83. *See, e.g.*, N. Gregory Mankiw, Matthew Weinzierl & Danny Yagan, *Optimal Taxation in Theory and Practice*, 23 J. ECON. PERSPS. 147, 159–61 (2009); George R. Zodrow, *Should Capital Income Be Subject to Consumption-Based Taxation?*, *in* TAXING CAPITAL INCOME 49, 49–81 (Henry J. Aaron et al. eds., 2007). This view, however, is not uniform. *See, e.g.*, Peter Diamond & Emmanuel Saez, *The Case for a Progressive Tax: From Basic Research to Policy Recommendations*, 25 J. ECON. PERSPS. 165, 177–83 (2011).

tax versus those that are not responsive. For example, someone who is saving to fund a comfortable retirement or for medical and long-term care as they age, and who "accidentally" leaves whatever is left to their heirs, will not really be influenced by taxation. Second, they contend that observed declines in wealth accumulation that correlate to transfer taxes are plausibly attributable to tax avoidance or increased lifetime gifting rather than reduced savings.[84] Lastly, these theorists note that most studies ignore recipients, who often work less after receiving an inheritance.

4. A Wealth Transfer Tax as a Periodic Wealth Tax

The foregoing arguments focus on the significance of *transferring* wealth. In contrast, a second set of justifications focuses on its very *existence*. But because political and administrative hurdles render taxing wealth itself difficult (if not impossible), taxing wealth transfers is an indirect solution.[85]

Wealth Inequality and Democratic Concerns. A first justification for taxing wealth is to protect our democratic institutions.[86] There is a strong link between money and political influence, and people have different amounts of money.[87] As a result, many argue that money muddles the ideal

84. Estimates of the impact of transfer taxes on savings and capital accumulation is mixed, but some recent work suggests a roughly ten percent decrease in savings for the very wealthiest individuals. DAVID JOULFAIAN, THE FEDERAL ESTATE TAX: HISTORY, LAW, AND ECONOMICS 102–07 (2019). For reviews of empirical work on this question, *see id.* at 101–33; Batchelder, *supra* note 5; Wojciech Kopczuk, *Taxation of Intergenerational Transfers and Wealth*, *in* HANDBOOK OF PUBLIC ECONOMICS 329, 329–90 (Alan J. Auerbach et al. eds., 2013).

85. One hurdle is that the Constitution prohibits direct taxes, and the traditional wisdom holds that a wealth tax is a direct tax. *See, e.g.*, Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 4–6; Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution,* 7 WM. & MARY BILL RTS. J. 1, 4–5, 72 (1998); Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?*, 11 U. PA. J. CONST. L. 839 (2009); Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717 (2020); Daniel Hemel & Rebecca Kysar, Opinion, *The Big Problem with Wealth Taxes*, N.Y. TIMES (Nov. 7, 2019), https://www.nytimes.com/2019/11/07/opinion/wealth-tax-constitution.html [https://web.archive.org/web/20191107111051/https://www.nytimes.com/2019/11/07/opinion/wealth-tax-constitution.html]. A second difficulty of taxing wealth directly is administrative. An annual wealth tax requires annual valuations, which historically have been costly, complicated, and encouraged the use of techniques that artificially deflate value. This perception remains, although recent work suggests these concerns might be overstated. David Gamage, Ari Glogower & Kitty Richards, *How to Measure and Value Wealth for a Federal Wealth Tax Reform*, ROOSEVELT INST. (Apr. 1, 2021), https://rooseveltinstitute.org/wp-content/uploads/2021/03/RI_Wealth Tax_Report_202104.pdf [https://perma.cc/4VX6-S4WB]. For more on these concerns, see Miranda Perry Fleischer, *Not So Fast: The Hidden Difficulties of Taxing Wealth*, 58 NOMOS: WEALTH 261 (2017). By taxing wealth only once a generation, the estate tax minimizes these concerns.

86. Glogower, *supra* note 5, at 1444–45; Repetti, *supra* note 68, at 1154–60.

87. Christiano, *supra* note 58; Daniel P. Tokaji, *Vote Dissociation*, 127 YALE L.J. F. 761, 771–74 (2018). In 2016, almost one-third of families with incomes over $150,000 made a political donation, compared to 7% of families with incomes under $30,000. Adam Hughes, *5 Facts About U.S. Political Donations*, PEW RSCH. CTR. (May 17, 2017), https://www.pewresearch.org/short-reads/2017/05/17/5-facts-about-u-s-political-donations [https://perma.cc/J673-6TQZ]. Disproportionate spending is

that "the political system should . . . treat[] all citizens as free and equal participants."[88] One concern is that the preferences of constituents with money will be prioritized over those without.[89] A growing body of evidence suggests that policymakers are more responsive to the views of the former;[90] this phenomenon has been observed at both the state[91] and federal level,[92] across a range of policies,[93] and especially when the two sets of views diverge.[94] This is both fundamentally at odds with a core tenet of democracy,[95] and creates a second harm by distorting the deliberative process.[96] If the system ignores information about the preferences of a large chunk of society, policymakers may lack all the information necessary to make fully-informed decisions. This vacuum also prevents the deliberative system from benefiting from a diversity of viewpoints.[97] A similar yet distinct harm from overweighting the preferences of the affluent is inefficiency. Here, the concern is that neither the harms to the non-affluent from policies favored by the wealthy nor the benefits from policies favoring the non-affluent will be taken into account. As a result, the true costs of a

especially pronounced among the ultra-wealthy: In 2012, for example, the top 0.01% earned about 5% of all income yet accounted for roughly 40% of all campaign contributions. Adam Bonica, Nolan McCarty, Keith T. Poole & Howard Rosenthal, *Why Hasn't Democracy Slowed Rising Inequality?*, 27 J. ECON. PERSPS. 103, 111–12 (2013).

88. Christiano, *supra* note 58, at 241; *see also* Tokaji, *supra* note 87. These concerns are distinct from those discussed in Section III.A.2. That discussion focused on the ways in which money plausibly provides political influence; this focuses on the harms from the resulting unequal influence.

89. *See, e.g.*, Christiano, *supra* note 58, at 245; Glogower, *supra* note 5, at 1442; Repetti, *supra* note 68; Tokaji, *supra* note 87, at 763, 769–74.

90. Bonica et al., *supra* note 87, at 118 (summarizing evidence); Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1577–79 (2015) (same); Tokaji, *supra* note 87, at 772 (same). *But see* Dylan Matthews, *Remember that Study Saying America Is an Oligarchy? 3 Rebuttals Say It's Wrong.*, VOX (May 9, 2016), https://www.vox.com/2016/5/9/11502464/gilens-page-oligarchy-study [https://perma.cc/5B6X-UW6Q].

91. Patrick Flavin, *Income Inequality and Policy Representation in the American States*, 40 AM. POL. RSCH. 29, 46 (2012); Elizabeth Rigby & Gerald C. Wright, *Whose Statehouse Democracy? Policy Responsiveness to Poor Versus Rich Constituents in Poor Versus Rich States*, *in* WHO GETS REPRESENTED 189 (Peter K. Enns & Christopher Wlezien eds., 2011).

92. *See* LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE, 253, 252–82 (2008); Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OP. Q. 778, 786–89 (2005).

93. Flavin, *supra* note 91, at 46; Rigby & Wright, *supra* note 91; BARTELS, *supra* note 92, at 267.

94. Bonica et al., *supra* note 87, at 118; Gilens, *supra* note 92, at 789.

95. Christiano, *supra* note 58, at 245–46, 252 ("The interests of most people are not treated as worthy of much consideration. This seems to me to violate the most fundamental principle animating democracy . . . ."); ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 1 (1971) ("[A] key characteristic of a democracy is the continuing responsiveness of the government to the preferences of its citizens, considered as political equals.").

96. Christiano, *supra* note 58, at 246.

97. *Id.* at 252.

variety of policies are obscured, potentially resulting in indirect redistribution to the affluent.[98]

Economic Externalities from Wealth Concentrations. A similar justification for taxing wealth is that large wealth concentrations harm the economy.[99] Although short-run studies are mixed, several long-run studies suggest that highly unequal concentrations of wealth are negatively correlated with economic growth.[100] Several plausible explanations exist, but two appear most likely.

First, high levels of inequality might lead to underinvestment in education and health. Poorer families often face borrowing constraints that encourage young adults to enter the workforce rather than continue with schooling that increases skills and later income. In turn, fewer resources will be available to pass on to the next generation, compounding the cycle.[101] A complex link between wealth, fertility, and education may also exist. Wealthier families tend to have fewer children, leading to greater investment in each one; the opposite is generally true for less-wealthy families.[102] At the societal level, societies with higher levels of inequality may invest less in educational opportunities for the less well-off.[103]

Somewhat similarly, high levels of inequality might decrease societal investment in health care.[104] And on the micro-level, having a relatively low income or social status might negatively impact an individual's health, which imposes costs in terms of lost human capital and diverted financial resources.[105] Second, unequal concentrations of wealth are linked to social unrest and diminishing social cohesion, both of which can also contribute to slower economic growth in a number of ways.[106] It is plausible that in highly unequal societies, individuals engage in more rent-seeking, which misallocates resources. Inequality also contributes to sociopolitical instability, which both disrupts normal market and economic activities (think

98. *Id.*

99. *See, e.g.*, Repetti, *supra* note 68, at 1149. This argument contradicts a common view that inequality encourages growth because it motivates lower-income individuals to work harder and because the wealthy have both the capacity to make capital investments and a higher propensity to save. *Id.*

100. *Id.* at 1148–49.

101. Roberto Perotti, *Growth, Income Distribution, and Democracy: What the Data Say*, 1 J. ECON. GROWTH 149, 152, 177–82 (1996)

102. *Id.* at 153, 177–82.

103. *See, e.g.*, Ichiro Kawachi, Bruce P. Kennedy, Kimberly Lochner, Deborah Prothrow-Stith, *Social Capital, Income Inequality, and Mortality*, 87 AM. J. PUB. HEALTH 1491, 1497 (1997).

104. *Id.* at 1491.

105. *Id.*

106. *Id.*

of labor strikes) and creates an environment of political and legal uncertainty.[107]

Owning Wealth and Ability to Pay. A final justification for taxing wealth is that simply holding it reflects ability to pay. Consider two people who each have $75,000 of labor income. If one also has several million dollars in the bank, shouldn't that change our assessment of whether the two have an equal ability to pay tax?[108] After all, the mere existence of wealth enhances one's financial capacity.[109] It also brings comfort, security, and status, all of which are intrinsically valuable and plausibly make it easier to generate even more wealth.[110] Second, recall the welfarist ideal that tax burdens should track ability or endowment, and that income is the best proxy. Due to the realization requirement, our income tax system does not tax all economic income as it accrues. Some therefore propose taxing wealth periodically to capture the same measure more fully.

B. ARGUMENTS AGAINST WEALTH TRANSFER TAXATION

While advocates of wealth transfer taxes tend to rely on arguments that reflect egalitarian and welfarist ideals, opponents generally ground their criticisms in libertarian and libertarian-adjacent arguments about efficiency, property rights, and the appropriate role of government. These can be a bit hard to categorize because scholarly opposition to wealth transfer taxes is scant in comparison to scholarly support. Most of the arguments made by everyday estate tax supporters are also fleshed out with care by academics. This is less true, however, for many of the opinions held by everyday estate tax opponents. Nonetheless, we can sort these critiques into roughly two groups.[111] The first set opposes wealth transfer taxes because they have differing normative visions of the role of government, a just distribution of resources, and fairness. The last set focuses on the efficiency of wealth transfer taxes to argue that they are themselves harmful.

107. Perotti, *supra* note 101, at 151, 173–77.

108. This question has become especially acute in recent years, as numerous entrepreneurs have minimal salary income yet have massive amounts of wealth. In 2019, for example, Amazon's Jeff Bezos earned a salary of $81,840. Numerous other tech founders and CEOs, including Larry Page (Google), Sergey Brin (Google), Jack Dorsey (Twitter), Larry Ellison (Oracle) and Mark Zuckerberg (Meta), have all drawn salaries of roughly $1 in recent years. David Goldman, *Jeff Bezos Made $81,840 Last Year. He's Still the Richest Person in the World.*, CNN BUS. (Apr. 11, 2019), https://www.cnn.com/2019/04/11/tech/jeff-bezos-pay/index.html [https://perma.cc/ECH4-PANT]; Rachel Gillett & Marissa Perino, *13 Top Executives Who Earn a $1 Salary or Less*, INSIDER (July 22, 2019), https://www.businessinsider.com/ceos-who-take-1-dollar-salary-or-less-2015-8 [https://perma.cc/8JVC-S755].

109. Glogower, *supra* note 5, at 1439–40.

110. *Id.* at 1442.

111. For a more in-depth exploration of many of these arguments, see Miranda Perry Fleischer, *Death and Taxes: A Libertarian Reappraisal*, 39 SOC. PHIL. & POL'Y 90 (2023).

1. Equality of Opportunity Revisited

The argument that equality of opportunity requires redistributing resources from rich to poor is contested.[112] Another interpretation of equal opportunity, known as "careers open to talents" or "the merit principle," instead focuses on open competition.[113] On this view, resources are irrelevant to one's ability to compete for jobs, school admissions and scholarships, and the like; what counts is whether all individuals have a chance as a formal matter to compete.[114] This ensures that positions are awarded based on merit to the most talented, instead of to the less talented due to arbitrary and unrelated characteristics like race or sex. Advocates of the merit principle often point to rags-to-riches stories such as media personality Oprah Winfrey, clothing designer Ralph Lauren, and Starbucks CEO Howard Schultz as proof that formal nondiscrimination sufficiently ensures a level playing field. If one interprets equal opportunity in this manner—as many Americans do—then one would naturally oppose any tax designed to redistribute wealth or income on equality of opportunity grounds, including a wealth transfer tax.

2. Rejecting Declining Marginal Utility and Progressivity

Many similarly contest the various arguments relating to the declining marginal utility of wealth and income. Some oppose the estate tax because they believe that redistribution to maximize welfare is beyond the proper scope of government, even if they accept the premise of declining marginal utility.[115] Others question the assumption itself.[116] Richard Epstein emphasizes, for example, that dollars are not ends unto themselves, but rather means. As he writes, "The decline in the marginal utility of an additional steak after you have already eaten one may be very high. But wealth is convertible into any number of different goods, so in each case the decline in utility has to be measured by referring to the utility of the most desired good as yet unpurchased."[117] And there's some evidence supporting this

112. For more on the various conceptions of equality of opportunity, see Alstott, *supra* note 5; Fleischer, *supra* note 51, at 624–32.

113. BRIGHOUSE, *supra* note 46, at 48 (2004) (" '[C]areers open to talents' states that no-one should be discriminated against at the point of hiring . . . except on grounds strictly relevant to their likely performance in the position."); Alstott, *supra* note 5, at 486 ("[E]very job should go to the most qualified person, regardless of morally irrelevant attributes like race, gender, and so on."); *see also* RAWLS, *supra* note 45, at 62.

114. Alstott, *supra* note 5, at 486 (" '[C]areers open to talents' . . . requires only that people be permitted equal access to jobs for which they are qualified.").

115. Richard A. Epstein, *Taxation in a Lockean World*, 4 SOC. PHIL. & POL'Y 49, 68 (1986).

116. Richard A. Epstein, *Can Anyone Beat the Flat Tax?*, 19 SOC. PHIL. & POL'Y, 140, 143, 169 (2002).

117. *Id.*

view,[118] including work suggesting that although utility likely declines as income rises in the lower range, it then *increases* with income in the middle range before declining again, creating an S-shaped curve.[119]

A related set of critiques reflects the normative dispute over whether the overall tax system should impose progressive or proportionate tax burdens.[120] Supporters of progressivity favor taxes that target the wealthy—such as estate taxes—as a way to increase the progressivity of the overall tax system.[121] Opponents of progressivity naturally oppose such taxes, favoring proportionate taxes for several reasons.[122] Some accept the ideal that tax burdens should track one's ability to pay but reject the assumption that declining marginal utility requires imposing higher tax rates on the wealthy—the "equal sacrifice" argument. If utility does not decline, then taxing everyone at the same rate imposes an equal sacrifice, negating the need for progressive rates.[123]

Others reject the ability-to-pay principle, instead arguing that taxes should reflect how much one benefits from the societal infrastructure (the "benefit" theory). As Friedrich Hayek explains, "since almost all economic activity benefits from the basic services of government, these services form a more or less constant ingredient of all we consume and enjoy and that, therefore, a person who commands more of the resources of society will also gain proportionately more from what the government has contributed."[124] Richard Epstein analogizes the state to a partnership, highlighting that partnerships default to the "pro rata division of gains and losses derived from any common venture," which ensures that "every individual [is] made better

118. For example, Epstein points to the long hours that many wealthy people work and argues that "[t]hese hours of work cumulatively suggest . . . a high marginal utility to wealth, just like ordinary members of the population." *Id.* at 169.

119. *See* Sarah B. Lawsky, *On the Edge: Declining Marginal Utility and Tax Policy*, 95 MINN. L. REV. 904, 929–39 (2011).

120. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 303–05 (1985); VON MISES, *supra* note 6, at 32.

121. See, e.g., Lily L. Batchelder, Leveling the Playing Field between Inherited Income and Income From Work Through an Inheritance Tax, BROOKINGS COMMENT. (January 28, 2020), https://www.brookings.edu/articles/leveling-the-playing-field-between-inherited-income-and-income-from-work-through-an-inheritance-tax [https://perma.cc/A3JF-BYNA]; Jennifer Bird-Pollan, *Why Tax Wealth Transfers?: A Philosophical Analysis*, 57 B.C. L. REV. 859, 880 (2016); Paul L. Caron, *The One Hundredth Anniversary of the Federal Estate Tax: It's Time to Renew our Vows*, 57 B.C. L. REV. 823 (2016); Duff, *supra* note 54, at 9; Graetz, *supra* note 48, at 270.

122. *See, e.g.*, EPSTEIN, *supra* note 120, at 303 ("[P]rogressive transfer taxes are subject to the same objections as progressive income taxes. . . .").

123. *See, e.g.*, Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressivity*, 19 U. CHI. L. REV. 417, 473–79 (1952) (attacking the desirability of progressivity in general); FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY: THE DEFINITIVE EDITION 442, 435–36 (Bruce Caldwell ed., U. Chi. Press 2011) (1960); Epstein, *supra* note 116, at 169.

124. HAYEK, *supra* note 123.

off to the same degree, that is, receive the same rate of return on his proportionate investment in social infrastructure."[125]

3. Private Property Rights

A third normative objection is that estate and inheritance taxes unjustly interfere with private property rights.[126] Supporters of strong private property rights, ranging from John Locke[127] and John Stuart Mill[128] to Robert Nozick[129] and Richard Epstein, overwhelmingly argue that if someone justly acquires property, she has the right to transfer that property however she likes, including by making gifts and bequests.[130] Because estate and inheritance taxes interfere with this right, they are not simply unjust, but *uniquely* unjust. As philosopher Loren Lomasky argues, they are "an especially cruel injury because [they] deprive[] the dead of one of their last opportunities for securing the goods that they value."[131] On this account, choosing to make a gift or bequest expresses the identity of the donor in a way that selling property does not. It is a sign of her affection for the recipient, as well as her values.[132] Just as other intimate family matters relating to the expression of values—such as which holidays to celebrate and whether to go to church—should be immune from state interference, so too should gratuitous transfers. Moreover, gifts and bequests take place in the private realm of the home and neither avail themselves of the market infrastructure nor represent a voluntary entrance into the public sphere. In contrast, most taxable activity—like selling labor or property—represents a voluntary entry into the public sphere whereby one willingly consents to the burdens of taxation in exchange for using the market infrastructure. Perhaps, then, the intrusive burden of taxing gifts and bequests (e.g., tracking, valuing, and reporting) in the private sphere should be given more weight than the burden from taxing transactions in the public marketplace.

125. Epstein, *supra* note 116, at 147.

126. EPSTEIN, *supra* note 120, at 304.

127. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 19–30 (C. B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

128. JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 226 (1848).

129. *See* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 150–53, 157–58, 168 (1974).

130. As legal scholar Richard Epstein explains, this includes "dispositions during life, by gift or by sale, and it includes dispositions at death. . . ." EPSTEIN, *supra* note 120, at 304. In contrast, many left libertarians assert that private property rights end at death and that a decedent's property should revert to common ownership. *See, e.g.*, HILLEL STEINER, AN ESSAY ON RIGHTS 249–60 (1994).

131. LOMASKY, *supra* note 6, at 270.

132. NOZICK, *supra* note 13.

4. Double Taxation

Many also view the estate tax as double taxation.[133] Although this critique is extremely common among members of the public, policymakers and scholars tend to be dismissive of it as betraying a misunderstanding of the broader tax system. They first note that because of the realization requirement,[134] many wealthy individuals have never paid income tax on the increase in value of their investments.[135] Studies suggest that untaxed appreciation comprises an average of 32% of smaller estates (a few million dollars) to 55% of large estates (those in the $100 million range).[136] To some extent, then, estate tax supporters are correct that opponents wielding the double taxation argument either misunderstand this point or overstate their case.

But what about wealth that has already been taxed, such as labor income invested in assets such as taxable savings accounts? Estate tax opponents are correct that an estate tax taxes this twice.[137] And to many, that just seems unfair on a gut level, despite various counterarguments. One counter is that the same income is often taxed multiple times to the same person; think of income, payroll, and sales taxes. Another counter is that recipients of gifts and bequests do not include them in income. Therefore, taxing gifts and bequests simply matches up the number of people that benefit from the property with the number of times it is taxed. If *Hannah* gives *Iris* a gift of $1,000, many argue that taxing both of them makes sense since each benefits from the funds. *Hannah* could have spent that $1,000 on fancy cheese, but instead chose to give the money to *Iris*, and she enjoys the warm glow that comes with making a gift. And *Iris* has $1,000 to spend as she sees fit.[138]

133. Kyle Pomerleau, *The Estate Tax Is Double Taxation*, TAX FOUND. (Nov. 2, 2016), https://taxfoundation.org/estate-tax-double-taxation [https://perma.cc/5Y9F-GB5Y].

134. Imagine that *Hannah* buys stock in a biotech startup for $1,000 that increases in value to $100,000. Because of the realization requirement, she is not taxed on the $99,000 appreciation until and unless she later sells the stock. And if she never sells, and dies owning the stock, Section 1014 allows her heirs to pretend that the stock's value at her death was their purchase price. As a result, her heirs do not have to pay tax on that $99,000 appreciation either.

135. *See, e.g.*, GRAETZ & SHAPIRO, *supra* note 5, at 81–82; Karen C. Burke & Grayson M.P. McCouch, *Turning Slogans into Tax Policy*, 27 VA. TAX. REV. 747, 751–52 (2008).

136. Chye-Ching Huang & Chloe Cho, *Ten Facts You Should Know About the Federal Estate Tax*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 30, 2017), https://www.cbpp.org/research/ten-facts-you-should-know-about-the-federal-estate-tax [https://perma.cc/TGN7-EK8G].

137. AMERICAN COLLEGE OF TRUSTS AND ESTATES COUNSEL, REPORT BY THE ACTEC TAX POLICY STUDY COMMITTEE ON PROPOSALS TO TAX THE DEEMED REALIZATION OF GAIN ON GRATUITOUS TRANSFERS OF APPRECIATED PROPERTY 5 (2019).

138. This argument views parents and children as separate. If one views families as a unit, then the family itself only benefits once from the $1,000. Although this argument may have some credence for gifts to minor children, the U.S. tax system generally treats parents and adult children as separate economic units.

But many transfer tax opponents contest that *Hannah* benefits when she makes a gift to *Iris* the same way that she benefits when, for example, she pays *Iris* to paint her house. In their view, *Hannah* has transferred the ability to benefit from the funds to *Iris*. Since only one person—*Iris*—ends up benefitting, only one person should be taxed. Since *Hannah* was already taxed via the income tax, it makes no sense either to impose a separate transfer tax or require *Iris* to include the transfer in income.[139] Setting aside the issue of appreciated property, we can see that the double taxation argument comes down to a normative view about the definition of income. If *Hannah* benefits from making a gift just as she benefits from having her house painted, there is no double taxation. But if one believes that *Hannah* gives up her ability to benefit and passes it to *Iris*, then taxing gifts and bequests is double taxation. As with arguments about equality of opportunity and progressivity, this simply comes down to reasonable disagreements about normative priors.

5. Efficiency and Administrative Concerns

A final set of arguments highlight efficiency and administrative concerns. For some, these concerns alone are sufficient to oppose the estate tax, even if they otherwise sympathize with its goals; for others, these concerns buttress normative critiques.

Economic Incentives. At heart, transfer taxes are taxes on savings by donors.[140] As such, opponents contend that they punish savers and reward spenders by raising the price of saving relative to spending.[141] This reaction seems intuitive to many laypeople, and is arguably backed up by two recent economic analyses finding a correlation between higher estate taxes and lower wealth accumulations at death—a reduction in wealth at death of roughly 10% for the very wealthiest taxpayers.[142] Some theorists–such as economists who deploy optimal tax analysis—thus argue that transfer taxes decrease overall welfare by shrinking the size of the pie available for

139. Paying alimony or child support is analogous. The payor earns the income and is taxed, and then transfers that income to the recipient, who is not taxed. In that situation, few contest that only one person is benefiting from the funds—the recipient—and it therefore makes no sense to impose a tax on both parties to the transaction. Pomerleau, *supra* note 133.

140. JOULFAIAN, *supra* note 84, at 102; CONG. BUDGET OFF., UNDERSTANDING FEDERAL ESTATE AND GIFT TAXES 1 (2021), https://www.cbo.gov/system/files/2021-06/57129-Estate-and-Gift-Tax.pdf [https://perma.cc/6NEC-BGAH].

141. *See supra* Section II.A.3.

142. JOULFAIAN, *supra* note 84, at 102–07; Batchelder, *supra* note 5, at 7. Estate tax supporters respond as follows. First, they emphasize the limitations of these studies, noting that the results are "fragile" or that overall empirical support for this argument is "inconclusive." Batchelder, *supra* note 5, at 7; CONG. BUDGET OFF., *supra* note 140, at 4. Second, they interpret these studies as showing that "wealth transfers decline[] only *slightly* in response to wealth transfer taxes" and that "donors do not appear to save *substantially* less." Batchelder, *supra* note 5, at 7 (emphasis added).

redistribution.[143] Professor Ed McCaffery offers a twist on this argument, arguing that the estate tax exacerbates inequalities of opportunity by encouraging lifetime consumption and early spending.[144] And many everyday people simply recoil at the idea of a tax that seems to single out behavior (working hard, saving, and frugality) that our society deems virtuous.

Harm to Small Businesses and Family Farms. A related critique—one that strongly resonates with the public—is that the estate tax harms small businesses and family farms. To that end, estate tax opponents frequently recount stories of families who allegedly have been or will be forced to sell farms and small businesses to pay the tax.[145] (The story of Lester Thigpen, an African-American tree farmer from Mississippi who was the grandson of slaves, is a prime example.)[146] Opponents also emphasize the costs that families must incur to plan for the tax, such as purchasing insurance to provide liquidity and paying advisors to help minimize potential taxes.

To the ire of estate tax supporters, however, many (if not all) of these stories are unproven. Namely, many of the individuals profiled by estate tax opponents would not have been subject to the tax, even at its pre-EGTRRA levels. And according to Michael Graetz, neither the American Farm Bureau nor New York Times reporter David Cay Johnston could find any farms that had actually been sold to the pay tax after a search in the late 90s.[147] Nevertheless, the *possibility* (however remote) that a family farm or small business could be harmed troubles many Americans. Moreover, many estate tax opponents overlook that this possibility becomes more likely were exemption levels to drop, and rates to increase, as they advocate.

Avoidance Costs. Another efficiency-related concern is that the tax raises little revenue while encouraging wasteful tax planning that renders the tax essentially voluntary.[148] In 2020, for example, the estate and gift taxes together raised only $17.6 billion—roughly 0.1% of gross domestic product.[149] Meanwhile, millions—possibly billions—of dollars[150] are spent

143. *But see supra* Section II.A.3 for responses to this argument.

144. McCaffery, *supra* note 5.

145. For an in-depth account of how repeal advocates harnessed this argument, see GRAETZ & SHAPIRO, *supra* note 5, at 51–73.

146. Thigpen, who feared that he'd have to sell his farm to pay the estate tax, testified before Congress, met with numerous Congressmen, and was featured in numerous stories about the estate tax during the repeal push of the late 1990s. It turns out, however, that Thigpen's estate would not have been taxable, even at the much lower exemption levels at the time. *Id.* at 62–66.

147. *Id.* at 126.

148. Richard A. Epstein, *Justice Across the Generations*, 67 TEX. L. REV. 1465, 1475–76 (1989).

149. CONG. BUDGET OFF., *supra* note 140, at 1.

150. Estimating the total spending on estate tax minimization and avoidance is difficult. In 1998, the Joint Economic Committee estimated that "the costs of complying with the estate tax laws are roughly

each year on avoidance activities that involve complicated legal structures.[151] Because of the availability of these structures to well-advised families, many view the estate tax as a "voluntary" tax that only the less-sophisticated, semi-wealthy pay, while the truly wealthy avoid it.[152] Here, opponents of the estate tax see another reason to reject it, while supporters see a reason to strengthen it.

Administrative Costs. A related critique is the cost and difficulty involved in administering the estate tax. Some opponents estimate that taxpayers spend almost $20 billion annually complying with the tax,[153] although supporters of the tax dispute this figure. One contributor to high compliance costs is valuation difficulties.[154] While the assets of many middle- and upper-middle class individuals such as lawyers and doctors are fairly easy to value–cash, brokerage and retirement accounts, publicly-traded stock, and straightforward real estate like suburban houses—the same is not true for the wealthy. One estimate suggests that roughly half the assets owned by the wealthiest 1% of American families are hard to value, including unique real estate, closely held stock, noncorporate business assets, farm assets, private equity and hedge funds, art, limited partnership interests, and other miscellaneous assets.[155] Moreover, taxpayers can engage in a number of complicated transactions to artificially minimize the value of normally easy-to-value assets like stock.[156] To opponents, the fact that valuation is costly, time consuming, and imprecise is another reason its limited revenue is not worth the cost.

the same magnitude as the revenue raised." JOINT ECON. COMM., 105TH CONG., THE ECONOMICS OF THE ESTATE TAX 30 (1998). In contrast, Professor Richard Schmalbeck, writing in 2001, argued that most families subject to the estate tax at that time spent only a few thousand dollars minimizing transfer taxes. Richard Schmalbeck, *Avoiding Federal Wealth Transfer Taxes*, *in* RETHINKING ESTATE AND GIFT TAXATION 113 (William G. Gale et al. eds., 2001). For an overview of these techniques, see U.S. SENATE COMM. ON FINANCE, ESTATE TAX SCHEMES: HOW AMERICA'S MOST FORTUNATE HIDE THEIR WEALTH, FLOUT TAX LAWS, AND GROW THE WEALTH GAP (2017), https://www.finance.senate.gov/imo/media/doc/101217%20Estate%20Tax%20Whitepaper%20FINAL1.pdf [https://perma.cc/F4F6-UN32].

151. As the Joint Committee on Taxation writes, "[i]ncurring these costs, while ultimately profitable from the donors' and donees' perspectives, is socially wasteful because time, effort, and financial resources are spent that lead to no increase in productivity. Such costs represent an efficiency loss to the economy in addition to whatever distorting effects Federal transfer taxes may have on other economic choices such as saving and labor supply." JOINT COMM. ON TAX'N, *supra* note 15, at 37.

152. For a critical discussion of this argument, *see* Paul L. Caron & James R. Repetti, *The Estate Tax Non-Gap: Why Repeal a "Voluntary" Tax?*, 20 STAN. L. & POL'Y REV. 153 (2009)

153. Scott Hodge, *The Compliance Costs of IRS Regulations*, TAX FOUND. (June 15, 2016), https://taxfoundation.org/compliance-costs-irs-regulations [https://perma.cc/8WDV-8RZ8].

154. Fleischer, *supra* note 85, at 276.

155. David Kamin, *How to Tax the Rich*, 146 TAX NOTES 119, 123 (2015).

156. Fleischer, *supra* note 85, at 279–81.

III. SETTLING THE DEBATE WITH A RIGNANO TAX

As Section II shows, the debate over estate taxation is complex, implicating both normative values and empirical questions. The recent weakening of the tax suggests that opponents are winning this debate, to the great frustration of estate tax supporters who repeat the following laments: If only the public understood that the tax affects a mere sliver of the population and how few family farms and small businesses are impacted by it. If only the public knew that the tax's burden likely falls on heirs, who have not in fact done anything to earn the wealth in question. If only opponents could see that the estate tax is not double taxation, due to the realization requirement and the step-up in basis. If only the public appreciated the harms of inequality.[157]

Estate tax advocates thus keep recycling the same tactics. One approach is to try to correct the public's factual misperceptions about double taxation, the impact on family farms and small businesses, and how many estates are hit by the tax.[158] Another is to argue that taxing the recipient instead of the transferor (via an accessions tax or income inclusion) would better display the tax's goals and burdens to the public, thereby convincing them of the value of taxing wealth transfers.[159]

But these approaches miss the mark by failing to adequately account for deeply held beliefs shared by a large portion of the population about fairness, desert, private property, and family. This Section first explores these beliefs, as well as seemingly contradictory views on equal opportunity and democratic participation that are also widely held. It then argues that a Rignano tax is the best way to reconcile the competing moral intuitions held by many Americans.

A. ATTITUDES TOWARD TAXATION, FAIRNESS, REDISTRIBUTION, AND EQUALITY

Crucially, these beliefs about fairness, desert, and property rights—which Liam Murphy and Thomas Nagel call "everyday libertarianism" and which economist Steven Sheffrin terms "folk justice"[160]—often do not

157. *See, e.g.*, SHEFFRIN, *supra* note 9, at 14; GRAETZ & SHAPIRO, *supra* note 5, at 83–84; Joel Slemrod, *The Role of Misconceptions in Support for Regressive Tax Reform*, 59 NAT'L TAX J. 57 (2006).

158. For example, some evidence suggests support for outright repeal drops somewhat when people learn how many people will actually be subject to the tax. SHEFFRIN, *supra* note 9, at 149; GRAETZ & SHAPIRO, *supra* note 5, at 118–30.

159. *See, e.g.*, Batchelder, *supra* note 5, at 3 ("The final advantage of a comprehensive inheritance tax is that it should improve public understanding of the taxation of wealth transfers. . . . These misconceptions have been exploited by opponents of the estate tax, who have framed the estate tax as a double tax on frugal, hard-working donors who are ruthlessly taxed right at the moment of death.").

160. MURPHY & NAGEL, *supra* note 8, at 34–36; SHEFFRIN, *supra* note 9, at ix–x.

overlap with the philosophical and economic frameworks favored by policymakers and academics. Sheffrin explains:

> Ordinary individuals hold a set of psychological principles about fairness in taxation that are considerably broader and that differ in systematic and fundamental ways from the ideas of fairness that dominate our public debate today. . . . [T]he emphasis on tax fairness as redistribution comes from academic work in philosophy and economics that, in many ways, stands apart from the concerns that motivate everyday people. . . . [T]ax fairness is important, but it is not synonymous with redistribution. To the average person, tax fairness means something else, primarily receiving benefits commensurate with the taxes one pays, being treated with basic respect by the law and the tax authorities, and respecting legitimate efforts to earn income. The average person is not totally indifferent to inequality, but concerns for redistribution are moderated by the extent to which income and wealth have been perceived to be earned through honest effort.[161]

Because the public takes these views so seriously, policymakers who simply try to convince the public to change its views face an uphill battle. For example, Murphy and Nagel acknowledge that their argument that pre-tax income is meaningless is "counterintuitive" and that "[c]hanging this [belief] would require a kind of gestalt shift, and it may be unrealistic to hope that such a shift in perception could easily become widespread."[162] Sheffrin terms this "resonance," arguing that "[a]ny ethical or social theory that does not resonate with folk ideas will be doomed to eventual failure as a vehicle for social change. Understanding folk ideas of justice is then essential to building effective social structures."[163]

Going further, many theorists argue that when policymakers fail to take these views seriously, they end up undermining their own normative aims.[164] Zachary Liscow illustrates with the common law and economics wisdom that redistribution should take place solely in the tax and transfer system. He argues that this approach makes sense in theory but fails in the real world because it "ignores how ordinary Americans think about [taxes] and thus ends up exacerbating inequality rather than mitigating it." As a result, "tax policy runs up against political constraints—driven by ordinary people's

161. SHEFFRIN, *supra* note 9, at ix–x.

162. MURPHY & NAGEL, *supra* note 8, at 175.

163. SHEFFRIN, *supra* note 9, at 9.

164. *See also* Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051, 1100 (2016) (arguing that rules that accord with public notions of fairness have lower implementation costs and such reduced costs should be considered by policymakers).

attitudes about taxation" that prevent tax policy from accomplishing policymakers' goals.[165]

1. Taxation and Folk Justice

What are these attitudes? One key belief relates to what moral philosophers call "desert" and what Steven Sheffrin terms "equity theory." To everyday people, there should be a roughly proportional relationship between effort and results.[166] People believe that the money they earn belongs to them,[167] and that if they "earn more money, they deserve to keep a decent share of it."[168] Even those who critique this belief acknowledge that the "idea that people deserve to be rewarded for thrift and industry" is natural to many and that "it can seem preposterous" that hard-working individuals who are willing to take risks do not deserve more than the lazy and unadventurous.[169] Although scholars debate the merits of these views,[170] numerous studies suggest that substantial portions of the public subscribe to them.[171] As Murphy and Nagel recognize, to many, these views are "instinctive[],"[172] "ingrained,"[173] and "hard to banish from [] everyday thinking."[174]

These beliefs lead to a distaste for redistributive taxation generally, and to some extent, opposition to the estate tax simply reflects these general principles of folk justice. But Sheffrin identifies two further aspects of folk justice that supercharge these attitudes as applied to the estate tax. In his view, the fact that estate tax opponents have successfully capitalized on these folk justice beliefs—while estate tax supporters have ignored them—explains a large part of the tax's deep unpopularity.[175] (Polls consistently suggest that roughly fifty percent of the population supports repealing it entirely).[176]

Moral Mandates. One concept is that of moral mandates, which are deeply held, non-negotiable subjective beliefs about right and wrong. These beliefs are resistant to logical argument, and can be seemingly inconsistent,

165. Liscow, *supra* note 11, at 499.
166. SHEFFRIN, *supra* note 9, at 37.
167. *Id.* at 119.
168. Liscow, *supra* note 11, at 516.
169. MURPHY & NAGEL, *supra* note 8, at 35–36.
170. *See, e.g.*, *id.* (critiquing what they call "everyday libertarianism").
171. *See* SHEFFRIN, *supra* note 9, at 34–38, 119–33; Liscow, *supra* note 11, at 525–26.
172. MURPHY & NAGEL, *supra* note 8, at 175.
173. *Id.* at 173.
174. *Id.* at 34.
175. SHEFFRIN, *supra* note 9, at 145.
176. Thorndike, *supra* note 3.

such as when a pro-life advocate also favors the death penalty.[177] When something contravenes a moral mandate, it generates a level of outrage that might seem excessive. An act becomes "wrong" and not merely "disagreeable."

According to Sheffrin, several of the arguments discussed in Section II.B. rise to the level of moral mandates. One is that imposing a tax when someone dies is simply immoral. On this account, the estate tax "comes at the worst possible time for families – the death of their family's breadwinner."[178] People are simultaneously grieving their loved ones and worried about providing for the family that's left behind. Telling people that it's not death per se that triggers the tax but instead the transfer of wealth; or that grieving families have to deal with all kinds of logistical and business arrangements, such as funerals and the probate process; or that the families affected by the tax are wealthy and well-provided for, will not make any headway. The tax is associated with death, and that simply seems immoral to many.

Another moral mandate—one which polling data suggests has been extremely influential—is that double taxation is unfair.[179] People have deeply-held beliefs that if someone works hard and saves their whole life, paying taxes as she goes along, she should be able to leave her wealth to her family at her death without the government swooping in a second time.[180] And again, telling people that double taxation is not unique to the estate tax, or that much wealth subject to the estate tax has not already been taxed, is pointless.

And finally, people value entrepreneurship.[181] They view the tax as disincentivizing hard work and wealth accumulation, thus undermining another deeply held value. Demonstrating that very few small businesses or family farms owe the tax, let alone need be liquidated to pay the tax, is largely fruitless.

System Justification. In addition to touching on moral mandates, Sheffrin argues that the tax also implicates "system justification theory." This theory—somewhat like cognitive dissonance—posits that individuals adapt their beliefs to defend existing systems and the status quo, even when they do not appear to benefit from those systems. They thus react strongly to threats to that system, even when people other than themselves—such as the

177. SHEFFRIN, *supra* note 9, at 45.
178. *Id.* at 146–47.
179. *Id.* at 147.
180. *Id.*
181. *Id.*

wealthy—will be the ones harmed by those threats.[182]

Specifically, the estate tax appears to threaten two key systems: the family and our meritocratic system that rewards talent and effort. Even if the estate tax will not affect the majority of Americans, many view wealthy businesspeople as "valuable members of society who deserve their wealth and support the American economy."[183] As such, a tax that affects them undermines an entire system of which they are a part. Likewise, even if the families affected by the tax are rich families, taxing them when they engage in a familial act of generosity threatens the family system that we are all a part of.[184]

2. Policy Silos

At the same time that the public opposes estate taxes, however, it also shares many of the values highlighted by its supporters. Economist Stefanie Stantcheva's recent empirical work on how people reason about income and estate taxes illustrates this seeming contradiction. In a large-scale representative survey, Stantcheva finds that 58% of respondents believe that parents should be able to pass along whatever they wish to their children, even if that creates unequal opportunities at a societal level, and that 61% of respondents believe that it is unfair to tax the estates of hard workers. Yet in this same group,

> 68% say that it is unfair that children from wealthy families have access to better amenities such as schools;
>
> 64% believe that the wealth distribution is unfair; and
>
> 46% view inequality as a serious issue.[185]

Stantcheva is not the first to note that many people hold a variety of conflicting beliefs simultaneously. In fact, her findings illustrate another aspect of moral mandates—people form them on an issue-by-issue basis. They do not represent an overarching world view, and they may contradict each other, as when a pro-life advocate also favors the death penalty.[186]

Zachary Liscow calls this phenomenon "policy silos," meaning that "ordinary people hold category-by-category views about what is just for a given policy and apply those views partly in isolation."[187] For example,

182. *Id.* at 49–53.

183. *Id.* at 149.

184. For an accessible summary of these views, see Joseph Thorndike, *Face It: Americans Just Don't Like the Estate Tax*, FORBES (Mar. 31, 2016), https://www.forbes.com/sites/taxanalysts/2016/03/31/face-it-americans-just-dont-like-the-estate-tax [https://perma.cc/3YEC-MZ4E].

185. Stantcheva, *supra* note 4, at 2348 tbl.VII.

186. SHEFFRIN, *supra* note 9, at 45.

187. Liscow, *supra* note 11, at 512.

people view taxation and transportation separately, such that they may oppose redistributive taxation but favor redistributive transportation policy. The former is "giving" money to the poor, while the latter is helping them get to work.[188] Stantcheva's findings echoed this observation, as respondents' views differed based on whether the questions focused on parents/transferors or children/transferees. To put it in Liscow's terms, people appear to view estate taxes in a different silo than equal opportunity concerns.

As a result of siloing, public support for two economically identical but superficially different programs can vary based on framing.[189] This has two implications. First, Liscow argues that lawmakers should not rely on the tax system as the sole means of redistribution but should also implement redistributive policies elsewhere. A second implication is that when policymakers do use the tax system for redistributive or similar reasons, they should take advantage of siloing, as the public's dislike of one tax might not necessarily translate into a dislike of a different tax. Joseph Thorndike has observed, for example, that even though the public hates the estate tax, it favors wealth taxes.[190]

3. A Rignano Tax Reconciles These Competing Intuitions

What does all this mean for wealth transfer taxes? One common suggestion is to replace the estate tax with a recipient-focused accessions or inheritance tax.[191] The hope is that focusing attention on recipients will shift the debate more firmly into the equal opportunity silo instead of the tax silo, as well as lessening the intensity of some of the moral mandates around double taxation, entrepreneurship, hard work, and thrift.

This Article takes that suggestion one step further. A Rignano-style accessions tax that exempts first-generation transfers does an even better job

188. *Id.* at 513.

189. *Id.* at 514–15 (reviewing experimental evidence on this point). Liscow's argument that policymakers should not rely solely on taxation when redistributing is not inconsistent with my argument that the concept should also inform the design of tax policies.

190. Thorndike, *supra* note 3.

191. *See, e.g.*, Batchelder, *supra* note 5, at 3 ("The final advantage of a comprehensive inheritance tax is that it should improve public understanding of the taxation of wealth transfers. . . . These misconceptions have been exploited by opponents of the estate tax, who have framed the estate tax as a double tax on frugal, hard-working donors who are ruthlessly taxed right at the moment of death.").
In addition to correcting the psychological mismatch, scholars offer numerous other reasons for replacing the estate tax with a recipient-focused tax. *See, e.g.*, *id.* (arguing that an estate tax does a poor job ["rough justice"] of measuring ability to pay because it focuses on the donor, not the donee, and estimating that "22% of heirs burdened by the U.S. estate tax have inherited less than $500,000, while 21% of heirs who inherit more than $2,500,000 bear no estate tax burden"); Alstott, *supra* note 5 (arguing that an inheritance tax better reflects equality of opportunity principles); Fleischer, *supra* note 54 (contending that an inheritance tax is superior to an estate tax in combatting the accumulation of dynastic power).

of incorporating folk justice and people's everyday psychological intuitions about the estate tax. Imagine the following structure (which Section IV fleshes out in more detail): *Grandfather* builds a business from the ground up and bequeaths $10,000,000 to *Mother*. No tax is imposed, but if *Mother* does not create any wealth of her own and simply retransfers $10,000,000 to *Daughter*, all of *Mother*'s estate is taxed. In contrast, if *Mother* creates new wealth, different portions of her estate are treated differently. The inherited $10,000,000 that *Mother* re-transfers is taxed, while any newly earned wealth is not.

By allowing individuals to make tax-free transfers of wealth that they themselves have earned—but not wealth that they have merely inherited—a Rignano tax acknowledges the very real, deeply-held value that the public places on hard work, entrepreneurship, and notions of desert while also addressing the concerns people hold about the prevalence of inherited wealth.[192]

IV. A RIGNANO TAX

The idea of taxing second- or third-generation wealth more heavily than newly earned wealth has a long history. Roughly 100 years ago, Eugenio Rignano offered the first sustained treatment of it, arguing that such a tax is the best way to move gradually toward socialism.[193] Rignano believed that the means of production should eventually be owned by the government, but that individuals, not the government, are better wealth-creators. He thus proposed a tax that would exempt transfers by wealth-creators, tax second transfers at 50%, and tax third transfers at 100%. This, he believed, would be the most efficient way to implement socialism.[194]

Libertarian Robert Nozick later picked up this idea, albeit for decidedly non-socialist reasons. In THE EXAMINED LIFE, Nozick suggests that a Rignano-type structure is the best means of balancing competing intuitions about family ties, wealth and inheritance, and fairness. He first defends the right of individuals to bequeath what they have created themselves as an act of love: "Bequeathing something to others is an expression of caring about them, and it intensifies those bonds. . . . [T]he donor . . . has earned the right to mark and serve her relational bonds by bequeathal."[195] But he does not view second-generation inheritances as a similar act of love, due to the lack

192. *See, e.g.*, Krugman, *supra* note 12.
193. RIGNANO, *supra* note 7.
194. *Id.*
195. NOZICK, *supra* note 13, at 30.

of connection between the person who created the wealth and the second recipient.

He also acknowledges, moreover, that when wealth is "passed on for generations to persons unknown to the original earner and donor, [it] produc[es] continuing inequalities of wealth and position" and that the "[t]he resulting inequalities seem unfair."[196] Unfortunately, Nozick's discussion of this tension is rather sparse. He does not explain, for example, why he believes the resulting inequalities are unfair. Nor do we know whether first-generation bequests are inherently fair, or whether they are unfair, but whose unfairness is outweighed by the value of the donor's ability to express affection and love.[197]

And most recently, philosopher Daniel Halliday argues that a Rignano tax furthers equality of opportunity ideals better than traditional estate and inheritance taxes. In his view, context matters—that is, whether someone is born into a family that has not just wealth, but *long-standing* wealth and the social and cultural capital that accompanies it (let's call these "wealth norms"). Imagine that *Grandfather* starts with nothing, builds a successful business, and leaves all his wealth to *Mother* at his death. Halliday believes that this bequest does not give *Mother* a head start in life. Her life prospects were largely shaped long before receiving her inheritance, when she was young and *Grandfather* was still building his business. He had not yet amassed enough wealth to pay for private school and expensive tutors for *Mother*, to give her seed money to start her own business or to launch her own career. Moreover, *Grandfather*'s self-made status suggests that the family did not have wealth norms when *Mother* was growing up. Instead of golfing at a country club, *Grandfather* likely bowled in the neighborhood bowling league and did not have the same cultural norms and social and professional networks as families with older wealth.

But now consider *Mother* and *Daughter*. Halliday argues that "parental conferral of advantage compounds over successive generations. . . . Families that have been wealthy for longer possess a greater range of powers that keep their children privileged."[198] *Grandfather's* bequest allows *Mother* to provide advantages to *Daughter* that she herself did not have, such as high-quality schools, tutors and after-school lessons, and expensive camps. It also means that *Daughter*—unlike *Mother*—grows up in a family with wealth norms. The family belongs to a country club, not a bowling league. *Mother*'s contacts can give *Daughter* internships, and *Daughter* knows which fork to

196. *Id.*
197. *See* HALLIDAY, *supra* note 13, at 167.
198. HALLIDAY, *supra* note 13, at 7.

use during the interview lunch and how to dress for it. For these reasons, Halliday views the transmission of wealth across three generations as a contributor to and a tag for economic segregation, which he argues undergirds unequal opportunities. As such, these inheritances should be taxed.

In contrast, Halliday contends that first-generation inheritances *should not* be taxed. Not only are they not problematic, but they might even reduce economic segregation by serving as a safety net keeping middle-class families afloat in a stagnating or contracting economy. Halliday observes that in many areas, the costs of housing and other necessities have skyrocketed while middle-class wages have stayed flat, rendering home-ownership unaffordable to many such families. But if *Grandfather* leaves the family home to *Mother*, or enough money for a down payment, this helps minimize economic segregation in such areas. First-generation inheritances thus counteract inequality of opportunity and therefore should not be taxed.

Implementing a tax that exempts the first transfer but taxes the second might sound simple to those unfamiliar with tax policy. Yet the devil is in the details. Implementing a Rignano tax requires resolving seven design decisions, explored below: the (1) base; (2) rates; (3) valuation; (4) frequency; (5) tracing; (6) transfers in trust; and (7) transition rules. Although a Rignano tax is complex, crafting one is possible.[199] As we shall see, in many instances one solution is superior regardless of why one wants to tax old money more heavily than new. With other decisions, however, differing justifications for taxing repeated wealth transfers point in different directions.

A. THE BASE

This section addresses three base-related decisions: Should the tax focus on transfers or receipts? Should it treat gifts and bequests equally? And should it contain any exclusions or exemptions?

1. Transfers or Receipts?

The first base-related question is whether to tax receipts or transfers. If *Grandfather* earns a fortune, leaves it to *Mother*, and *Mother* in turn passes it along to *Daughter*, who does the tax focus on? Does it look at *Grandfather* and *Mother* in turn, and tax *Mother* because she's the one who re-transfers wealth while exempting *Grandfather* because he's the one who earned the

199. Many of these ideas were first explored in Miranda Perry Fleischer, *Taxing Old Money: Considerations in Crafting a Rignano Tax*, 8 LEAP 86 (2020), https://raco.cat/index.php/LEAP/article/view/387931 [https://perma.cc/6M3K-C8B7].

wealth? This model is akin to a traditional estate tax, which focuses on the total amount of wealth transferred by an individual over the course of her lifetime.[200] Or does it look at each and ask who among them received re-transferred wealth (here, *Daughter*)? This is similar to traditional accessions or inheritance taxes, which apply to transferees based on gifts and bequests received.[201]

In either case, the tax is imposed once, at transfer.[202] But the distinction matters, both psychologically and normatively. At first glance, one might think an estate tax model makes the most sense. If *Grandfather* creates the wealth, and the goal is to allow him to transfer it tax-free, then the focus should be on him. Yet this ignores many of the normative aims of those who wish to tax wealth transfers in the first instance.[203]

Start with dynastic wealth and equality of opportunity concerns. Looking at the sum of gratuitous transfers received by a given individual tracks *ex ante* differences in opportunity better than looking at aggregate transfers made by an individual. Imagine a decedent with an estate of $5,000,000. An estate tax treats her the same whether she leaves it all to one child or splits it up among ten recipients. Yet receiving $5,000,000 impacts life opportunities much more dramatically than receiving $500,000. The same is true for dynastic wealth: what matters is how much wealth someone *receives.* An inheritance of $50,000,000 bestows political and economic power in a way that an inheritance of $500,000 does not. As numerous commentators have acknowledged, a recipient-focused accessions or inheritance tax better reflects these concerns.[204]

Next consider the welfarist argument that gratuitous transfers received should count toward an individual's ability to pay, just like salary, business profits, and gains from property sales. This concern also suggests a recipient-focused tax. How much wealth a transferor has does not necessarily correspond to the ability to pay of the transferee. For example, Lily Batchelder and Surachai Khitatrakun estimate that "22% of heirs burdened by the estate tax have inherited less than $500,000, while about 21%

200. *See* Alstott, *supra* note 5, at 502.

201. As explained in Section II, accessions taxes are imposed cumulatively on all the gratuitous transfers received over the course of a lifetime, whereas inheritance taxes are imposed annually. Another recipient-focused option is to treat gifts and bequests as income to the recipient. Although these are distinct concepts, they are often confused in the literature. Fleischer, *supra* note 54, at 920–21.

202. Glogower, *supra* note 5, at 1483.

203. If one views a wealth transfer tax as a second-best for a wealth tax, then the distinction between an estate and accessions tax is less relevant. Both decrease the amount passed on to the next generation.

204. *See* Alstott, *supra* note 5; MURPHY & NAGEL, *supra* note 8, at 157, 160; Duff, *supra* note 54, at 26–27; Rakowski, *Transferring Wealth*, *supra* note 48, at 431.

inheriting more than $2,500,000 bear no estate tax burden."[205]

An accessions-tax framework also better addresses the concern that wealth concentrations are in and of themselves harmful by encouraging donors to split their fortunes up. An estate tax would treat *Warren* the same whether he leaves his fortune in one big bundle to one lucky heir, or whether he splits it up among multiple recipients. But an accessions tax treats these two situations differently, since it focuses on cumulative gifts and bequests received in excess of an exemption amount. Since each recipient has their own exemption amount, splitting a large fortune up generates a lower overall tax bill.

Finally, the psychological insights discussed in Section III.B. also point to the superiority of an accessions tax. Recall, for example, Stantcheva's findings that support for transfer taxes rises when people focus on recipients instead of transferors.[206] This is likely due in part to framing and siloing, but perhaps also to the fact that focusing on recipients weakens the pull of moral mandates about double taxation and hard work.[207]

2. Gifts

A second decision is whether the tax should apply not only to bequests but also to gifts. Although Rignano clearly suggests taxing both, Halliday is more equivocal. Halliday's equivocation is misplaced; the tax should apply to both equally.

a. Gifts in General

Consider the various reasons for taxing wealth transfers, starting with equality of opportunity. As Halliday notes, gifts are usually received earlier in life than bequests. This creates advantages sooner rather than later for the donee and her family, thus magnifying those advantages.[208] For this reason, Anne Alstott has suggested varying inheritance tax burdens based on the recipient's age.[209] Further, the act of making a gift suggests that the donor feels financially secure enough to dispose of some of her wealth while alive, which makes it more likely that her heirs grew up in a family with wealth norms.

205. Batchelder, *supra* note 5, at 53–56.

206. *See* Stantcheva, *supra* note 4.

207. *See, e.g.*, Batchelder *supra* note 5, at 3 ("The final advantage of a comprehensive inheritance tax is that it should improve public understanding of the taxation of wealth transfers. . . . These misconceptions have been exploited by opponents of the estate tax, who have framed the estate tax as a double tax on frugal, hard-working donors who are ruthlessly taxed right at the moment of death.").

208. HALLIDAY, *supra* note 13, at 189.

209. Alstott, *supra* note 5, at 521–32.

The ability-to-pay and dynastic wealth concerns also suggest taxing both gifts and bequests. Both gifts and bequests enable recipients to spend money for political purposes as well as influence the economic lives of others. Both gifts and bequests provide utility to recipients. In fact, declining marginal utility suggests that gifts might even provide more utility than bequests of comparable size, as individuals tend to have less money earlier in their lives. And both serve as a tag for one's nonfinancial endowment. Again, gifts may signal greater nonfinancial advantages than comparably sized bequests, as families that engage in lifetime gifting are often wealthier than families who do not.

Moreover, Halliday's arguments for excluding gifts from a Rignano tax do not withstand scrutiny. One argument is that transferors have such a strong preference for bequests that excluding gifts would not encourage them to make gifts instead.[210] Halliday correctly observes that many transferors do not maximize opportunities to make tax-free gifts under current law and that many people save more than enough to cover the expenses of old age. He also acknowledges, however, that these statistics reflect decisions made during periods with relatively low rates and that they likely underestimate the extent to which wealthier families will change their behavior. A key part of estate planning for such families is maximizing the tax advantages of lifetime gifts, and minimizing the ability of transferors to characterize bequests as gifts creates a great deal of complexity in the current estate tax system.

Halliday also argues that taxing gifts is essentially pointless.[211] He believes that most gifts can be easily concealed—unlike bequests, which are documented during probate and hard to hide. But many large gifts are similarly hard to conceal. Stock transfers are recorded; large cash transfers are tracked. And even gifts of jewelry and other family heirlooms generate records when donees insure them. Of course, under-the-table gifts will always occur, but not at a level that makes attempting to tax gifts pointless. Because this Article advocates for treating gifts similarly to bequests, later references to "bequests" or "inheritances" refer to gifts and vice versa.

b. Gifts and Timing Complications

Taxing gifts does raise a complication related to timing. Return to *Grandfather*, *Mother*, and *Daughter*. We do not know exactly how much *Mother* will inherit—which affects the accessions tax imposed on *Daughter*—until *Grandfather* is dead. If the tax only applied to bequests, this would not be a problem. But what if the tax also applies to gifts and

210. HALLIDAY, *supra* note 13, at 191–92.
211. *Id.* at 194.

Mother makes a gift to *Daughter* while *Grandfather* is still alive, before he bequeaths any wealth to *Mother*?

To illustrate, imagine that *Mother* gives *Daughter* $1,000,000 and five years later, receives $10,000,000 from *Grandfather*. If we look just at the first gift of $1,000,000, it initially appears to be newly created wealth that should not be taxed. But money is fungible; if *Mother* knows she's about to receive an inheritance, this frees her up to make a lifetime gift to *Daughter*, whether from her own or borrowed funds. The tax would be easy to avoid if we simply cast any transfer from *Mothe*r's generation to *Daughter*'s generation as a first transfer of wealth if it comes before *Grandfather* transfers anything to *Mother.* Yet whether *Mother* inherits before or after the gift to *Daughter* seems irrelevant if the point is to tax the second generation in a family that inherits wealth. This is especially true if one views second-generation wealth transfers as more of a welfarist or equal opportunity concern than first-generation transfers.

A "catch-up tax" that applies to transferees who have themselves made prior transfers can account for this scenario. When *Daughter* receives $1,000,000 from *Mother*, the tax—as applied to *Daughter*—would treat it as a first-generation transfer because at that point, *Mother* has not yet inherited anything. When *Mother* later inherits $10,000,000 from *Grandfather*, the tax—as applied to *Mother*—would treat different parts of that bequest differently. It would treat $9,000,000 as first-generation wealth and any amounts previously transferred by *Mother* to *Daughter*—here $1,000,000—as second-generation wealth.

Now consider what might happen later. One possibility is that *Mother* consumes the $10,000,000 she inherits from *Grandfather*, making no more gifts to *Daughter*. Because *Daughter* receives nothing more, no more tax is imposed upon the family. In total, $11,000,000 has been transferred within the family ($10,000,000 to *Mother*, and $1,000,000 to *Daughter*.) Overall, the tax will have treated $10,000,000 as first-generation wealth (*Daughter* is taxed as receiving $1,000,000 of first-generation wealth and *Mother* is taxed as receiving $9,000,000) and $1,000,000 as second-generation wealth (imposed on *Mother* via the catch-up tax at *Grandfather's* death).[212] In essence, the price *Mother* pays for making a lifetime gift before receiving her own inheritance is that she, not *Daughter*, is treated as having received a second-generation transfer.

212. Note that this possibility is yet another argument in favor of using an accessions-type tax instead of an estate tax. If *Mother* consumes all $10,000,000 that she inherits, then there are no transfers from *Mother* subsequent to her initial gift to *Daughter* to which the catch-up tax could apply.

Another possibility is that *Mother* later passes her $10,000,000 inheritance down to *Daughter*. In that case, a total of $21,000,000 has been transferred within the family ($10,000,000 to *Mother*, and $11,000,000 to *Daughter*). Of this, $10,000,000 represents a second transfer, and $11,000,000 represents newly created wealth (*Grandfather* created $10,000,000 and *Mother* created $1,000,000). When *Daughter* receives *Mother's* $10,000,000 inheritance, the tax should therefore treat only $9,000,000 as second-generation wealth. This accurately taxes $10,000,000 of the family's total transfers as second-generation wealth (recall that when *Mother* received her inheritance, $1,000,000 was treated as second-generation due to the catch-up tax), and $11,000,000 as first-generation wealth ($1,000,000 when *Daughter* received *Mother*'s lifetime gift, $9,000,000 of *Mother's* receipt from *Grandfather*, and another $1,000,000 when *Mother* dies).

3. Exclusions and Exemptions

The last set of base-related decisions concerns exclusions and exemptions. As both Rignano and Halliday suggest, each individual should have a relatively small lifetime exclusion amount.[213] Assume that after *Grandfather* bequeaths his $10,000,000 to *Mother*, she has several runs of bad luck and passes along only $1,000,000 to *Daughter*. Even though that $1,000,000 is second-generation wealth, it seems plausible to allow *Daughter* to inherit something free of tax for the same reasons that most (if not all) systems have such exemptions. In addition to administrative concerns, allowing small inheritances tax-free recognizes that bequests are a natural part of most families' lives, and that they can provide a needed cushion for many less-wealthy individuals. Any amount chosen would be arbitrary, but something like $500,000 or $1,000,000 seems reasonable.

For similar reasons, the tax should have something similar to the annual exclusion described in Section I, but on a smaller scale. The annual exclusion's purpose is to simplify record-keeping and to recognize that intra-family gift giving for birthdays, weddings, and holidays is a normal, everyday occurrence in almost all families that does not trigger any normative concerns. These same concerns are relevant in a Rignano tax. That said, the current $19,000 per recipient exclusion is far larger than necessary to cover regular birthday and holiday gifts, and in fact, allows for much tax-free giving that exacerbates unequal opportunities.[214] As with the lifetime exemption amount, any chosen number would be arbitrary, but something like $5,000 seems reasonable.

213. RIGNANO, *supra* note 7, at 102; HALLIDAY, *supra* note 13, at 65.
214. *See* McCaffery, *supra* note 5.

Most transfer tax systems also exempt marital and charitable transfers. Intra-spousal transfers should not be taxed, as they do not transmit wealth down to a lower generation.[215] Charitable transfers are a bit trickier from a normative perspective. In theory, their treatment should depend on what kind of charity receives the gift or bequest. If one's concern is equality of opportunity, for example, a gift to an inner-city tutoring program furthers equality of opportunity while other gifts may undermine it (imagine gifts to private foundations that employ family members or to a private school that provides few scholarships).[216] But if one goal of a Rignano tax is to gain public traction where other transfer taxes flounder, charitable transfers should be exempted. Charities benefit from a "halo effect," and the point that some charities exacerbate social ills is nuanced and hard for the public to understand. Further, giving to charity is seen as virtuous, and may invoke reactions similar to the moral mandates and systems justification theories discussed earlier.

A final question is whether the relationship between the wealth creator and the second recipient should matter in determining whether a gift or bequest received is second-generation. Specifically, should second-time-around transfers that originate in a different family be exempted if the recipient is the first in her family to inherit? Halliday, for example, suggests the tax should apply to anyone whose parents or grandparents have inherited, but not to individuals who are the first in their families to inherit. That makes sense if one's concern is equal opportunity and if one agrees with Halliday that repeated wealth transfers are the real culprit in that context due to the creation of wealth norms and economic segregation.[217]

Imagine two scenarios in which *Grandfather* starts with nothing, earns a fortune, and leaves it to *Mother*. In *Childless*, *Mother* has no children and leaves her wealth to *Friend*'s child. *Mother*'s *Friend* neither inherits from *Friend*'s parents nor bequeaths any wealth to *Friend*'s child. In *Helping Hand Family*, *Mother* has a daughter, to whom she leaves her wealth. In both cases, *Mother* inherited wealth and then passed it along a second time. In that sense, both *Daughter* and *Friend*'s child have received second-generation wealth. But if the concern is that repeated wealth transfers create or signal economic segregation and wealth norms, then *Daughter* and *Friend*'s child are not similarly situated. *Friend*'s child is the first in *Friend*'s family to inherit, and in that sense, what she receives is not second-generation

215. RIGNANO, *supra* note 7, at 102–03.

216. *See* Fleischer, *supra* note 57; Fleischer, *supra* note 51.

217. HALLIDAY, *supra* note 13, at 197. *See* Fleischer, *supra* note 199, for a longer discussion of this issue.

wealth.[218] *Daughter*, by contrast, belongs to the second generation of *Mother*'s family to inherit. This suggests looking not only at the recipient, but also at the pattern of prior transfers in the recipient's family—if one shares Halliday's concerns.[219]

However, other normative justifications for taxing wealth transfers point in other directions. If one's focus is dynastic wealth and traditional equality of opportunity concerns, or welfarist concerns, then the source of the gratuitous transfer should be irrelevant. Receiving unearned advantage, power, or welfare is the main concern, more than whether that receipt followed an intra-familial chain of transmission. The same is true if one's concern is the mere existence of wealth.

Likewise, the psychological insights of folk justice suggest that treating intra-family transfers *worse* than other transfers would not fare well. First, system justification theory indicates that a large factor in hostility to the existing estate tax is its perceived threat to the family.[220] Second, it is plausible that people hold moral mandates about family businesses and family farms that would be triggered if intra-family transfers were treated worse. Thus, any softening of the public's opposition to inheritance taxes that comes from exempting first transfers would likely be undone if familial transfers were treated worse than other second transfers.

B. THE RATE

After choosing a base, one must also choose a rate. Halliday and Rignano both use examples in which first-generation transfers are not taxed, second-generation transfers are taxed at 50%, and third-generation transfers are taxed at 100%.[221] This Article proposes completely exempting first-generation inheritances and taxing subsequent ones at a rate of 40%, although it acknowledges that any rate will be somewhat arbitrary. Although this Article's normative arguments point to taxing later transfers more heavily than initial transfers, they do not point to specific rates the way they signal, for example, that gifts and bequests should both be taxed. Nor does past experience illuminate the perfect rate as a technical matter. Perhaps

218. If *Mother* inherited wealth, her friends likely have similar social capital. It is probable that *Friend*'s child has grown up with wealth norms, even if *Friend* did not inherit wealth. However, that is likely also true of the offspring of initial earners, and they do not seem to be Halliday's concern.

219. *See* Fleischer, *supra* note 199, for more on this point.

220. SHEFFRIN, *supra* note 9, at 149.

221. RIGNANO, *supra* note 7, at 102–03. Although Halliday uses this example, he rejects taxing third and later transfers at a rate of 100%. He asks but does not resolve whether first transfers should be totally exempted or merely taxed more lightly than second and later transfers. Nor does he address whether all second or later transfers should be taxed at the same rate.

more than any other design question, choosing a rate reflects balancing numerous political considerations.

1. Initial Transfers

The rate on initial transfers should be a simple, easy to understand zero. Work on cognitive psychology and tax suggests that individuals focus on "highly visible" and "easily recallable" aspects of a tax; this is known as "prominence" or "saliency." When thinking about income taxes, for example, the public tends to focus on the highest marginal rate.[222] Completely exempting initial transfers of wealth provides a sharp and clear distinction between initial and successive transfers in a way that merely using a lower rate does not. "You are not taxed *at all* when you pass along wealth that you have earned" has a salience that "you are taxed *less*" lacks.

The former also harnesses the power of folk justice better than the latter. Start with systems justification theory and the notion that taxing wealth transfers threatens a system that people are a part of and value. Here, it is the act of taxation in and of itself which is harmful. Taxing transfers of earned wealth at a low rate is still taxing them. Telling people that a system they care about is damaged only "a little bit" will do little to assuage the concerns of those who value the family. Damaging something valuable a little bit still damages it.

Completely exempting initial transfers also better counters the double taxation argument. Once again, it is the act of taxation—not the level of taxation—that gives this argument weight with the public. The public believes (rightly or wrongly) that the wealth-earner has already been taxed on the wealth. Educating the public about untaxed appreciation and the step-up in basis has not countered that. Nor has emphasizing that what should matter is the total tax burden, not the number of times something is taxed. Telling the public that you are taxing earned wealth less than inherited wealth will be similarly fruitless. From a folk justice perspective, the best way to address concerns that earned wealth is being double taxed is to be crystal clear that transferring it does not trigger tax. Only completing exempting such transfers does this.

2. Subsequent Transfers

If first-generation transfers are completely exempted, how should later transfers be treated? Rignano suggested taxing second-generation transfers at 50% and third-generation transfers at 100%; although Halliday rejects the latter suggestion, he does not address whether second- and third-generation

222. Edward J. McCaffery, *Cognitive Theory and Tax*, 41 UCLA L. REV. 1861, 1886–87 (1994).

transfers should be taxed differently.[223] This Article proposes treating them alike by taxing all later transfers at a flat rate of forty percent.

As an initial matter, second- and later-generation transfers should be treated similarly to each other. While the insights of folk justice strongly point to distinguishing first-generation wealth, they do not justify treating later transfers differently from each other. Nor do most of the justifications for taxing wealth transfers. Gifts and bequests received increase well-being and enhance ability to pay, regardless of whether the transferor earned or inherited the wealth in question. Money is money when it comes to political spending. Similarly, under traditional equality of opportunity concerns, money is money when it comes to paying for private school tuition or houses in top school districts, tutors, or fancy camps.

That said, other justifications are plausibly consistent with distinguishing among second-generation and later transfers, even if they do not necessarily mandate such an approach. Take Halliday's linkage of wealth norms and equality of opportunity; it is likely that the older the family's money, the stronger the wealth norms. Likewise, it is plausible that the longer a family has been politically or economically powerful in a given town, the more powerful they are. Knowing that another family has had power over yours for decades is probably more demoralizing the longer that has been the case.

In these cases, however, any difference in power or opportunity between second- and later-generation wealth diminishes over time. Let's illustrate with wealth norms and equal opportunity: *Grandfather* creates wealth, which he passes along to *Mother*, who in turn passes her inheritance along to *Daughter*. Under Halliday's reasoning, *Mother* enjoys substantially fewer advantages than *Daughter*, since *Mother* grows up in a family with first-generation wealth and *Daughter* grows up in a family with second-generation wealth. Yet it is unlikely that *Daughter* has substantially fewer advantages than *Daughter's* children. The marginal advantage of growing up with third-generation wealth as opposed to second is likely much smaller than the marginal advantage of growing up with second- versus first-generation wealth. The case for distinguishing between second- and later-generation inheritances is therefore much weaker than for distinguishing first transfers.

And on a practical level, treating second and third inheritances alike minimizes the valuation, tracing, and record-keeping concerns addressed below. All that need be determined is how much an individual's parents

223. HALLIDAY, *supra* note 13, at 64–65.

inherited. Given the weak theoretical case for distinguishing among later transfers, and the strong practical case against doing so, treating second and later transfers similarly to each other is preferable.

This Article thus proposes a rate of 40% on subsequent transfers, which is the current estate tax rate in the U.S. This number is admittedly arbitrary, and none of the theoretical considerations discussed above mandate any given rate. That said, something about tax rates that exceed 50% seem to hit a nerve with people. And given the prominence bias discussed above, it is likely that a Rignano tax that is seen as "raising rates" above current levels would face more opposition than one that does not raise rates.

3. Adjusting for Age

A final rate-related issue is whether gifts and bequests received earlier in life should be taxed more heavily than those received later in life. Here, practical and theoretical considerations are in tension. Several justifications for taxing wealth transfers point in the direction of adjusting for age, such as equal opportunity theory.[224]As theorists recognize, receiving an inheritance early in life alters one's life prospects more than receiving one later in life. A $1,000,000 bequest at age twenty-five provides seed money for a start-up, while such a bequest at age sixty-five likely does no more than enable one to enjoy a more comfortable retirement. Other justifications, however, do not support adjusting for age. A large bequest increases one's ability to pay regardless of one's age, for example. And although such adjustments could be made,[225] doing so adds another layer of complexity and is probably not worth that additional complexity.

C. FREQUENCY: DETERMINING THE NUMBER OF TRANSFERS

A further issue is determining how many times wealth has been transferred. Revisit *Grandfather*, *Mother*, and *Daughter*. Two questions arise. First, if *Grandfather* leaves his wealth directly to *Daughter* in a "generation-skipping transfer" that skips over *Mother*, is that a first- or second-generation transfer? Put another way, should that be treated the same or differently than if he leaves it to *Mother*, who in turn re-bequeaths it to *Daughter*? Second, what if *Grandfather* leaves his wealth to *Mother*, who

224. *See, e.g.*, Alstott, *supra* note 5, at 521–32.

225. *See, e.g.*, *id.*; INST. FOR FISCAL STUD., THE STRUCTURE AND REFORM OF DIRECT TAXATION: REPORT OF A COMMITTEE CHAIRED BY PROFESSOR J. E. MEADE 320–30 (1978), https://ifs.org.uk/sites/default/files/output_url_files/meade.pdf [https://perma.cc/SC2C-CSXS] [hereinafter MEADE COMMITTEE REPORT]; Harry J. Rudick, *What Alternative to the Estate and Gift Taxes?*, 38 CAL. L. REV. 150, 169 (1950).

dies soon thereafter? Should adjustments be made for deaths in rapid succession?

1. Generation-Skipping Transfers

Let's start with generation-skipping transfers. Current law imposes an additional tax on such transfers to ensure that families face an equivalent level of tax whether their wealth proceeds directly from one generation to the next or skips over one generation. This prevents ultra-wealthy families in which *Mother*'s generation may not need *Grandfather*'s wealth from minimizing their tax burden by having *Grandfather* pass his wealth directly to *Daughter*.

Although counterarguments exist, a Rignano tax should contain similar rules that treat a transfer by *Grandfather* directly to *Daughter* as a second transfer instead of a first. This would prevent families from avoiding one level of tax by skipping generations. As under current law, however, exceptions should apply if *Mother* pre-deceases *Grandfather*, such that *Grandfather*'s transfer to *Daughter* does not skip over a living person.[226]

To be sure, this design decision runs counter to folk justice principles. It renders transfers directly to grandchildren vulnerable to the double taxation argument and to system justification concerns about harming families. But the Rignano tax is not a tax designed to further folk justice principles; rather, it is a tax designed to take such principles into account when designing a wealth transfer tax that achieves other goals. Here, treating such transfers as first transfers would allow for too much game-playing, thus undermining the goals of taxing second-generation wealth. Moreover, it is plausible that the treatment of such transfers will be less salient to the public than the fact that the default for first transfers is complete exemption.[227] For these reasons, the better approach is to treat generation-skipping transfers as two transfers, not one.

2. Transfers in Rapid Succession

A related issue is how to treat transfers in rapid succession. Imagine that *Grandfather* bequeaths his fortune to *Mother*, who dies unexpectedly a few months later, re-transferring his wealth to *Daughter*. Should this be considered a second transfer? Halliday argues that it should not be: "A short interval between bequests may mean that a donor has had less opportunity to

226. The existing generation-skipping transfer tax rules could be used to determine when a generation-skipping transfer has occurred. For example, if *Mother* predeceases *Grandfather*, no additional transfer would be imputed.

227. Very few members of the public who are not extremely wealthy, for example, know about the generation-skipping tax, whereas most people are aware of the estate tax.

save and accumulate due to an early death. It is harder to say, in that case, that this person's bequests should still be taxed as if he or she had remained idle."[228]

Halliday's approach is misguided; transfers in rapid succession are still transfers. Halliday is correct that *Mother* has had less time to build upon *Grandfather*'s inheritance *after* receiving it. Yet he ignores that she had time *before* either her or *Grandfather*'s death to earn her own wealth, and that wealth will be taxed as first-generation wealth. Counting each transfer treats *Mother* and *Daughter* the same as other families.

D. VALUATION

Perhaps the most difficult issue is how to value re-transferred wealth. Revisit *Grandfather*, who starts with nothing and builds a $10,000,000 fortune. He bequeaths his wealth to *Mother*, who later dies with a $50,000,000 fortune which she leaves to *Daughter*. How much of *Mother*'s $50,000,000 should be considered a second transfer of *Grandfather*'s wealth? Rignano and Halliday, without discussion, use a simple but flawed approach in their examples: they would treat $10,000,000 as a second transfer and $40,000,000 as newly created wealth.

1. The Problem

This approach erroneously overlooks the fact that asset values fluctuate over time due to a variety of causes—inflation, the time value of money, changing market conditions, and the owner's efforts. Take inflation. Imagine that *Mother* invests her inheritance in an asset that keeps exact pace with inflation. $10,000,000 inherited in 1993 has an inflation-adjusted value of roughly $22,700,000 in 2025.[229] The Rignano/Halliday default wrongly treats the $12,700,000 increase that is due to inflation as instead stemming from *Mother*'s efforts. But *Mother* has added no value. The asset has simply kept up with inflation.

2. Risk-Free Rate of Return as the Default Solution

A more accurate approach would impute the risk-free rate of return to *Grandfather*'s fortune. This better distinguishes between earned and inherited wealth by recognizing the dual roles of risk and choice. To illustrate, imagine that *Grandfather* leaves *Mother* a building worth $10,000,000 that is worth $30,000,000 when she re-bequeaths it to *Daughter*. As explained above, attributing only $10,000,000 of the

228. HALLIDAY, *supra* note 13, at 63–64.
229. *See CPI Inflation Calculator*, *supra* note 15.

building's value to *Grandfather* overstates *Mother*'s contribution and understates *Grandfather*'s. Yet attributing all $30,000,000 to *Grandfather* does exactly the opposite. It overstates *Grandfather*'s contribution and understates *Mother*'s.

What is key is that when *Mother* inherited the building, she had a choice. At that point, she held $10,000,000 of wealth that she could invest however she liked. She could continue to hold that particular building, swap it for other real estate, or cash out and invest in stocks, bonds, or a risky start-up. If she keeps the building itself, some—but only some—of any later increase in value is due to her choice to do so.

More specifically, a later increase in value has three possible components: the risk-free rate of return, a return to risk, and (occasionally) inframarginal returns.[230] The risk-free rate of return is the return one would receive by investing in a zero-risk project with a guaranteed return, such as a U.S. Treasury bond. This return is simply compensation for using the invested funds—a pure time-value-of-money return sometimes referred to as the "return to waiting."[231]

To illustrate, imagine a stock investor. Unlike a bond investor, the stock investor does not know *ex ante* whether she will recoup her investment. Because the company's value could either increase *or* decrease, she will insist on a higher return to compensate her for taking on that risk. Most investment returns are comprised solely of these two elements, which means that the return to risk is the excess over the risk-free return.

Occasionally, an investment also yields an inframarginal return, which is a return above and beyond the market rate for risky investments. These arise from "special opportunit[ies] not generally available in the market" and are usually associated with "rents to ideas, managerial skill, or market power." They can include unique returns to capital due to information asymmetries or imperfect markets, as well as returns to some combination of a person's labor, ingenuity, and/or luck.[232]

Although distinguishing between inframarginal and market-rate returns is difficult, we need not do so. *Mother*—not *Grandfather*—should be

230. John R. Brooks, *Taxation, Risk, and Portfolio Choice: The Treatment of Returns to Risk Under a Normative Income Tax*, 66 TAX L. REV. 255, 261 & n.25 (2013); Noël B. Cunningham, *The Taxation of Capital Income and the Choice of Tax Base*, 52 TAX L. REV. 17, 23 (1996); David A. Weisbach, *The (Non)Taxation of Risk*, 58 TAX L. REV. 1, 19 (2004).

231. David Elkins & Christopher H. Hanna, *Taxation of Supernormal Returns*, 62 TAX LAW. 93, 98 (2008) (explaining that the "risk free rate return . . . is simply a return to waiting"). *See also* Brooks, *supra* note 230, at 261 n.25; Cunningham, *supra* note 230, at 23.

232. Brooks, *supra* note 230, at 261 n.25; Weisbach, *supra* note 230, at 19–21; Elkins & Hanna, *supra* note 231, at 100–03.

credited for both whenever *Mother* has a choice about investing her inherited wealth. Any investment of *Grandfather*'s $10,000,000 would have triggered, at minimum, the risk-free rate of return and should be traced back to *Grandfather*'s bequest. Returns above and beyond the risk-free-rate of return, however, should be attributed to *Mother*.

The default rule should therefore be to attribute the risk-free rate of return—as measured by the average U.S. Treasury bond yield—to *Grandfather*'s investment. The best measure of this is the average yield on a U.S. Treasury Bond of comparable length. Imagine that *Mother* outlives *Grandfather* by 30 years. If so, the average rate of return for a 30-year bond should be imputed to *Mother*'s inheritance from *Grandfather*. Any "extra" wealth should be credited to *Mother* and treated as new, first-generation wealth.

3. Complications

The foregoing analysis assumes both that *Mother* has a choice about what to invest in, and that her investments are successful. But what if those assumptions are incorrect? Start with choice. Imagine that *Grandfather* bequeaths stock that skyrockets in value to a trust with an independent trustee over whom *Mother* has no control. Given that *Mother* has no say in how to invest the asset and assumes no risk herself, none of the stock's value is attributable to her choices. The stock's full value at her death should be credited to *Grandfather*. Moreover, we already have rules that identify when one has control over a trust; the Rignano tax could simply import the grantor trust rules.

Next let's upend the assumption that *Mother*'s investments are uniformly successful. Imagine that *Mother* quickly squanders *Grandfather*'s fortune by investing his $10,000,000 in Blockbuster Video stock. She later, however, invests in a relatively unknown start-up called "Google," parlaying a few thousand dollars into $10,000,000. How should *Mother*'s fortune be treated at her death?

Mother's fortune should still be treated as inherited and traced back to *Grandfather* for three reasons (an approach favored by Rignano).[233] First, *Mother* is able to leave *Daughter* $10,000,000 more than without *Grandfather*'s wealth. His bequest enables *Mother* to start at $10,000,000; lose $10,000,000; and nevertheless end at $10,000,000. Without the bequest, if *Mother* loses and re-earns $10,000,000, she ends at zero. Second, if we assume that *Mother* would have earned the risk-free rate of return when successfully investing *Grandfather*'s bequest, parity requires us to make the

233. RIGNANO, *supra* note 7, at 52–53.

same assumption even when the outcome is different. Either we assume that return or we do not.

Finally, ignoring *Grandfather*'s bequest ignores that money is fungible and creates incentives that undermine the goals of wealth taxation by essentially encouraging *Mother* to squander *Grandfather*'s bequest. Let's say that *Mother* has an idea for a successful business that will earn her $15,000,000, and *Mother* also wants to spend $10,000,000 on a year-long first-class trip around the world. Compare two scenarios, *Early Trip* and *Late Trip*. In *Late Trip*, *Mother* saves *Grandfather*'s money and starts a business that earns $15,000,000 before taking the trip. The trip reduces her bank account from $25,000,000 to $15,000,000. Under the default rule established above, we'd use the risk-free rate of return to see what *Grandfather*'s wealth would have grown to. For the sake of illustration, let's assume it would have grown to $14,000,000. If so, only $1,000,000 of *Mother*'s bequest to *Daughter* is treated as earned by *Mother*.

In contrast, imagine what happens if we use a rule that ignores *Grandfather*'s bequest if she spends it or invests it poorly. *Mother* can reduce her tax burden by travelling before earning her own money. In *Early Trip*, *Mother* spends *Grandfather*'s money on the trip and zeroes out her account. She then starts a business and earns $15,000,000, which she passes along to *Daughter*. If we ignore *Grandfather*'s bequest on the grounds that she spent it or wasted it, all her $15,000,000 wealth is treated as self-made.

Mother should not be treated differently depending on what she does with *Grandfather*'s money. Whether she spends it, invests it poorly, or invests it wisely, she had power over $10,000,000, and at her death, $10,000,000 (plus the risk-free-rate-of-return) should be credited back to *Grandfather*.

E. TRACING

A fifth issue—flagged by neither Rignano nor Halliday—is determining who receives inherited wealth as it moves downstream. This has two components, one normative and one administrative.

1. The Normative Question

Let's start with the normative question. We've been using an example with one member in each generation for simplicity. Again, assume that *Grandfather* leaves *Mother* $10,000,000, but now imagine that *Mother* has not one but two children, *Daughter* and *Son*.

In applying the tax to *Daughter* and *Son*, how should we decide as a normative matter who receives *Grandfather*'s wealth, and who receives the

wealth created by *Mother*? Ideally, we'd somehow allocate *Grandfather*'s wealth to each of them in proportion to how much wealth they actually receive from *Mother*. This would be possible if *Mother* does not make any lifetime gifts, instead re-transferring all of *Grandfather*'s wealth at her death. Lifetime gifts, however, render this impossible.

One option is to allocate *Grandfather*'s bequest *pro rata* among *Daughter* and *Son* by giving them each a $5,000,000 "taxable amount" that is essentially a mirror-image of existing exemptions (this represents the total amount of *Grandfather*'s wealth that should be taxed as a second transfer when *Mother* passes it along, divided by two since *Mother* has two children). Under this approach, transfers to each of them would be taxed until they reached $5,000,000; later transfers would be untaxed. This solution, however, has two problems. First, it undertaxes the family if *Mother* favors one child. Imagine that *Mother* does not earn her own wealth, and transfers all of *Grandfather*'s $10,000,000 to *Daughter* and none to *Son*. Under the pro rata apportionment approach, only $5,000,000 would be treated as second-generation. Second, assigning a per-capita amount at *Grandfather*'s death requires knowing who *Grandfather*'s bequest should be apportioned among—that is, who *Mother* is going to leave her wealth too—which may be unknowable at his death.

A better solution is a first-in-time approach that treats the first $10,000,000 received by either *Daughter* or *Son* as second-generation, regardless of how *Mother* splits $10,000,000 between them. This is essentially how the current system treats a donor's lifetime exemption amount and allows *Mother* to allocate the tax burden via the timing of her transfers.

2. Administration

The next question is how one determines as an administrative matter, that a recipient of a gift or bequest has received wealth that has been inherited by the transferor. This requires more record-keeping than a traditional estate or inheritance tax, but not an insurmountable amount. And in fact, certain elements of this Article's proposal exist in current estate and inheritance taxes in the U.S. and internationally.

Revisit *Grandfather*, *Mother*, and *Daughter*. As under current law, *Grandfather*'s executor will file a tax return at his death that shows the total amount of gratuitous transfers that *Grandfather* has made. To implement a Rignano tax, his executor would also make an election on that return to treat some or all of *Grandfather*'s wealth as first-generation, as well as recording to whom *Grandfather* left his wealth. Any wealth not elected by the executor will be treated entirely as a second-generation transfer. Absent malpractice,

Grandfather's executor will make the election. *Mother*, who receives *Grandfather*'s bequest, will also file a tax return upon receipt showing the bequest's source and value, as well as indicating whether any assets are not under her investment control. Assuming *Grandfather*'s executor make the proper election, however, *Mother* will pay no tax.

These records enable us later to determine how much of any wealth that *Mother* later passes along should ultimately be traced back to *Grandfather*. When *Mother* makes a gift or bequest later, we need to know three things to calculate *Daughter*'s tax liability: the imputed value of *Grandfather*'s bequest to *Mother* at the time of *Mother*'s later transfer, the amount of that later transfer, and the value of any assets transferred from *Grandfather* to *Mother* over which *Mother* had no control.

We know the imputed value of *Grandfather*'s bequest by applying the risk-free rate of return to its value, as recorded on his and *Mother*'s tax return. This, of course, assumes *Mother* had investment control over the assets. If *Grandfather* also bequeathed assets to *Mother* over which she had no control, we'd determine both the imputed value of assets over which she control, and the current value of any assets over which she lacked control. This determines what dollar value of any transfers from *Mother* should be taxed to the recipients. Any excess will be treated as wealth created by *Mother* and not taxed.

This approach requires more record-keeping than under current law—namely, it requires both transferors and recipients to file returns, instead of just the transferor (in an estate tax) or just the recipient (in an inheritance tax). But the valuations required present no more difficulties than under current law. Transferors must already value assets at the time of a gift or bequest, and at times, formulas are used to impute such values based on current interest rates.

Two additional aspects of this approach are similarly used both in the U.S. and abroad. First, many inheritance tax systems tax recipients differently depending on from whom they inherit. (Generally, heirs who inherit from close relatives such as parents are treated more leniently than those who inherit from more distant relatives like cousins.). There is thus precedent for looking at the source of a gift or bequest when taxing the recipient.

Second, current law in the U.S. provides that in some circumstances, the tax consequences to a decedent turn on actions taken at the prior death of a spouse.[234]More specifically, the second spouse to die can use any of the

234. *See* I.R.C. § 2010(c)(2), (4) & (5) (portability rules); I.R.C. § 2044(a) and I.R.C. § 2056(b)(7)

first spouse's unused exemption amount, so long as the first spouse's executor made the proper election. The success of portability, as these rules are known, suggest that tying one person's tax consequences to the actions of prior transferors is workable.

F. TRANSFERS IN TRUST

The foregoing illustrations have used outright gifts and bequests. But many wealthy families transfer most of their wealth in trusts that last for several generations. For example, *Grandfather* may choose to create a trust that pays the income to *Mother* for her life, and at her death, distributes the corpus to *Daughter*. Applying a Rignano tax to transfers in trust raises additional questions. The first, which arises in any accessions tax proposal, is to determine when the taxable events occur. Note that for each trust beneficiary, there are potentially two important events—the date the tax is actually imposed, and the date the clock starts for valuation purposes for later transfers.

1. Remainder Interests

Let's start with *Daughter* and her remainder interest. Should she be taxed at vesting, or at distribution?[235] Most accessions tax proposals suggest distribution for administrative and valuation reasons.[236] First, we do not know until distribution exactly how much *Daughter* receives. While we can often estimate the value of her remainder interest when *Grandfather* creates the trust based on current interest rates and *Mother*'s life expectancy, any figure is just that—an estimate. And for some trusts, additional valuation difficulties appear. Imagine that *Grandfather*'s trust was to *Mother* for life, and then to her children equally. Perhaps *Daughter* is the only living child at *Grandfather*'s death. But whether *Mother* has more children affects the share of the remainder *Daughter* will receive. Finally, many interests are subject to trustee discretion, as would be the case if the remainder interest in *Grandfather*'s trust passed to "*Mother*'s children in such proportions as the trustee determines to be in their best interests." Second, until distribution, *Daughter* may not have liquid funds with which to pay the tax. Although

(second spouse to die must include any property for which the first spouse elected qualified terminable interest property treatment).

235. As under current law, receiving a general power of appointment—which provides the holder with unrestricted access to all or part of a trust's principal—should be treated the same as coming into ownership of the property subject to the power.

236. *See, e.g.*, William D. Andrews, *Reporter's Study of the Accessions Tax Proposal*, *in* FEDERAL ESTATE AND GIFT TAXATION: RECOMMENDATIONS OF THE AMERICAN LAW INSTITUTE AND REPORTERS' STUDIES 446 (1969); Batchelder, *supra* note 5, at 65; Edward C. Halbach, Jr., *An Accessions Tax*, 23 REAL PROP. PROB. & TR. J. 211 (1988); MEADE COMMITTEE REPORT, *supra* note 225; Rudick, *supra* note 225, at 169.

some trust interests can be sold or borrowed against, many cannot.

These concerns apply with equal force to a Rignano tax. But where do normative considerations point, vesting or distribution? With a traditional accessions tax, one could argue that most (but not all) normative justifications suggest treating vesting as the taxable event. For example, if an accessions tax is designed to further welfarist principles, then vesting seems logical, as one's welfare (from security, reputation, and the fungibility of money) increases upon vesting. Political influence likely starts accumulating at vesting, when politicians and PACs start courting the remainder beneficiary. And since money is fungible, a vested interest frees up other funds that can provide a head start when it comes to educational and economic opportunities. That said, Anne Alstott has argued that the choice/chance distinction counsels in favor of distribution if an accessions tax is designed to reflect equal opportunity concerns.

But a Rignano tax is not designed to further any single normative goal such as equality of opportunity or welfarism in isolation. Instead, it is designed to find a compromise among competing intuitions about wealth transfer taxation—even when those intuitions may seem "wrong" to tax theorists. To that end, some of the administrative considerations discussed above take on normative weight. Consider valuation. In theory, one could tax at vesting based on estimated values and then adjust at distribution to account for divergences from the estimate. But it is quite likely the public would react negatively to the taxation of undistributed yet vested interests, for the same reason the public reacts negatively to the possible taxation of unrealized gains. To many, it simply seems unfair to impose a tax when there has not yet been an event that provides liquidity, or when valuation is unclear. Given that one purpose of a Rignano tax is to make political headway where other inheritance taxes fail, the better course is to wait until distribution of remainder interests to impose the tax—that is, until we know exactly who gets exactly how much.

The same rule, with two exceptions, should apply when determining when *Daughter*'s clock starts ticking for purposes of valuing later growth for subsequent transfers. *Daughter* generally does not have control of the funds until distribution, and therefore none of their prior growth (or lack thereof) should be attributed to her to determine what part of subsequent transfers by *Daughter* stems from her own initiative or *Grandfather*'s wealth. The first exception would be if *Daughter* somehow had discretionary investment control of the assets during *Mother*'s income interest, in which case investment decisions could plausibly be attributed to her. The second is if *Daughter* could sell her remainder interest at vesting, in which case the decision to leave it invested in the trust should be attributed to her and any

later distribution of wealth beyond the risk-free-rate of return should be deemed self-made.

2. Income Interests

What about income interests? Assume that *Mother*'s income interest has an estimated FMV of $1,000,000 at vesting based on the present value of its payment stream and is predicted to pay out $100,000 a year for the rest of *Mother's* life. Or imagine that *Daughter* receives a secondary life estate instead of the corpus outright at *Mother*'s death. Should she be treated as receiving the inheritance all at once at vesting, or over time when she receives her annual income distribution? In theory, these are economically equivalent, assuming perfect information about interest rates and lifespans (just as the difference between taxing a remainder interest at vesting and distribution is).

The same considerations that apply to remainder interests should apply here as well. The normative considerations that justify a traditional accessions tax do not point clearly in one direction, while weighty valuation and liquidity concerns remain. The default should be that the taxable event, be it imposing tax or starting the clock for later valuation purposes, happens at distribution. Exceptions would be made where the beneficiary has control over investment assets or the ability to sell her income interest.

G. TRANSITION RULES

A Rignano tax contains a unique transition issue. In the illustrations used throughout this Article, we have assumed that *Grandfather* was self-made. And in the example above, we know how much of *Mother's* wealth to tax because *Grandfather*'s estate would have filed an election to treat his estate as first-generation wealth.

But what if *Grandfather* himself inherited some money, and was not completely self-made? How do we treat the first generation after a transition to a Rignano tax? Treating all existing wealth at the time of the tax's imposition as self-made is unsatisfactory, for it essentially delays implementation of the tax for a generation and does not reflect reality. Instead, some existing wealth should be treated as self-made, and some should be considered second-generation wealth. Halliday and Rignano both acknowledge the need for a transition rule to determine that portion, with Rignano suggesting that one-third to one-half of current wealth should be treated as inherited.[237] Fairly recent studies suggest that anywhere from 15% to 46% of current wealth is inherited. Although any number will be

237. RIGNANO, *supra* note 7, 89–90.

admittedly arbitrary, treating one-sixth to one-third of existing wealth as second-generation wealth seems reasonable.[238]

CONCLUSION

This Article has made the case for an inheritance tax system that—unlike our own—taxes old money more heavily than new. Specifically, it proposes completely exempting gifts and bequests of self-made wealth, but taxing heirs who receive re-transferred wealth. Although such a tax is more complex than our current system, the challenges are manageable and are well worth it.

Crucially, this proposal provides a way out of the enduring stalemate over taxing wealth. The estate tax has been the subject of passionate debate for decades, resulting in an ongoing state of political uncertainty. Rates and exemption levels have ping ponged back and forth for two decades, including a single year—2010—that had no estate tax at all. And although recent legislation ostensibly made the exemption's expansion "permanent," there is no reason a future Congress could not "permanently" shrink it again. Given the current political polarization, there is no doubt that questions about whether and how to tax wealth will continue to generate heated debate.

What makes this debate so intractable is not only that the public as a whole is divided on the issue of inheritance taxation, but that many individual Americans hold simultaneous beliefs about wealth, opportunity, desert, fairness, and family that seemingly contradict each other. Many of us, for example, have at least a sliver of sympathy for some of the claims of both supporters *and* opponents of the tax.

Yet our current system treats taxing wealth transfers as an all or nothing proposition, without acknowledging a key source of our seemingly contradictory beliefs: the finding that many of us silo beliefs about wealth, distinguishing among earned and inherited wealth. By harnessing this finding, as well as the insights of other recent psychological work on taxation, a Rignano tax thus reconciles the benefits of wealth transfer taxation with deeply held beliefs about fairness, desert, private property, and family. And by so doing, it offers an opportunity for a stable and lasting resolution to the debate over taxing inherited wealth.

238. Wojciech Kopczuk & Joseph P. Lupton, *To Leave or Not to Leave: The Distribution of Bequest Motives*, 74 REV. ECON. STUD. 207, 209 (2007).